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**THE
LAWS OF ENGLAND.**

VOLUME V.

THE LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE
LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE
EARL OF HALSBURY
LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895-1905,
AND OTHER LAWYERS.

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In this Volume the Law is stated as at June 4th, 1910.

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<i>Building Societies</i> - - - - - "	BUILDING SOCIETIES.
<i>Canal Companies</i> - - - - - "	RAILWAYS AND CANALS.
<i>Cemetery Companies</i> - - - - - "	BURIAL AND CREMATION.
<i>Corporations generally</i> - - - - - "	CORPORATIONS.
<i>Electrical Companies</i> - - - - - "	ELECTRIC LIGHTING AND POWER.
<i>Friendly Societies</i> - - - - - "	FRIENDLY SOCIETIES.
<i>Gas Companies</i> - - - - - "	GAS.
<i>Industrial, Provident and similar Societies</i> - - - - - "	INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.
<i>Insurance Companies</i> - - - - - "	INSURANCE.
<i>Light Railway Companies</i> - - - - - "	TRAMWAYS AND LIGHT RAIL- WAYS.
<i>Loan Societies</i> - - - - - "	LOAN SOCIETIES.
<i>Partnerships</i> - - - - - "	PARTNERSHIP.
<i>Railway Companies</i> - - - - - "	RAILWAYS AND CANALS.
<i>Receivers in Winding up</i> - - - - - "	RECEIVERS.

<i>For Telegraph and Telephone Companies - See title</i>					TELEGRAPHS AND TELE- PHONES.
<i>Trade Unions</i>	-	-	-	„	TRADE AND TRADE UNIONS.
<i>Tramway Companies</i>	-	-	-	„	TRAMWAYS AND LIGHT RAIL- WAYS.
<i>Water Companies</i>	-	-	-	„	WATER SUPPLY.

COMPENSATION.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION; MASTER
AND SERVANT.

COMPOSITION WITH CREDITORS.

See BANKRUPTCY AND INSOLVENCY.

COMPOUNDING FELONY.

See CRIMINAL LAW AND PROCEDURE.

COMPROMISE.

See LOCAL GOVERNMENT; PRACTICE AND PROCEDURE.

COMPULSORY PILOTAGE

See ADMIRALTY; SHIPPING AND NAVIGATION.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> [1891] A. C.)
A.-G. ..	..	..	Attorney-General
Act. ..	..	..	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & El. ..	..	..	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—1842
Adam ..	..	..	Adam's Justiciary Reports (Scotland), 1893—(current)
Add. ..	..	..	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen. ..	..	..	Advocate-General
Alc. & N. ..	..	..	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas. ..	..	..	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn ..	..	..	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb. ..	..	..	Ambler's Reports, Chancery, 2 vols., 1725—1783
And. ..	..	..	Anderson's Reports, Common Pleas, fol., 1 vol., 1535—1605
Andr. ..	..	..	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon. ..	..	..	Anonymous
Anst. ..	..	..	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas. ..	..	..	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley ..	..	..	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O. ..	..	..	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn. ..	..	..	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H. ..	..	..	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C. ..	..	..	Aspinall's Maritime Law Cases, 1870—(current)
Atk. ..	..	..	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan. ..	..	..	Ayliffe's New Pandect of Roman Civil Law
Ayl. Par. ..	..	..	Ayliffe's Parergon Juris Canonici Anglicani
B. & Ad... ..	..	..	Barnewall and Adolphus' Reports, King's Bench 5 vols., 1830—1834
B. & Ald. ..	..	..	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C. ..	..	..	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S. ..	..	..	Best and Smith's Reports, Queen's 10 vols., Bench, 1861—1870
Bac. Abr. ..	..	..	Bacon's Abridgment
Bail Ct. Cas. ..	..	..	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Ball & B. ..	..	..	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814
Bankr. & Ins. R. ..	..	..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855

Bar. & Arn.	..	..	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	..	..	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	..	..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	..	..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	..	..	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	..	..	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	..	..	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	..	..	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal.	..	..	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	..	..	Beawes's <i>Lex Mercatoria</i>
Bellewe	..	..	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.
Bell, C. C.	..	..	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess.	..	..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol.	..	..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec.	..	..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	..	..	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	..	..	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	..	..	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	..	..	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	..	..	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	..	..	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	..	..	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch.	..	..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com.	..	..	Blackstone's Commentaries
Bl. D. & Osb.	..	..	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	..	..	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	..	..	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	..	..	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.)	..	..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	..	..	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	..	..	Sir J. Brooke's Abridgment
Bro. C. C.	..	..	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	..	..	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	..	..	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	..	..	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor.	..	..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	..	..	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827
Brod. & Bing.	..	..	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822

Brod. & F.	..	..	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	..	..	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush.	..	..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	..	..	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1669—1624
Bruce	..	..	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	..	..	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	..	..	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	..	..	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	..	..	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	..	..	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	..	..	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	..	..	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	..	..	Court of Appeal
C. B.	..	..	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	..	..	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. Ct. Cas.	..	..	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	..	..	Common Law Reports, 3 vols., 1853—1855
C. P. D.	..	..	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	..	..	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841
Cab. & El.	..	..	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas.	..	..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	..	..	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	..	..	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	..	..	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	..	..	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1815—1853
Car. & M.	..	..	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	..	..	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	..	..	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	..	..	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	..	..	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B.	..	..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	..	..	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. temp. Finch	..	..	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680
Cas. temp. King	..	..	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733
Cas. temp. Talb.	..	..	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date)	..	..	Law Reports, Chancery Division, since 1890 (e.g. [1891] 1 Ch.)
Ch. App.	..	..	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	..	..	Law Reports, Chancery Division, 45 vols., 1875—1890
Ch. Rob.	..	..	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808

Char. Pr. Cas. ..	..	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas. ..	..	Charley's Chamber Cases, 1 vol., 1875—1876
Chit. .. ..	..	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin. ..	..	Clark and Finnely's Reports, House of Lords, 12 vols., 1831—1846
Clay. .. ..	..	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick. ..	..	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph. ..	..	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe ..	..	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent. .. ..	..	Coke's Entries
Co. Inst. .. ..	..	Coke's Institutes
Co. Litt. .. ..	..	Coke on Littleton (1 Inst.)
Co. Rep. .. ..	..	Coke's Reports, 13 parts, 1572—1616
Coll. .. ..	..	Collyer's Reports, Chancery 2 vols., 1844—1846
Coll. Jurid. ..	..	Collectanea Juridica, 2 vols.
Colles .. ..	..	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt. .. ..	..	Coltman's Registration Cases, 1 vol., 1879—1885
Com. .. ..	..	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas. .. ..	..	Commercial Cases, 1895—(current)
Com. Dig. .. ..	..	Comyns' Digest
Comb. .. ..	..	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law. ..	..	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al. ..	..	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas. ..	..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg. ..	..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G. .. ..	..	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas. ..	..	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. temp. Brough. ..	..	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834
Coop. temp. Cott. ..	..	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D. .. ..	..	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper .. ..	..	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp. .. ..	..	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. U. .. ..	..	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk. .. ..	..	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas. .. ..	..	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H. .. ..	..	Cox, Macrae, and Hertalet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J. .. ..	..	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M. .. ..	..	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R. .. ..	..	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph. .. ..	..	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Cr. App. Rep. .. ..	..	Cohen's Criminal Appeal Reports, 1909 (current)
Craw. & D. .. ..	..	Crawford and Dix's Circuit Cases (Ireland), 3 1838—1846

Craw. & D. Abr. C.	..	..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838
Cress. Insolv. Cas.	..	..	Cresswell's Insolvency Cases, 1 vol., 1827—1829
Cripps' Church Cas.	..	..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
Cro. Car.	..	..	Croke's Reports <i>temp.</i> Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641
Cro. Eliz.	..	..	Croke's Reports <i>temp.</i> Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	..	..	Croke's Reports <i>temp.</i> James I., King's Bench and Common Pleas, 1 vol., 1603—1625
Cru. Dig.	..	..	Cruise's Digest of the Law of Real Property, 7 vols.
Cunn.	..	..	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
Curt.	..	..	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844
Dalr.	..	..	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720
Dan.	..	..	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823
Dan. & Ll.	..	..	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829
Dav. & Mer.	..	..	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844
Dav. Pat. Cas.	..	..	Davies' Patent Cases, 1 vol., 1785—1816
Dav. Ir.	..	..	Davy's (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611
Day	..	..	Day's Election Cases, 1 vol., 1892—1893
Dea. & Sw.	..	..	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857
Deac.	..	..	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840
Deac. & Ch.	..	..	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835
Dears. & B.	..	..	Dearly and Bell's Crown Cases Reserved, 1 vol., 1856—1858
Dears. C. C.	..	..	Dearly's Crown Cases Reserved, 1 vol., 1852—1856
Deas & And.	..	..	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832
De G.	..	..	De Gex's Reports, Bankruptcy, 1 vol., 1844—1848
De G. F. & J.	..	..	De Gex, Fisher, and Jones's Reports, Chancery, 4 vols., 1859—1862
De G. & J.	..	..	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859
De G. J. & Sm.	..	..	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865
De G. M. & G.	..	..	De Gex, Macnaghten, and Gordon's Reports, Chancery, 8 vols., 1851—1857
De G. & Sm.	..	..	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852
Delane	..	..	Delane's Decisions, Revision Courts, 1 vol., 1832—1835
Den.	..	..	Denison's Crown Cases Reserved, 2 vols., 1844—1852
Dick.	..	..	Dickens' Reports, Chancery, 2 vols., 1559—1798
Dig.	..	..	Justinian's Digest or Pandects
Dirl.	..	..	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677
Dods.	..	..	Dodson's Reports, Admiralty, 2 vols., 1811—1822
Donnelly	..	..	Donnelly's Reports, Chancery, 1 vol., 1836—1837
Doug. El. Cas.	..	..	Douglas' Election Cases, 4 vols., 1774—1776
Doug. (K. B.)	..	..	Douglas' Reports, King's Bench, 4 vols., 1778—1785
Dow	..	..	Dow's Reports, House of Lords, 6 vols., 1812—1818
Dow & Cl.	..	..	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832
Dow. & L.	..	..	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849

Dow. & Ry. (K. B.)	..	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827
Dow. & Ry. (M. C.)	..	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827
Dow. & Ry. (N. P.)	..	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823
Dowl.	..	Dowling's Practice Reports, 9 vols., 1830—1841
Dowl. (N. S.)	..	Dowling's Practice Reports, New Series, 2 vols., 1841—1843
Dr. & Wal.	..	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841
Dr. & War.	..	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843
Drew.	..	Drewry's Reports, Chancery, 4 vols., 1852—1859
Drew. & Sm.	..	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865
Drinkwater	..	Drinkwater's Reports, Common Pleas, 1 vol., 1839
Drury temp. Nap.	..	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859
Drury temp. Sug.	..	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844
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<i>Corporations generally</i>	„	CORPORATIONS.
<i>Electrical Companies</i>	„	ELECTRIC LIGHTING AND POWER.
<i>Friendly Societies - - -</i>	„	FRIENDLY SOCIETIES.
<i>Gas Companies - - -</i>	„	GAS.
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<i>Light Railway Companies -</i>	„	TRAMWAYS AND LIGHT RAILWAYS.
<i>Loan Societies - - -</i>	„	LOAN SOCIETIES.
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<i>Water Companies - - -</i>	„	WATER SUPPLY.

Part I.—Nature.

SECT. 1.—Definition.

SECT. 1. Definition. Definition.

1. It may not be possible to bring within the terms of a logical definition either a company or an associations, or that which may in a certain sense be implied by either or both of these words; but it has been loosely described as the result of an arrangement by which parties intend to form a partnership which is constantly changing—to-day consisting of certain members and to-morrow consisting of some only of those members along with others who have come in—so that there is a constant shifting of the partnership, a determination of the old and a creation of a new partnership, with the intention that, so far as the partners can by agreement between themselves bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership (a). It generally consists of a considerable number of persons, and, if it has shares, those shares are transferable (b). One of the leading differences between a company and an ordinary partnership is that in the former a member can, and in the latter he cannot, sell his shares without the consent of all the other members (c).

Incorporated and unincor- porated companies.

2. A company may be incorporated or unincorporated (d). In the former case, the corporation is a totally different person, or thing, or entity from its members—the individuals comprising it (e). A company which is not incorporated or privileged by the Crown or from the legislature is not from a legal point of view distinguishable from the members composing it (f).

At common law there cannot be a public company not incorporated (g).

(a) *Smith v. Anderson* (1880), 15 Ch. D. 247, C. A., per JAMES, L.J., at p. 273. But the object, as regards liabilities, cannot be attained by any arrangement between the persons themselves, unless the persons contracting with them authorise the change by novation, or unless by special provisions in Acts of Parliament sanction is given to such arrangements (*ibid.*, at p. 274). In the same case BRETT, L.J., suggested that there might some day be found a relation which, without being strictly either a company or a partnership, might be an association (*ibid.*, at p. 277); and according to COTTON, L.J., an association may mean the result of a number of persons or of firms joining themselves together for the purpose of carrying on a particular adventure (*ibid.*, at p. 282). The words under consideration in the case were “company, association, or partnership,” occurring in s. 4 of the Companies Act, 1862 (25 & 26 Vict. c. 89), which is re-enacted by s. 1 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); see p. 44, *post*.

(b) *Re Stanley, Tennant v. Stanley*, [1906] 1 Ch. 131, 134; Lindley, *Law of Companies*, 6th ed., p. 2; and see p. 186, *post*.

(c) *Re Russell Institution, Figgins v. Baghino*, [1898] 2 Ch. 72, 80.

(d) *Re St. James's Club* (1852), 2 De G. M. & G. 383, 389; *Re Griffith, Carr v. Griffith* (1879), 12 Ch. D. 655.

(e) *Foster (John) & Sons v. Inland Revenue Commissioners*, [1894] 1 Q. B. 516, 528, 530, C. A.; *Salomon v. Salomon & Co.*, [1897] A. C. 22, 42, 51; even if an individual holds the whole of the shares of the corporation (*Gramophone and Typewriter, Ltd. v. Stanley*, [1908] 2 K. B. 89, C. A., per FLETCHER MOULTON, L.J., at p. 99).

(f) Lindley, *Law of Companies*, 6th ed., p. 1.

Macintyre v. Connell (1851), 1 Sim. (N. S.) 225, 233; compare *Elve Boyton*, [1891] 1 Ch. 501, 507, C. A. A company which is neither a corporation nor a partnership is a thing unknown to the common law of England (Lindley, *Law of Companies*, 6th ed., v. 2). As to companies acting as corporations when

The term "company" (*h*) may, even as regards statutes of the United Kingdom, include a company formed in France (*i*), or registered in South Africa (*k*) or in Guernsey (*l*). SECT. 1
Definition

SECT. 2.—Classification.

3. Companies may be formed for every conceivable kind of object, including that of trading at a profit, and the promotion of "art, science, religion, charity or any other useful object" (*m*), and hence they cannot be usefully classified according to the object for which they are formed. The following classification is according to the different means by which companies are constituted or privileged or governed:— Classification.

(1) Companies incorporated by royal charter (*n*), comprising companies incorporated—(i.) by prerogative royal charter; (ii.) by royal charter granted in pursuance of some special statute; (iii.) by letters patent granted in pursuance of a general statute (*o*).

(2) Companies incorporated by special Acts of Parliament, comprising companies—(i.) not only constituted by, but governed and managed according to the provisions of, the special Act (*p*); (ii.) incorporated by inference from the provisions of an Act (*q*);

not authorised by statute or charter, see p. 764, *post*. As to the meanings of "public company," and "private company" see pp. 71, 73, *post*.

(*h*) An incorporated industrial and provident society has been held not to be an "incorporated company" within the meaning of the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 17 (*Great Northern Rail. Co. v. Coal Co-operative Society*, [1896] 1 Ch. 187, 194). But this decision is open to question, and has been disregarded on other points (*Clark v. Balm, Hill & Co.*, [1908] 1 K. B. 667); and it may be observed that a society would seem to be the same thing as an association, and the terms "association" and "company" are synonymous (*Smith v. Anderson* (1880), 15 Ch. D. 247, at p. 273, C. A.); compare *Thomas v. United Butter Companies of France, Ltd.*, [1909] 2 Ch. 484. As to the meaning of "public company," "company," and "company in the United Kingdom" in a will, see *Re Castlehow, Lamony v. Carter*, [1903] 1 Ch. 352; *Re Stanley, Tennant v. Stanley*, [1906] 1 Ch. 131; *Re Hilton, Gibbes v. Hale-Hinton*, [1909] 2 Ch. 548.

(*i*) *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176.

(*k*) *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A. C. 455.

(*l*) *Clark v. Balm, Hill & Co.*, *supra*.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 20 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 23]; and compare Lindley, *Law of Companies*, 6th ed., pp. 7—11, 131 *et seq.*

(*n*) See title CORPORATIONS, Vol. VIII., p. 314.

(*o*) It is believed that the only instance of a company which could obtain incorporation by letters patent granted exclusively under the powers of a general statute is a banking company under the Joint Stock Banks Act, 1844 (7 & 8 Vict. c. 113). As to this Act, see further, pp. 612 *et seq.*, *post*; and title BANKERS AND BANKING, Vol. I., p. 581; and as to chartered companies, p. 744, *post*.

(*p*) As to such companies, see further, p. 674, *post*.

(*q*) Where an Act of Parliament establishing a body contains provisions which show a manifest intention in the legislature to make that body a corporation—as, for instance, where it is impossible, according to any principles of English law, to give effect to the Act unless the body is held to be incorporated—the courts will treat the body as incorporated and as having all the incidents of a corporation (*River Tone Conservators v. Ash* (1829), 10 B. & C. 349, 383, 391; *Bridgwater and Taunton Canal Co. v. Bluet* (1829), 10 B. & C. 393, 401; *Salford Corporation v. Lancashire County Council* (1890), 25 Q. B. D. 384, 389, C. A.; and see title CORPORATIONS, Vol. VIII., p. 320). A statute vesting property in commissioners and their successors creates a corporation (*Bower v. Griffith* (1868), 16 W. R. 540). Persons appointed by statute to carry out a trust for an unlimited time are incorporated (*Ex parte Newport Marsh Trustees* (1848), 18 L. J. (CH.) 49).

SECT. 2.
Classifica-
tion.

(iii.) constituted by a special Act, but governed and managed in accordance with certain general Acts (*r*).

(3) Companies incorporated by registration in pursuance of general statutes, as, for instance, under the Companies (Consolidation) Act, 1908 (*s*), or the statutes which it replaces, or under previous Acts (*t*).

(4) Companies incorporated by Board of Trade certificate or orders confirmed by the Board under certain statutes (*u*).

(5) Collecting societies converted by order of the court into companies under the Act of 1908 (*w*).

(6) *Quasi*-corporations or privileged companies, comprising incorporated companies on which certain privileges incident to corporations created by royal charter and certain other powers have been conferred by letters patent under the Chartered Companies Act, 1837 (*a*).

(7) Unincorporated companies, such as land societies, although consisting of more than twenty members (*b*).

Part II.—Domicil and Residence of Companies.

SECT. 1.—*In General.*

Domicil of
company
incorporated
under the
Act of 1908.

4. A company incorporated under the Act of 1908, or subject to its provisions, though incorporated under some previous statute, resides, for the purposes of the Act, in England, Scotland, or Ireland, according to the situation of its registered office (*c*). All communications and notices may be addressed to the company at its registered office (*d*); any summons, order, or other document, including a writ of summons, may be served there (*e*); the jurisdiction to wind up the company depends on the situation of the registered office (*f*); a winding-up petition must, as a rule, be served there (*g*); and when returns have to be filed the filing is with the Registrar of Joint Stock Companies of the country in which the office is situate (*h*).

(*r*) As to such companies, see further, pp. 674 *et seq.*, *post*.

(*s*) 8 Edw. 7, c. 69.

(*t*) As to such companies, see further, pp. 25 *et seq.*, *post*.

(*u*) See Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121); Light Railways Act, 1896 (59 & 60 Vict. c. 48), ss. 10, 11; see further, title RAILWAYS AND CANALS.

(*w*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 36 (4); see p. 626, *post*.

(*a*) 7 Will. 4 & 1 Vict. c. 73. As to such companies, see further, p. 751, *post*.

(*b*) *Re Siddall (a Person of Unsound Mind)* (1885), 29 Ch. D. 1, C. A.; and see p. 45, *post*.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 3, 4, 5.

(*d*) *Ibid.*, s. 62.

(*e*) *Ibid.*, s. 116 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 62]; *White v. Land and Water Co.*, [1883] W. N. 174; *Vignes v. Smith (Stephen) & Co.* (1909), 53 Sol. Jo. 716; see p. 17, *post*.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131.

(*g*) Companies Winding-up Rules, 1909, r. 28.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 243, 285.

5. All companies subject to provisions of the Act of 1908 are not, however, incorporated under it. The courts which it empowers to wind up companies registered and incorporated under it have also jurisdiction to wind up many unregistered companies which carry on business (i). For the purpose of determining the court having winding-up jurisdiction, an unregistered company is deemed to be registered in that part of the United Kingdom in which its principal place of business is, or if it has such a principal place in more than one part of the kingdom, then in each such part, and the principal place of business situate in that part of the kingdom in which proceedings are being instituted is, for all the purposes of the winding up, to be deemed the registered office (k).

SECT. 1.
In General
Domicil of
other
companies
subject to
the Act.

6. Irrespective of the Act of 1908 or the purpose of winding up, the domicil of a trading company is fixed by the situation of its principal place of business (l), that is to say, its chief office, where the central management and control are actually to be found (m). In the case of a company registered under the Act of 1908 (n) the controlling power is, as a fact, generally exercised at the registered office, and that office is therefore, not only for the purposes of the Act, but for other purposes, the principal place of business (o). This is not, however, necessarily the case (p); and the question whether that or some other place is the principal place of business of the company is in each case a pure question of fact to be determined, not according to the construction of this or that bye-law, but upon a scrutiny of the course of business and trading (a).

Domicil of
trading
companies.

7. The companies to which this article relates are, as a rule, companies, incorporated or unincorporated, formed for trading or business purposes. The principal exceptions are those associations formed for promoting commerce, art, science, religion, charity, and any other useful object, which apply their profits or other income in promoting their objects, and prohibit the payment of any dividend to their members, and which are, with the licence of the Board of Trade, allowed to register as incorporated limited companies, without using the word "Limited" as part of their names (b). These corporations are not trading companies (c), but they have to comply with most of the requirements of the Act of 1908, including that of having a registered office situate in England, Scotland, or

Domicil
generally.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 200]; and see p. 647, *post*.

(k) *Ibid*.

(l) *Jones v. Scottish Accident Insurance Co.* (1886), 17 Q. B. D. 421; *Adams v. Great Western Rail. Co.* (1861), 6 H. & N. 404.

(m) *Ibid*.; *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A. C. 455, 458, *New Zealand Shipping Co., Ltd. v. Stephens* (1906), 96 L. T. 50; compare *Re Hilton, Gibbes v. Hale-Hinton*, [1909] 2 Ch. 548.

(n) 8 Edw. 7, c. 69.

(o) *Watkins v. Scottish Imperial Insurance Co.* (1889), 23 Q. B. D. 285.

(p) *Keynsham Blue Lias Co. v. Barker* (1863), 2 H. & C. 729.

(a) *De Beers Consolidated Mines, Ltd. v. Howe*, *supra*.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 20 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 23].

(c) Some of them, nevertheless, carry on business in a sense, as by printing and selling books at a profit; but the profit cannot be taken by the members. One instance is the Incorporated Council of Law Reporting for England and Wales.

SECT. 1. In General. Ireland (*d*). The domicile of such non-trading corporations must, it seems, be ascertained from the law which applies to trading companies registered under the Act of 1908 in this kingdom and having, as required by statute, a registered office in England, Scotland, or Ireland, and not by the laws which are invoked to fix the domicile of a corporation sole (*e*). As regards non-trading corporations which are not registered as incorporated limited companies, the domicile is, in most cases, fixed by its obvious connection with some special district, as, for instance, in the case of an incorporated town, college, or hospital formed for the discharge of functions in a particular place, or such corporations sole as bishops and rectors (*f*).

Recognition of foreign corporations.

8. A corporation duly created under the law of a foreign country (*g*) is recognised as a corporation by the English courts (*h*), and may sue or be sued in those courts (*i*), under its corporate name, or even under a name gained by reputation from its business (*k*). If the name differs from that in its charter or instrument of constitution, proof of identity is an answer to any objection (*l*). But a corporation created by a Government which is not recognised by the Government of this country is not recognised by the English courts (*m*).

Domicil.

9. The residence or domicile of a trading corporation is fixed by its principal place of business (*n*), and the domicile is not changed by its doing business in another country; if it is chartered in several States successively, it becomes a citizen of each State (*o*); but a foreign partnership actually complete and subsisting in a foreign country cannot be brought within the purview of the Act of 1908 by registration (*p*). The domicile of the corporation is distinct from that of its shareholders or officers (*q*).

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 62, 63, 64.

(*e*) As to which, see Dicey, Conflict of Laws, 2nd ed., p. 163; and title CORPORATIONS, Vol. VIII., p. 313.

(*f*) Dicey, Conflict of Laws, 2nd ed., p. 163.

(*g*) For purposes of jurisdiction British colonies are regarded as foreign countries (*Firebrace v. Firebrace* (1878), 4 P. D. 63, 66); see title DEPENDENCIES AND COLONIES, Vol. IX., p. 578.

(*h*) Dicey, Conflict of Laws, 2nd ed., p. 469. There are many conventions between this country and other countries with reference to the recognition by each of the companies formed in the other country; see Lindley, Law of Companies, 6th ed., pp. 1227, 1228.

(*i*) *Dutch West India Co. v. Moses* (1724), 1 Stra. 612; *sub nom. Henriques v. Dutch West India Co.* (1727), 1 Ld. Raym. 1632, Ex. Ch.; *Société Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Co., Ltd.* [1901] 2 Ch. 513; *Westman v. Aktiebolaget Elkmans Mekaniska Snickarefabrik* (1876), 1 Ex. D. 237. As to the rule to be applied where there is a concurrent remedy abroad, see *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. 141, *per* GORELL BARNES, P., at p. 152.

(*k*) *Dutch West India Co. v. Moses*, *supra*.

(*l*) *Bank of St. Charles v. De Bernales* (1825), 1 Ry. & M. 190.

(*m*) *Berne (City) v. Bank of England* (1804), 9 Ves. 347.

(*n*) See p. 15, *ante*.

(*o*) See Dicey, Conflict of Laws, 2nd ed., p. 163.

(*p*) *Bulkeley v. Schutz* (1871), L. R. 3 P. O. 764; *Bateman v. Service* (1881), 6 App. Cas. 386, P. C.

(*q*) Dicey, Conflict of Laws, 2nd ed., p. 161; compare *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484, *per* Lord LINDLEY, at p. 505.

The facts that the articles of association of an English company authorise it to comply with the laws of a foreign State in which it carries on business, and that it has caused itself to be registered in a State whose laws provide that the shareholders in a foreign corporation shall be individually liable for its debts do not render the shareholders liable in this country for debts contracted by the company in the foreign State (*r*).

SECT. 1.
In General.

SECT. 2.—*In Relation to Service of Legal Process.*

SUB-SECT. 1.—*British Companies.*

10. Where by any statute (*a*) provision is made for service of any writ of summons, bill, petition, summons, or other process upon any corporation, or upon any society or fellowship, or any body or number of persons, whether corporate or unincorporate, every writ of summons must (*b*) be served in the manner so provided (*c*).

Statutory
provisions
regulating
service.

In such a case service cannot be effected under the rule of procedure (*d*) which provides for service in the absence of any statutory provision regulating service (*e*). Thus, where a company is governed by the Act of 1908 (*f*) and has its registered office in Scotland or Ireland, or is regulated by the Companies Clauses Consolidation Act, 1845 (*g*), and has its principal office in Scotland or Ireland, it must be served in that country, and cannot be served in England, even if it has branch offices and agencies and a head branch office for England in London (*h*).

(*r*) *Risdon Iron and Locomotive Works v. Furness*, [1906] 1 K. B. 49, C. A.

(*a*) *Palmer v. Caledonian Rail. Co.*, [1892] 1 Q. B. 823, 829, C. A.

(*b*) *Wood v. Anderston Foundry Co.* (1888), 36 W. R. 918; *Palmer v. Caledonian Rail. Co.*, *supra*; *Watkins v. Scottish Imperial Insurance Co.* (1889), 23 Q. B. D. 285; *Vignes v. Smith (Stephen) & Co.* (1909), 53 Sol. Jo. 716.

(*c*) R. S. O., Ord. 9, r. 8. Service is regulated by statute in the following cases:—(1) companies regulated by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 116 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 62]; see p. 83, *post*; (2) companies regulated by the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 135; see p. 678, *post*; (3) companies regulated by the Companies Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 17), s. 137; (4) companies to which the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 134, applies; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 12 *et seq.*; (5) companies under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 138; see title RAILWAYS AND CANALS; (6) companies established by the Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 26; see p. 744, *post*; (7) friendly societies (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 94); see title FRIENDLY SOCIETIES; (8) companies incorporated outside, but having a place of business within, the United Kingdom which have complied with the requirements of the Act of 1908, as to registering names and addresses for service (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 274 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 35]; see p. 20, *post*; (9) certain banking companies empowered to sue or be sued in the name of a public officer; see p. 755, *post*; (10) registered trade unions (Trade Union Act, 1971 (34 & 35 Vict. c. 31), s. 9); see title TRADE AND TRADE UNIONS.

(*d*) R. S. O., Ord. 9, r. 8; see p. 18, *post*.

(*e*) *Palmer v. Caledonian Rail. Co.*, *supra*, at p. 829.

(*f*) 8 Edw. 7, c. 69.

(*g*) 8 & 9 Vict. c. 16.

(*h*) *Watkins v. Scottish Imperial Insurance Co.*, *supra*; *Wood v. Anderston Foundry Co.*, *supra*.

SECT. 2.
In Relation
to Service
of Legal
Process.

In the absence of any provision of an Imperial Act of Parliament (i) regulating service of process, every writ of summons or other process requiring personal service issued against a corporation aggregate may be served on the head officer, clerk, treasurer, or secretary of such corporation (k).

Service on
Scotch and
Irish
companies.

11. The statutory provision as to service at the registered address for service within the United Kingdom in the case of foreign companies carrying on business therein (l) does not apply to foreign incorporated companies which are not outside the United Kingdom, but are outside England; such companies may, in certain cases, by leave of the court, be served out of the jurisdiction (m). In the case, however, of actions founded on a breach within the jurisdiction of contracts, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, service out of the jurisdiction cannot be ordered where the defendant is ordinarily domiciled or resident in Scotland or Ireland (n); and in such a case there is no power to order service on companies domiciled in Scotland or Ireland (o). Nor can a company domiciled or ordinarily resident in Scotland or Ireland bind itself by agreement that an English writ for breach of contract within the jurisdiction may be served on it in its country of domicile (p). It may, however, bind itself by agreement that service of the writ upon an agent in England shall be good service upon the company (q).

Where a company registered under the Act of 1908 has its registered office in Scotland, and branches in England, leave may be given to serve in Scotland the writ in an action for an injunction to restrain infringements in England of a trade mark, on the ground that the injunction may be enforced by sequestration on the company's property in England (r).

A Scotch or Irish corporation aggregate, as regards which there is no statutory provision regulating service, but which carries on business in England, is, for the purpose of service (s), a foreign corporation, and may be sued and served in England like any other foreign corporation, although the cause of action did not arise in England (t).

(i) *Palmer v. Caledonian Rail. Co.*, [1892] 1 Q. B. 823, 829, C. A.; *Mackereth v. Glasgow and South Western Rail. Co.* (1873), L. R. 8 Exch. 149.

(k) R. S. O., Ord. 9, r. 8; Ord. 67, r. 5.

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 274 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 35]; and see title PRACTICE AND PROCEDURE.

(m) R. S. O., Ord. 11, r. 1. As to the regard which is to be had to comparative cost and convenience where there is a concurrent remedy in Scotland or Ireland; see *ibid.*, r. 2; *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. 141, C. A.; and see, generally, title PRACTICE AND PROCEDURE.

(n) R. S. O., Ord. 11, r. 1.

(o) *Jones v. Scottish Insurance Co.* (1886), 17 Q. B. D. 421; *Lendert v. Anderson* (1883), 12 Q. B. D. 50.

(p) *British Wagon Co. v. Gray*, [1898], 1 Q. B. 35, C. A.

(q) *Montgomery v. Liebenthal*, [1898] 1 Q. B. 487, C. A.

(r) *Re Burland's Trade Mark, Burland v. Broxburn Oil Co.* (1889), 41 Ch. D. 542.

(s) R. S. O., Ord. 9, r. 8.

(t) *Logan v. Bank of Scotland*, [1904] 2 K. B. 495, 498, 499, C. A.; as to serving foreign corporations, see p. 19, *post*.

SUB-SECT. 2.—*Foreign and Colonial Corporations and Partnerships.*

SECT. 2.

In Relation
to Service
of Legal
Process.Service
within the
jurisdiction.

12. Where a foreign corporation has a place of business in England, and thus *de facto* carries on business in such a way as to be resident there, although its principal place of business is abroad, it may be sued in England (even if the cause of action arose out of England) by an ordinary writ, which may be served on its head officer, or secretary, or other proper officer (*u*) in England, and need not be served abroad (*x*).

A clerk of the London agents of a foreign corporation is not a clerk of the corporation on whom service can be effected (*a*). The mere employment by a foreign corporation of an agent in England who has his own office, which is used for some purposes of the corporation, not including its principal purpose, and also for some purposes of other companies, is not a sufficient residence to justify service on the agent (*b*); and where a corporation has no place of business of its own, but only collecting agents in various parts of England, service on one of such agents is not sufficient (*c*). But if a part of the principal business of the foreign corporation is carried on at an office in England, of which it is the lessee, paying rent and having its name painted up there, the fact that the person in charge is merely an agent, and also agent for other companies, does not prevent him from being a person who may be served (*d*).

It is sufficient if, for a substantial period of time, business is carried on by the foreign corporation at a fixed place of business in England, through some person who there carries on its business as its representative, and not merely his own independent business. Thus, a person in charge of a stand at an exhibition in England where the foreign corporation's manufactured goods are exhibited, even for a short time, may be served (*e*); and service at the London place of business of a foreign corporation on its general European manager is sufficient (*f*).

13. A foreign company outside the jurisdiction may bind itself by agreement that service on a person in England shall be sufficient service on the company (*g*), but not that service out of the jurisdiction in cases not within the rules of procedure shall be sufficient (*h*).

Agreement
as to service.

(*u*) R. S. O., Ord. 9, r. 8.

(*x*) *Newby v. Colt's Patent Firearms Co.* (1872), L. R. 7 Q. B. 293; *Haggin v. Comptoir D'Escompte de Paris* (1889), 23 Q. B. D. 519, C. A.; *Compagnie Générale Transatlantique v. Law (Thomas) & Co., La "Bourgogne,"* [1899] A. C. 431; *Logan v. Bank of Scotland*, [1904] 2 K. B. 495, 499, C. A.

(*a*) *The "Princess Clémentine,"* [1897] P. 18.

(*b*) *Badcock v. Cumberland Gap Park Co.*, [1893] 1 Ch. 362.

(*c*) *Nutter v. Messageries Maritimes* (1885), 54 L. J. (Q. B.) 527; and see *Jones v. Scottish Accident Insurance Co.* (1886), 17 Q. B. D. 421, 422.

(*d*) *Compagnie Générale Transatlantique v. Law (Thomas) & Co., La "Bourgogne,"* *supra*; *Lhoneux, Limon & Co. v. Hong Kong and Shanghai Banking Corporation* (1886), 33 Ch. D. 446.

(*e*) *Dunlop Pneumatic Tyre Co. v. Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.*, [1902] 1 K. B. 343, C. A.

(*f*) *Palmer v. Gould's Manufacturing Co.*, [1884] W. N. 63.

(*g*) *Tharvest Sulphur and Copper Co. v. Société Industrielle des Metaux* (1889), 58 L. J. (Q. B.) 435; and see *Copin v. Adamson* (1875), 1 Ex. D. 17, C. A.

(*h*) *British Wagon Co. v. Gray*, [1896] 1 Q. B. 35, C. A.

**SECT. 2.
In Relation
to Service
of Legal
Process.**

Service
abroad.

Filing names
of persons
who may be
served, by
foreign com-
panies with
places of
business in
the United
Kingdom.

Service on
unincor-
porated
foreign
companies.

14. The rules of procedure as to service out of the jurisdiction on Scotch and Irish companies (i) apply also to the case of a foreign or colonial company (k). Such companies, however, are not exempted from liability to service where the action is founded on breach of a contract which by the terms thereof ought to be performed within the jurisdiction (l); and in their case certain matters to which regard must be had on applications for leave to serve Scotch and Irish companies (m) are immaterial.

Leave to serve out of the jurisdiction is not to be granted unless the court or judge is satisfied that the case is a proper one for such service (n), and a foreign as distinguished from a colonial company must be served with notice of the writ, and not with the writ itself (o).

15. Every trading corporation incorporated outside the United Kingdom which establishes a place of business within the United Kingdom is now required (under penalties) to file with the Registrar of Joint Stock Companies the names and addresses of some one or more persons resident in the United Kingdom authorised to accept on behalf of the company service of process and any notices required to be served on the company, and also to file notice of any alteration in such names or addresses (p). Any process or notice required to be served on the company is sufficiently served if addressed to any person whose name has been so filed, and left at or sent by post to the address which has been so filed (p). Such a company must also conspicuously exhibit, on every place where it carries on business in the United Kingdom, the name of the company and the country in which it is incorporated (p). Foreign corporations subject to these provisions, but which have not complied with them, may be served in the same manner as heretofore (q).

16. Unincorporated foreign companies are, as regards service of English process, in a different position from that of foreign corporations. They are not corporations aggregate, and therefore service upon an officer is not sufficient (r). Nor are they corporate or unincorporate bodies upon whom service may be effected under the provisions of any statute (s). As regards service of process, they are regarded as mere partnerships (t). Thus, a foreign partnership *en commandite*, or other foreign partnership which, unlike a French *société anonyme*, or a German *actiengesellschaft*, is not a corporation, comes within the provisions of the rules of procedure relating

(i) B. S. C., Ord. 11.

(k) *Scott v. Royal Wax Candle Co.* (1876), 1 Q. B. D. 404; *Bawtree v. Great North-West Central Rail. Co.* (1898), 14 T. L. R. 448, C. A.

(l) B. S. C., Ord. 11, r. 1 (e).

(m) *Ibid.*, r. 2.

(n) *Ibid.*, r. 4.

(o) *Ibid.*, r. 6; *Westman v. Aktiebolaget Ekmans Mekaniska Snickarefabrik* (1876), 1 Ex. D. 237; see title PRACTICE AND PROCEDURE.

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 274 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 35]. It seems doubtful whether the section affects the domicile of companies registering under it, except as regards service of process.

(q) See p. 19, *ante*.

(r) See p. 19, *ante*.

See p. 17, *ante*.

See B. S. C., Ord. 9, r. 8.

to actions by and against firms and persons carrying on business in names other than their own (*u*). Hence, two or more persons claiming or liable as partners and carrying on business within the jurisdiction may, without any leave, sue or be sued in England in the name of the firm (*v*), although all or some of them are foreigners, colonial subjects, Scotchmen, or Irishmen, and whether they reside or are domiciled in England or not (*x*). Whether there is a carrying on of business within the jurisdiction is in each case a question of fact. Thus, where a Scotch firm, whose members are domiciled and resident in Scotland, employs an agent in London to procure orders on commission, and he pays the office rent, and receives and transmits orders to the firm, but has no general authority to conclude contracts with them, the firm does not carry on business within the jurisdiction (*a*).

SECT. 2.
In Relation
to Service
of Legal
Process.

SECT. 3.—*In Relation to County Court Jurisdiction.*

17. Except where otherwise provided, proceedings in a county court may be commenced in the court within the district of which the defendant or one of the defendants dwells or carries on his business at the time of commencing the action or matter, or, by leave, in the court within the district of which the defendant, or one of the defendants, dwelt or carried on business at any time within six calendar months next before the time of commencement, or in the court in the district of which the cause or claim wholly or in part arose (*b*).

County court
proceedings
against
companies

A corporation dwells, within the meaning of this provision, at the place where its business is carried on (*c*), or, where it has more than one place of business, at its principal place of business (*d*). In the case of a manufacturing joint stock company the registered office is not necessarily the place where it dwells; for, if it makes and sells its articles at another place, that is the residence of the company (*e*). Where, however, the substantial business of the company is done at the registered office, that is where the company dwells (*f*).

A corporation carrying on business in one city and employing in

(*u*) R. S. C., Ord. 48a; and see *Western National Bank v. Percy & Co.*, [1891] 1 Q. B. 304; *Dobson v. Festi*, [1891] 2 Q. B. 92, C. A.; and titles PARTNERSHIP; PRACTICE AND PROCEDURE. As to agreements to accept service, see *Montgomery, Jones & Co. v. Liebenenthal & Co.*, [1898] 1 Q. B. 487, C. A.; *British Wagon Co., Ltd. v. Gray*, [1896] 1 Q. B. 35, C. A.

(*w*) R. S. C., Ord. 48a., r. 1.

(*x*) *Worcester City and County Banking Co. v. Firbank, Pauling & Co.*, [1894] 1 Q. B. 784, C. A.; *Grant v. Anderson & Co.*, [1892] 1 Q. B. 108, C. A.; *Lysaght v. Clarke & Co.*, [1891] 1 Q. B. 552, C. A.

(*a*) *Grant v. Anderson & Co.*, *supra*; compare *Baillie v. Godwin* (1886), 33 Ch. D. 604; and see *Heinemann v. Hale & Co.*, [1891] 2 Q. B. 83.

(*b*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 74. As to the mode of service under the county court jurisdiction, see title COUNTY COURTS, Vol. VIII., p. 476.

(*c*) *Taylor v. Crowland Gas and Coke Co.* (1855), 11 Exch. 1.

(*d*) *Adams v. Great Western Rail. Co.* (1861), 6 H. & N. 404; *Re Brown v. London and North Western Rail. Co.* (1863), 4 B. & S. 326; *Shiels v. Great Northern Rail. Co.* (1861), 30 L. J. (q. b.) 331.

(*e*) *Keynsham Blue Lias Co. v. Barker* (1863), 2 H. & C. 729.

(*f*) *Aberystwith Promenade Pier Co. v. Cooper* (1865), 35 L. J. (q. b.) 44.

**SECT. 3.
In Relation
to County
Court
Jurisdiction.**

another a general commission agent, who transacts the corporation's business there at an office, the rent of which the corporation pays, does not carry on business in the latter city (g); nor does a railway company carry on business at a receiving house or booking office kept by an agent for the receipt and booking of parcels for railways generally (h).

SECT. 4.—For Taxing Purposes.

**Residence
for taxing
purposes.**

18. A residence which is sufficient for the service of process is not necessarily sufficient to bring a foreign corporation within the operation of a taxing Act (i).

The proposition that a company always resides where it is registered and nowhere else cannot be maintained. A company does not, in a natural sense, reside anywhere; but in applying the conception of residence to a company the courts proceed as nearly as possible upon the analogy of an individual, and the courts have, therefore, to see where a company really does business. A company may be of foreign nationality, and yet reside in the United Kingdom; otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad (k).

**Income tax
payable.**

19. All bodies corporate, companies, or societies of persons, whether corporate or not corporate, are chargeable with the same income tax as an individual (l), but are not, as a rule (m), exempt from liability when the amount of income is of such a small amount as would exempt an individual (n). The words of the statute charging income tax refer to persons residing or not residing in the United Kingdom (o), and a company may have a residence which renders it liable to income tax, although its domicile is outside the United Kingdom (p). The question of residence is entirely distinct from domicile, which is often independent of actual residence (q).

**Where whole
income
liable to tax.**

20. If the company's residence is in England, and its business is carried on wholly or partly in England, it is liable to income tax on all its profits, whether earned in England or abroad (r). In such cases, therefore, tax must be paid on the whole income, although the dividends payable to foreign shareholders are paid outside the United Kingdom (a).

(g) *Corbett v. General Steam Navigation Co.* (1859), 4 H. & N. 482.

(h) *Minor v. London and North Western Rail. Co.* (1856), 1 C. B. (N. S.) 325; and see title COUNTY COURTS, Vol. VIII., p. 471.

(i) *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A. C. 455, 459.

(k) *Ibid.*, per Lord LOREBURN, L.C., at p. 458.

(l) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 40, 192; and see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 19.

(m) See title FRIENDLY SOCIETIES.

(n) *Curtis v. Old Monkland Conservative Association*, [1906] A. C. 86; *Mylam v. Market Harborough Advertiser Co.*, [1905] 1 K. B. 708.

(o) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sched. D.

(p) *A.-G. v. Coote (Sir C. H. (Bart.))* (1817), 4 Price, 183.

(q) *Walcot v. Botfield* (1854), Kay, 534, 543.

(r) *San Paulo (Brazilian) Rail. Co. v. Carter*, [1896] A. C. 31.

(a) *Denver Hotel Co. v. Andrews* (1895), 43 W. R. 339, C. A.; *Grove v. Elliott*

The same principle has been applied to companies registered and controlled in the United Kingdom, but carrying on business abroad (b).

SECT. 4.
For Taxing
Purposes.

The position of the company's registered office, though it does not necessarily determine (c), is an important factor in determining where its residence is (d). Where a company, incorporated under the Act of 1908 or any statute which it replaces, whether it is or is not also registered abroad, is formed with the object of carrying on a business abroad, and is managed by a board of directors, who hold their meetings at the registered office in England, subject to some control of general meetings of the shareholders to be held in London, the company resides in the United Kingdom, and is liable to pay income tax upon the whole of its profits wherever earned, although some members of the board reside abroad, and have all the practical management of the manufacture and sale of products which are exclusively carried on there, and although the dividends required for the English shareholders are the only part of its profits sent to the United Kingdom (e); for the principle is, not that the registered office is necessarily the company's residence, but that in such a case it is the place where the central management and control actually abide (f).

Where
residence is
for taxing
purposes.

21. In order to bring an English company within the parts of the income tax Acts which render it liable to income tax on the whole profits of the business abroad, the control must be control in England by, or in some such way as by, a board of directors in England, and not merely the control which is obtained by an English company having a preponderating influence by means of a large or exclusive shareholding in a company formed and carrying on business abroad (g). The fact that a company here holds, by itself or its nominees, practically or absolutely the whole of the shares in a foreign company may give the former company the control of the latter in the sense that it may enable the former by exercising its voting power to turn out the directors of the latter, and to enforce its own views as to policy; but it does not thereby make the assets or business those of the English company (h). Nevertheless, a shareholding company in that position may bring about such an arrangement as will constitute the foreign company its agent for the purpose

How control
affects
liability.

and *Parkinson* (1896), 3 Tax Cas. 481; *Jones (Frank) Brewing Co. v. Apthorpe* (1898), 15 T. L. R. 113; *United States Brewing Co., Ltd. v. Apthorpe* (1898), 4 Tax Cas. 17; *St. Louis Breweries, Ltd. v. Apthorpe* (1898), 79 L. T. 551; *Apthorpe v. Schoenhofen (Peter) Brewing Co., Ltd.* (1899), 80 L. T. 395.

(b) *Imperial Continental Gas Association v. Nicholson* (1877), 37 L. T. 717 (as company); *London Bank of Mexico and South America v. Apthorpe*, [1891] 2 Q. B. 378, O. A. (banking company); *San Paulo (Brazilian) Rail. Co. v. Carter*, [1896] A. C. 31 (railway company); and see the cases referred to in note (a), p. 22, *ante*. The kind of the business is, as a rule, immaterial.

(c) See p. 15, *ante*.

(d) *Cesena Sulphur Co. v. Nicholson*, *Calcutta Jute Mills Co. v. Nicholson* (1876), 1 Ex. D. 428, 450, 451.

(e) *Ibid.*

(f) *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A. C. 455, 458.

(g) *Kodak, Ltd. v. Clark*, [1903] 1 K. B. 505, O. A.; *Gramophone and Typewriter, Ltd. v. Stanley*, [1908] 2 K. B. 89, O. A.

(h) *Gramophone and Typewriter, Ltd. v. Stanley*, *supra*, at p. 95 *St. Louis Breweries, Ltd. v. Apthorpe supra*.

SECT. 4.
For Taxing
Purposes.

of carrying on the business, and thereupon the business will become, for all taxing purposes, the English company's business (i). Whether this follows is in each case a question of fact. Thus, if not only all the shares, but all the assets and the management of the foreign company are taken over by an English company, the business is then carried on partly in England and partly abroad, and income tax is chargeable upon the whole of the profits, and not only on those transmitted to England (i).

Income tax
on foreign
profits.

Where, however, a company resident in the United Kingdom derives income from securities or possessions outside the United Kingdom, or from trade carried on entirely elsewhere than in the United Kingdom, the tax only falls on so much of the income as is received in this country (j). In such a case the tax is only payable on what is actually received here, and not on what is only constructively received by being taken into account in the balance-sheets upon which profits are ascertained (k).

Deductions.

22. An English company carrying on business abroad cannot make any deduction in respect of interest on its debentures payable to holders abroad (l) or bonuses on repayments of loans (m); but an insurance company may deduct the amount of annuities granted in consideration of a lump sum or premium down as part of its business (n).

Foreign
company.

23. A foreign or colonial corporation may be resident in this country for the purposes of income tax (o). Thus, a company incorporated and registered in a colony where there is an office denominated its head office there, but with another office in London, the business of which is the sale under contracts executed in England of produce obtained in the colony, general meetings being held in the colony, but control of the company being vested in a governing body, some of whom reside in England and some in the colony, but always exercised in London, resides in England, and is liable to income tax on the whole of the annual profits of its trade, whether carried on in the United Kingdom or elsewhere (p).

(i) *Apthorpe v. Schoenhofen (Peter) Brewing Co., Ltd.* (1899), 80 L. T. 395; and see *United States Brewing Co., Ltd. v. Apthorpe* (1898), 4 Tax Cas. 17. The decision in *Bartholomay Brewery Co. (Rochester) v. Wyatt*, [1893] 2 Q. B. 499, must be read subject to what was laid down in *San Paulo (Brazilian) Rail. Co. v. Carter*, [1896] A. C. 31, and *Apthorpe v. Schoenhofen (Peter) Brewing Co., Ltd.*, *supra*.

(j) *Colquhoun v. Brooks* (1889), 14 App. Cas. 493; *Scottish Provident Institution v. Allan*, [1903] A. C. 129.

(k) *Gresham Life Assurance Society v. Bishop*, [1902] A. C. 287.

(l) *Alexandria Water Co. v. Musgrave* (1883), 11 Q. B. D. 174, C. A.

(m) *Arizona Copper Co. v. Surveyor of Taxes*, [1896] W. N. 93.

(n) *Gresham Life Assurance Society v. Styles*, [1892] A. C. 309.

(o) *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A. C. 455.

(p) *Ibid.*; *Goerz & Co. v. Bell*, [1904] 2 K. B. 136, where a company registered as a joint stock company in Pretoria, when it was within the South African Republic, which was formed to carry on financial operations and to acquire mining and other properties in South Africa and elsewhere and turn them to account, and to form subsidiary companies, was held to reside in the United Kingdom, and to be liable to income tax on all the annual profits of its trade whether carried on in the United Kingdom or elsewhere; for its head office was in fact in London, where almost every transaction of importance affecting

Where any company not resident in the United Kingdom derives annual profits or gains from any property within that kingdom, or any trade or vocation carried on within that kingdom, income tax is payable on those profits or gains (q).

SECT. 4.
For Taxing
Purposes.

Part III.—Company Legislation prior to the Companies (Consolidation) Act, 1908.

24. In order to understand the provisions of the Companies Act, 1862 (r), with reference to companies which were not formed under it, and the corresponding provisions of the Companies (Consolidation) Act, 1908, with reference to companies not formed under that Act (s), reference must be made to some statutes which, before the year 1862, made general provision for the incorporation of companies by means of registration at a public office, and without the necessity of obtaining a special Act of Parliament or a royal charter (t).

Legislation
prior to
1908.

25. The Companies Act, 1844 (u), applied to every joint stock company (as defined in the Act) established in England or Ireland, or established in Scotland and having an office or place of business in any other part of the United Kingdom, for any commercial purpose, or for any purpose of profit, or for the purpose of assurance or insurance, with certain exceptions (a).

Companies
Act, 1844.

The term joint stock company comprehended: (1) Every partnership whose capital was divided or agreed to be divided into shares, and so as to be transferable without the express consent of

Joint stock
companies

the management, control, and direction of the company was dealt with and decided at board meetings of the directors, although there was a director in South Africa, and there were others in different countries; see also *New Zealand Shipping Co., Ltd. v. Stephens* (1906), 96 L. T. 50.

(g) Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sched. D; *Tischler & Co. v. Apthorpe* (1885), 52 L. T. 814; *Werle & Co. v. Colquhoun* (1888), 20 Q. B. D. 753, C. A.

(r) 25 & 26 Vict. c. 89.

(s) 8 Edw. 7, c. 69; see p. 37, *post*.

(t) The earlier Acts which require notice are:—(1) Companies Act, 1844 (7 & 8 Vict. c. 110) (since repealed); (2) An Act to Regulate Joint Stock Banks in England (7 & 8 Vict. c. 113) (since repealed); (3) Limited Liability Act, 1855 (18 & 19 Vict. c. 133) (since repealed); (4) Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47) (since repealed); (5) Joint Stock Companies Act, 1857 (20 & 21 Vict. c. 14) (since repealed); (6) Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49) (since repealed); (7) Joint Stock Companies Amendment Act, 1858 (21 & 22 Vict. c. 60) (since repealed); (8) An Act to enable Joint Stock Companies to be formed on the principle of Limited Liability (21 & 22 Vict. c. 91) (since repealed). For other statutes containing provisions generally applicable to companies incorporated by special statutes for public purposes, see pp. 674 *et seq.*, *post*.

(u) 7 & 8 Vict. c. 110.

(a) *Ibid.*, s. 2. The exceptions are banking companies, schools, scientific and literary institutions, and also friendly societies, loan societies, and benefit building societies, respectively duly certified and enrolled under the statutes in force respecting such societies, other than such friendly societies as grant assurances on lives to the extent specified in the Act (*ibid.*).

PART III.
Company
Legislation
prior to Act
of 1908.

all the co-partners; (2) every assurance company (as defined in the Act), including certain insuring friendly societies, whether the same should be joint stock companies or mutual assurance societies or both; and (3) every partnership which at its formation, or by subsequent admission (except any admission subsequent on devolution or any other act in law), should consist of more than twenty-five members (*b*). But the Act did not, except where expressly made applicable, apply to partnerships existing before November 1, 1844, or, except as specially provided, to any company for executing such works as bridges, canals, reservoirs, railways, harbours, and the like, which could not be executed without parliamentary authority, or (except as specially provided) to any company incorporated by statute or charter, or to any company authorised by statute or letters patent to sue or be sued in the name of some officer or person (*c*).

Registration
 required.

The Companies Act, 1844, required the officers of existing joint stock companies (*d*), however incorporated, or privileged, or established, to register some small particulars within a limited time (a money penalty being imposed on the company in case of default). The certificate obtained on such registration was only evidence of compliance, and was not to be considered as a certificate of complete registration, so as to confer on the company the powers and privileges of the Act (*e*); but facilities were given to existing companies of the kinds aforesaid (except assurance companies) for obtaining complete registration under the Act (*f*).

In the case of a company forming itself under the Act, the promoters on filing certain returns with the Registrar of Joint Stock Companies obtained a certificate of provisional registration (*g*). This did not incorporate the company or enable the promoters to exercise all the powers of the company (*h*). In order to obtain incorporation and full powers a deed of settlement had to be executed and other requirements had to be complied with before a "certificate of complete registration" could be obtained; on this certificate being given the company was incorporated as from its date (*i*), but not with limited liability.

Limited
 Liability
 Act, 1855.

26. By the Limited Liability Act, 1855 (*k*), any joint stock company thereafter formed under the Companies Act, 1844, with a capital divided into shares of a nominal value of not less than £10 each, or any solvent joint stock company already registered under the Companies Act, 1844, or constituted under any private Act of Parliament, was enabled to obtain a certificate of complete registration with limited liability on complying with the requirements of

(*b*) Companies Act, 1844 (7 & 8 Vict. c. 110), s. 2.

(*c*) *Ibid.*

(*d*) That is, of the kinds to which the Act applied in case of original registration; see *infra*.

(*e*) Companies Act, 1844 (7 & 8 Vict. c. 110), s. 58.

(*f*) *Ibid.*, s. 59.

(*g*) *Ibid.*, s. 4.

(*h*) *Ibid.*, ss. 7, 25.

(*i*) *Ibid.*, s. 25.

(*k*) 18 & 19 Vict. c. 133.

the Act (*l*). The limited liability thus conferred was more like that of members of companies subject to the Companies Clauses Consolidation Act, 1845 (*m*), than of members of companies under the Joint Stock Companies Act, 1856 (*n*), or the Act of 1908 (*o*). Assurance companies were by the terms of the Act expressly excluded (*p*).

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Company
Legislation
prior to Act
of 1908.

27. The Joint Stock Companies Act, 1856 (*a*), repealed the Companies Act, 1844 (*b*), and an Act slightly amending it (*c*), and the Limited Liability Act, 1855 (*d*), but provided that the repeal should not take effect as to any company completely registered under the Act of 1844 until such company had obtained the registration mentioned in the Act (*e*). This repealing enactment was itself repealed in 1857, when it was provided that the three Acts which had been repealed should be deemed to have been and still to remain unrepealed as to any company completely registered which had not obtained registration under the Act of 1856, until the company obtained registration under the Acts of 1856 and 1857, after which they should be repealed as to such company (*f*).

Joint Stock
Companies
Act, 1856.

The Act of 1856 also provided that every company registered under the Act of 1844 should before November 4, 1856, and any other company duly constituted by law before the Act of 1856 and having seven or more members, might at any time thereafter, register itself as a company under the Act of 1856 either with or without limited liability. Registration with limited liability was only allowed when the company had either obtained such registration under the Limited Liability Act, 1855, or had obtained the assent of a certain majority of its shareholders (*g*). Separate provisions were made as to the mode of registration of existing companies (*h*) under the Act of 1856. The Act did not apply to persons associated together for the purpose of banking or assurance (*i*).

The Act of 1856 contained provisions for the registration and incorporation of new companies limited by shares or unlimited, resembling those of the Companies Act, 1862, with reference to similar companies (*k*). Seven or more persons associated for any

(*l*) Limited Liability Act, 1855 (18 & 19 Vict. c. 133), ss. 1, 2, 3.

(*m*) 8 & 9 Vict. c. 69; see pp. 674 *et seq.*, *post*.

(*n*) 19 & 20 Vict. c. 47; see *infra*.

(*o*) See p. 160, *post*.

(*p*) Limited Liability Act, 1855 (18 & 19 Vict. c. 133), ss. 1, 2. As to banking companies, see p. 28, *post*.

(*a*) 19 & 20 Vict. c. 47.

(*b*) 7 & 8 Vict. c. 110; see p. 25, *ante*.

(*c*) Stat. 10 & 11 Vict. c. 78 (1847).

(*d*) 18 & 19 Vict. c. 133.

(*e*) Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), s. 107.

(*f*) Joint Stock Companies Act, 1857 (20 & 21 Vict. c. 14), s. 23. The three Acts were finally repealed by the Companies Act, 1862 (25 & 26 Vict. c. 89), and the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66).

(*g*) Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), s. 110.

(*h*) *Ibid.*, s. 111.

(*i*) *Ibid.*, s. 2.

(*k*) Which, with the amendments made by subsequent Acts, are now re-enacted

PART III.
Company
Legislation
prior to Act
of 1908.

lawful purpose (not being banking or insurance) might by signing a memorandum of association, and complying with other requirements, form themselves into an incorporated company with or without limited liability (*l*). The articles of association might then, as now, modify or exclude a form, then called Table B; and if there were no articles, the provisions of that table constituted the regulations of the company. Registration, as now, was effected with the Registrar of Joint Stock Companies, who gave a certificate of incorporation to the company, which thereupon became a body corporate, with perpetual succession and a common seal, with power to hold lands (*m*).

Joint Stock
Companies
Act, 1857.

28. The Joint Stock Companies Act, 1857, in addition to the provisions above referred to, enabled companies of seven or more shareholders, with a fixed capital in shares, and already duly constituted by law and not being a company thereby required to be registered, to register under the Acts of 1856 and 1857, either with or without limited liability. If the liability was not already limited, certain assents had to be obtained to registration with limited liability (*n*). The Act provided that if after July 13, 1857, more than twenty persons carried on in partnership any trade or business having for its object the procurement of gain to the partnership, each of them should be severally liable for the whole debts of the partnership, unless they were (1) a company registered under the Act of 1856; (2) a company incorporated or otherwise legally constituted by or in pursuance of some Act of Parliament, royal charter, or letters patent; or (3) engaged in working mines in the Stannaries jurisdiction (*o*).

The Act of 1857 further provided that a company completely registered under the Companies Act, 1844 (*p*), and whether with or without limited liability (except a company formed for the purpose of insurance), which had not registered under the Act of 1856 (*q*), and which did not register under the Acts of 1856 and 1857 before November 3, 1857, was incapable until registered of suing or paying dividends; and its directors and managers were liable to penalties, but the default did not render the company illegal (*r*).

Banking
companies.

29. Banking companies, previously excluded from the operation of the Joint Stock Companies Act, 1856 (*s*), were brought within its operation (except as regards limited liability) by the Joint Stock Banking Companies Act, 1857 (*t*), with which the Joint Stock

by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); see p. 39, *post*.

(*l*) 19 & 20 Vict. c. 47, s. 3.

(*m*) *Ibid.*, s. 13.

(*n*) 20 & 21 Vict. c. 14, s. 29.

(*p*) 7 & 8 Vict. c. 110; see p. 25, *ante*.

(*q*) 19 & 20 Vict. c. 47; see p. 27, *ante*.

(*r*) Joint Stock Companies Act, 1857 (20 & 21 Vict. c. 14), ss. 27, 28.

(*s*) 19 & 20 Vict. c. 47, s. 2.

(*t*) 20 & 21 Vict. c. 49, s. 3.

Companies Acts of 1856 and 1857 were incorporated (*u*). Limited liability, except as to notes, might be obtained by banking companies under a subsequent Act (*w*).

The Joint Stock Companies Amendment Act, 1858 (*a*), enabled a banking company of seven or more persons and with a share capital to register for the purpose of winding up under certain Acts.

30. The Companies Act, 1862 (*b*), repealed the previous Acts of 1844, 1856, 1857, and 1858 (*c*), but the repeal did not affect the incorporation of any company registered under any Act repealed (*d*), and portions of two of the repealed Acts relating to banking companies were re-enacted (*e*).

To companies formed and registered, or registered but not formed, under the Joint Stock Companies Acts (*f*), or any of them, the provisions of the Act of 1862 (except Table A) applied as if they had been formed and registered under that Act (as companies limited by shares or unlimited as the case might be) with the necessary qualifications as to reference to the date of registration, and as to the power of altering Table B annexed to the Act of 1856 (*g*). Notwithstanding certain words in one of the above provisions, a company formed and registered under the Joint Stock Companies Acts, 1856, 1857, could wind up voluntarily without being first re-registered (*h*).

Generally speaking, re-registration was unnecessary whether a company had been formed and registered or only registered under any of the Joint Stock Companies Acts. There were, however, some companies which were required to re-register, namely, (1) insurance companies completely registered under the Companies Act, 1844 (*i*); and (2) any other companies which by any repealed statute should have, but had not, been registered under the Joint Stock Companies Acts, or one of them (*j*). Therefore companies completely registered under the Companies Act, 1844, and banking companies registered under the Joint Stock Banks Act, 1844 (*k*), which had not re-registered before 1862, were

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Companies
Act, 1862,

Registration
of existing
companies.

(*u*) Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49), s. 2. As to banking companies required or enabled to register under the same Act, see p. 612, *post*.

(*w*) Stat. 21 & 22 Vict. c. 91 (1858).

(*a*) 21 & 22 Vict. c. 60, s. 23.

(*b*) 25 & 26 Vict. c. 89, s. 205, and Sched. III.

(*c*) See pp. 25 *et seq.*, *ante*.

(*d*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205.

(*e*) *Ibid.*, s. 205, and Sched. III, Part II.; see p. 612, *post*.

(*f*) The expression "Joint Stock Companies Acts," as used in the Act of 1862 (25 & 26 Vict. c. 89), meant the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47); the Joint Stock Companies Act, 1857 (20 & 21 Vict. c. 14), both which Acts might, by s. 2 of the Act of 1857, be cited together as "The Joint Stock Companies Acts, 1856, 1857"; the Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49), and the Act enabling joint stock banking companies to be formed with limited liability (21 & 22 Vict. c. 91); but not the Companies Act, 1844 (7 & 8 Vict. c. 110); see Companies Act, 1862 (25 & 26 Vict. c. 89), s. 175.

(*g*) Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 176, 177.

(*h*) *Re London Indiarubber Co.* (1866), 1 Ch. App. 329.

(*i*) 7 & 8 Vict. c. 110.

(*j*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 209.

(*k*) 7 & 8 Vict. c. 113; see pp. 612 *et seq.*, *post*.

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respectively required to re-register under the Act of that year. Default in compliance rendered the company, until registration, incapable of suing or paying dividends, and exposed directors and managers to pecuniary penalties, but did not render the company illegal (*l*). Re-registration had to be effected in accordance with Part VII. of the Act of 1862 (*m*).

Part VII. of the Act of 1862, consisting of ss. 179—198, related exclusively to the registration of existing companies, and, without requiring, permitted registration under the Act of every then existing company (including those registered under the Joint Stock Companies Acts (*n*)) consisting of seven or more members, and any company thereafter formed in pursuance of any Act (except the Act of 1862) or letters patent, or being a company working mines within and subject to the Stannaries jurisdiction, or being otherwise duly constituted by law, and consisting of seven or more members. The registration might be with unlimited liability, or with liability limited by shares or by guarantee; and the registration might take place with a view to the company being wound up (*o*). This enactment was subject to certain exceptions (*p*) and regulations (*q*) practically identical with the exceptions from and regulations in regard to the power for existing companies to register under Part VII. of the Act of 1908 (*r*).

New
companies.

No new company, association, or partnership, unless it was formed under some other Act or under letters patent, or unless it was a company engaged in working mines within and subject to the Stannaries jurisdiction, could be formed with more than ten persons for the purpose of carrying on the business of banking, or with more than twenty persons for the purpose of carrying on any other business that had for its object the acquisition of gain by the company, association, or partnership, or by its individual members, unless it was registered as a company under the Act of 1862 (*a*).

Any seven or more persons associated for any lawful purpose (banking not being excluded) might, by signing a memorandum of association and otherwise complying with the requisitions in respect of registration, form an incorporated company, with or without limited liability (*b*). If limited, the liability of the members might, according to the memorandum, be limited either to the amount, if any, unpaid on the shares respectively held by them,

(*l*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 210. As there are no analogous provisions in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), it may be assumed that no defaulting companies are now in existence. An insurance company which had failed to re-register could not sue even by a petition for winding up (*Re Waterloo Life, Education, Casualty, and Self Relief Assurance Co.* (No. 1) (1862), 31 Beav. 586).

(*m*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 180.

(*n*) See note (*f*), p. 29, *ante*.

(*o*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 180.

Ibid., ss. 178, 181—198.

See p. 61, *post*.

Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4.

(*b*) *Ibid.*, s. 6. The provisions as to registration under the Act of 1862, as modified by intervening enactments, are re-enacted in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

or to such amount as they might respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up (*c*). The former companies were companies limited by shares; the latter companies limited by guarantee.

PART III.
Company
Legislation
prior to Act
of 1908.

31. By the Companies Act, 1867, a company formed as a limited company might by its memorandum of association impose unlimited liability on its directors or managing director (*d*).

Companies
Act, 1867.

The same Act enabled a company formed for the purpose of promoting commerce, art, science, religion, charity, or any other useful object, and applying its profits or other income in promoting its objects, and prohibiting payments of dividend to its members, to be registered (if licensed to do so by the Board of Trade) with limited liability without using the word "Limited" as part of its name (*e*).

32. By the Companies Act, 1879 (*f*), any company registered before or after August 13, 1879, as an unlimited company (*g*) was enabled to register under the Companies Acts, 1862 to 1879, as a limited company, and any company already registered as a limited company might re-register under the Act of 1879 (*h*). Registration might be obtained under the Act, and its privileges thereby obtained, notwithstanding anything contained in any Act of Parliament, charter, deed of settlement, contract of co-partnership, cost-book regulations, letters patent, or other instrument constituting or regulating the company (*i*), but the unlimited liability of a bank of issue was preserved in respect of its notes (*k*). By the resolution assenting to registration a company might (1) increase its nominal capital by increasing the nominal amount of each share, in which case the increase could only be called up on and for the purposes of winding up; or (2) make any part of its uncalled capital liable to be called up only in the like event and for the same purposes (*l*).

Companies
Act, 1879.

33. The Companies Act, 1900 (*m*), contained several provisions affecting registration. The conclusiveness of all certificates of incorporation as to due compliance with all requirements as to registration was more clearly established (*n*). In the case of a company inviting the public to subscribe for its shares restrictions were placed on the appointment of a director by the articles of association (*o*), and the memorandum or articles of such a company had to fix the minimum subscription upon which shares offered to

Companies
Act, 1900.

(*c*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 7.

(*d*) 30 & 31 Vict. c. 131, s. 4.

(*e*) *Ibid.*, s. 23.

(*f*) 42 & 43 Vict. c. 76.

(*g*) Compare Companies Act, 1862 (25 & 26 Vict. c. 89), s. 180.

(*h*) 42 & 43 Vict. c. 76, s. 4.

(*i*) *Ibid.*, s. 10.

(*k*) *Ibid.*, s. 6.

(*l*) *Ibid.*, s. 5.

(*m*) 63 & 64 Vict. c. 48.

(*n*) *Ibid.*, s. 1.

(*o*) *Ibid.*, s. 2.

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Legislation
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of 1908.

the public for the first time might be allotted, except where it was desired that no allotment should be made unless all the shares so offered should be subscribed (*p*). If such a company desired to pay an underwriting commission in respect of shares, the articles had to authorise the payment and state the amount or rate per cent. of the commission (*q*). In the case of future companies registered as guarantee companies, but having a share capital, the memorandum of association was required to contain statements which under the Act of 1862 were only required to be stated, if at all, in the articles (*r*).

Companies
Act, 1907.

34. The Companies Act, 1907 (*s*), enabled two or more persons to register themselves as a private company—that is to say, a company which by its articles restricted the right to transfer its shares, limited the number of its members (exclusive of persons in its employment) to fifty, and prohibited any invitation to the public to subscribe for any of its shares or debentures—and exempted every such company from complying with many of the stringent provisions of the Act with reference to other companies (*t*). A private company, unless prohibited by its memorandum or articles, was enabled, by passing a special resolution and filing certain documents, to turn itself into a public company (*a*). By the same Act the restrictions on appointing directors and as to the minimum subscription, which under the Act of 1900 only applied to a company inviting a public share subscription (*b*), were (subject to modifications) made applicable to companies which did not invite a public share subscription, and which had not before that date allotted any shares or debentures, but not to private companies as defined by the Act. The Act of 1907 also applied the provisions of that Act as to underwriting shares to cases where shares were not offered to the public (*c*).

Foreign
companies.

By the Act of 1907 every company incorporated outside the United Kingdom and having a place of business within it was required within a certain period to file with the Registrar of Joint Stock Companies a copy of its instrument of constitution, a list of its directors, and the name and address of a person resident in the United Kingdom authorised to accept service of process and notices on behalf of the company (*d*). The Companies Act, 1908 (*e*), enabled any company incorporated in a British possession, and which had complied with the last-mentioned provision, to hold lands in the

(*p*) Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4.

(*q*) *Ibid.*, s. 8. An omission in this respect might be cured by altering the articles after registration of the company.

(*r*) *Ibid.*, s. 27.

(*s*) 7 Edw. 7, c. 50.

(*t*) *Ibid.*, s. 37 (1). Such a company could turn itself into a public company of the kind hereinafter designated "*quasi-private*" (*ibid.* s. 37 (2)); see p. 75, *post*.

(*a*) *Ibid.*, s. 37 (2).

(*b*) *Ibid.* s. 1.

(*c*) *Ibid.*, s. 8.

(*d*) Companies Act, 1907 (7 Edw. 7, c. 50), s. 35

(*e*) 8 Edw. 7, c. 12.

United Kingdom as if it had been incorporated under the Companies Acts.

35. The above-mentioned enactments have now been repealed, and the net result of their provisions has been re-enacted in substance by the Companies (Consolidation) Act, 1908 (*f*).

PART III
Company
Legislation
prior to Act
of 1908.

Part IV.—Companies under the Companies (Consolidation) Act, 1908.

SECT. 1.—*In General.*

SUB-SECT. 1.—*Repeal of Former Acts.*

36. The Companies (Consolidation) Act, 1908 (*g*), which is hereinafter referred to as “the Act of 1908,” came into operation on April 1, 1909 (*h*), and repeals (*i*) the whole of the Acts which previously could be cited as the Companies Acts, 1862 to 1908 (*k*).

Repeal of
former Acts

The Act of 1908 also repeals (*l*) certain other enactments (*m*) which related to companies, or to the administration, on the same

(*f*) 8 Edw. 7, c. 69. As to the history of company legislation, see Evans and King on the Companies (Consolidation) Act, 1908, pp. 1—29.

(*g*) 8 Edw. 7, c. 69.

(*h*) *Ibid.*, s. 296.

(*i*) *Ibid.*, s. 286 (1), Sched. VI., Part I.

(*k*) The following are the Acts repealed:—Companies Act, 1862 (25 & 26 Vict. c. 89); Companies Seals Act, 1864 (27 & 28 Vict. c. 19); Companies Act, 1867 (30 & 31 Vict. c. 131); Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104); Companies Act, 1877 (40 & 41 Vict. c. 26); Companies Act, 1879 (42 & 43 Vict. c. 76); Companies Act, 1880 (43 Vict. c. 19); Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30); Companies Act, 1886 (49 & 50 Vict. c. 23); Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62); Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63); Directors Liability Act, 1890 (53 & 54 Vict. c. 64); Companies (Winding-up) Act, 1893 (56 & 57 Vict. c. 58); Companies Act, 1898 (61 & 62 Vict. c. 26); Companies Act, 1900 (63 & 64 Vict. c. 48); Companies Act, 1907 (7 Edw. 7, c. 50); Companies Act, 1908 (8 Edw. 7, c. 12).

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286 (1), Sched. VI., Part I.

(*m*) The following are the enactments repealed:—Stannaries Act, 1869 (32 & 33 Vict. c. 19), ss. 25, 26, 34; Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10, so far as it relates to the winding up of companies; Stannaries Act, 1887 (50 & 51 Vict. c. 43), ss. 9, 10, 13 (2) (from “Upon the winding up” to the end of the section), and 31; Trustee Savings Banks Act, 1887 (50 & 51 Vict. c. 47), s. 3; Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), ss. 1, 2, 3, so far as they relate to companies; Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 18; Preferential Payments in Bankruptcy (Ireland) Act, 1889 (52 & 53 Vict. c. 60), s. 4, so far as it relates to companies; Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19); Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (4); Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 56; Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), s. 28 (1), so far as it relates to the winding up of companies.

SECT. 1. lines as the administration of companies, of other associations or
In General. partnerships.

SUB-SECT. 2.—Savings from Repeal.

Re-enactment
of former
provisions.

37. The Act of 1908, whilst it repeals the enactments referred to, re-enacts, with some slight amendments, the net result of their provisions, although not in exactly the same language or according to the same arrangement (*n*).

As many of the provisions of the Act of 1908 apply to companies formed before it was passed, although they have not been registered under it, the mention of any particular matters in the repealing or any other section of the Act does not affect the general application of s. 38 of the Interpretation Act, 1889 (*o*). The repeal does not affect the incorporation of any company registered under any repealed enactment (*p*), or Table B to the Joint Stock Companies Act, 1856 (*q*), so far as it applies to any company existing on April 1, 1909 (*r*); or Table A in Sched. I. to the Companies Act, 1862 (*a*), or any part thereof (either as originally contained in that schedule or as altered in pursuance of s. 71 of that Act) (*b*)

(*n*) The object of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), was to present the whole body of the statutory law on the subject in a complete form, repealing the former statutes; like other such Acts, it repeats, often in altered form, clauses of the repealed Acts, and, generally speaking, the enactments must be dealt with as they stand, and a minute critical examination of repealed clauses ought not to be entered on for the purpose of interpretation except upon special grounds (*Thames Conservators v. Smeed, Dean & Co.*, [1897] 2 Q. B. 334, 336, C. A.; *Bank of England v. Vagliano Brothers*, [1891] A. C. 107). Previous decisions on the subject may be useful as guides, but the standards laid down in them must not be substituted for that which is laid down in the Act (*Re Wilcoxon, Ex parte Griffith* (1883), 23 Ch. D. 69, C. A.). See, further, title STATUTES.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286 (2). Where any Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed are, unless the contrary intention appears, to be construed as references to the provision so re-enacted; and the repeal is not to affect the previous operation of, or anything done or suffered under, the enactment repealed, or any right, privilege, obligation, liability, penalty, forfeiture or punishment acquired, accrued or incurred, or any pending investigation, proceeding, or remedy in respect of any of such matters (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38). But the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), by ss. 293 and 294, applies the references in certain Acts to repealed Companies Acts to the Act of 1908.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 206].

(*q*) 19 & 20 Vict. c. 47. As to the preservation of such a company's power to make contracts in writing, signed by its agents, see *Prince v. Prince* (1866), L. R. 1 Eq. 490.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286 (1). Table B is, as regards companies limited by shares, the predecessor of Table A to the Companies Acts, 1862 to 1908.

(*a*) Table A to the Companies Act, 1862 (25 & 26 Vict. c. 89), occupies the same position, as regards companies limited by shares, as Table A to the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

(*b*) Table A to the Act of 1862 was altered by Order of the Board of Trade in 1906. For the original form of Table A, see *Encyclopædia of Forms*, Vol. IV., p. 340; for the altered form, *ibid.*, Vol. XVI., p. 164.

so far as the same applies to any company existing on April 1, 1909 (c); or the effect of any conveyance, mortgage, or other deed, made before April 1, 1909, in pursuance of any repealed enactment (d).

SECT. 1.
In General.

38. The Act of 1908 also contains provisions, incidental to a consolidating statute, relating to the continuance of offices and salaries (e), the Companies Liquidation Account (f), the registers of companies (g), pending proceedings for winding up (h), the continuance of existing rules and orders (i), the preservation of the power of companies to alter their memoranda of association under the Mortgage Debenture Act, 1865 (j), and the continuance in force of two old enactments (k) as to banking companies (l).

Continuation
of existing
offices etc.

39. A reference in any document to an enactment repealed by the Act of 1908 is to be read as referring to the corresponding provision (if any) of the Act of 1908 (m).

Reference
to repealed
enactments.

In the case of existing companies an express or implied reference in the Act of 1908 to the date of registration is to be construed as a reference to the date of registration of the company under the Joint Stock Companies Acts, or the Companies Act, 1862, as the case may be (n).

SUB-SECT. 3—*Interpretation.*

40. In the Act of 1908, unless the context otherwise requires, the following expressions have the following meanings (o):—

Interpreta-
tion.

“Articles” means the articles of association of a company, as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in Table B in the schedule to the Joint Stock Companies Act, 1856 (p), or in Table A in the First Schedule annexed to the Companies Act, 1862 (q), or in that table as altered in pursuance

Articles.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) s. 286 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 206].

(d) *Ibid.*, s. 288 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 208].

(e) *Ibid.*, s. 289 (1), (3), (4), and (5).

(f) *Ibid.*, s. 289 (6); see further, p. 435, *post*.

(g) *Ibid.*, s. 289 (2); see further, p. 148, *post*.

(h) *Ibid.*, s. 287.

(i) *Ibid.*, s. 290; see note (i), p. 552, *post*.

(j) *Ibid.*, s. 292; 28 & 29 Vict. c. 78, s. 3.

(k) Joint Stock Banks Act, 1844 (7 & 8 Vict. c. 113), s. 47, and part of Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49), s. 12; see p. 612, *post*.

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286 (1); Sched. VI., Part II. [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205].

(m) *Ibid.*, s. 291. Many of the repealed enactments are referred to in the articles of association of companies registered before the Act of 1908 was passed.

(n) *Ibid.*, ss. 246, 247.

(o) *Ibid.*, s. 285.

(p) 19 & 20 Vict. c. 47.

(q) 25 & 26 Vict. c. 89.

SECT. 1. In General.	of s. 71 of that Act (r), or in Table A in the First Schedule to the Act of 1908 (s).
Books and papers.	"Books and papers" and "books or papers" include accounts, deeds, writings, and documents (t).
Company.	"Company" means a company formed and registered under the Act of 1908, or an existing company (u).
	"Company within the stannaries" means a company engaged in or formed for working mines, within the stannaries (a).
Court.	"The court" used in relation to a company means the court having jurisdiction to wind up the company (b).
	"The court exercising the stannaries jurisdiction" used in relation to any proceedings means the county court in which the jurisdiction formerly exercised by the court of the vice-warden of the stannaries in respect of those proceedings is for the time being vested (c).
Debenture.	"Debenture" includes debenture stock (d).
Director.	"Director" includes any person occupying the position of director by whatever name called (e).
Document.	"Document" includes summons, notice, order, and other legal process, and registers (f).
Existing company.	"Existing company" means a company formed and registered under the Joint Stock Companies Acts (g) or under the Companies Act, 1862 (h).
Gazette.	"The Gazette" means, as respects companies registered in England, the <i>London Gazette</i> ; as respects companies registered in Scotland, the <i>Edinburgh Gazette</i> ; and as respects companies registered in Ireland, the <i>Dublin Gazette</i> .
General rules	"General rules" means general rules made under the Act of 1908, and includes forms.
Joint stock company.	"Joint stock company" for the purposes of Part VII. of the Act of 1908, so far as relates to registration of companies as companies limited by shares, means a company having a permanent paid-up or nominal capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons; and such a company when registered with limited liability under

(r) See note (b), p. 34, ante.

(s) See p. 204, post.

(t) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 174, 176, 220, 221, 222, 227 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 115, 127, 154—156].

(u) For the meaning of existing company, see *infra*.

(a) See pp. 659 *et seq.*, post.

(b) As to the courts having jurisdiction, see pp. 391 *et seq.*, post.

(c) See p. 659, post.

(d) See pp. 345 *et seq.*, post.

(e) See p. 209, post.

(f) See pp. 299 *et seq.*, post.

(g) For the definition of the Joint Stock Companies Acts, see p. 37, post.

(h) 25 & 26 Vict. c. 89.

the Act of 1908 is to be deemed to be a company limited by shares (i). SECT. 1.
In General.

"Joint Stock Companies Acts" means the Joint Stock Companies Act, 1856 (k), the Joint Stock Companies Acts, 1856, 1857 (l), the Joint Stock Banking Companies Act, 1857 (m), and the Act to enable Joint Stock Banking Companies to be formed on the principle of limited liability (n), or any one or more of those Acts, as the case may require; but does not include the Act of 1844 (o). Joint Stock
Companies
Acts.

"Memorandum" means the memorandum of association of a company, as originally framed or as altered in pursuance of the provisions of the Act of 1908 (p). Memo-
randum.

"Prescribed" means, as respects provisions relating to winding up, prescribed by general rules, and as respect the other provisions of the Act of 1908 prescribed by the Board of Trade (q). Prescribed.

"Prospectus" means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company (r). Prospectus.

"The registrar of companies," or, when used in relation to registration of companies, "the registrar," means the registrar or other officer performing under the Act of 1908 the duty of registration of companies in England, Scotland, or Ireland, or in the stannaries, as the case requires (s). Registrar.

"Share" means share in the share capital of the company, and includes stock, except where a distinction between stock and shares is expressed or implied (t). Share.

SUB-SECT. 4.—*Application of Act to Existing Companies without
Re-registration.*

41. The Act of 1908 applies not only to companies formed and registered under it (u), but, to a modified extent, to existing companies (w). In its application to existing companies it applies in the same manner, in the case of a company limited by shares, as if the company had been formed and registered under the Act of 1908 as such; in the case of a company limited by guarantee, as if the company had been formed and registered under the same Act as limited by guarantee; and in the case of an unlimited Existing
companies.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 250 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 181].

(k) 19 & 20 Vict. c. 47.

(l) 19 & 20 Vict. c. 47; 20 & 21 Vict. c. 14; see 20 & 21 Vict. c. 14, s. 2.

(m) 20 & 21 Vict. c. 49.

(n) 21 & 22 Vict. c. 91.

(o) 7 & 8 Vict. c. 110. The definition of the Joint Stock Companies Acts is a re-enactment of the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 175.

(p) See p. 64, *post*.

(q) As to the Board of Trade, see p. 434, *post*.

(r) See p. 120, *post*.

(s) See p. 59, *post*. In the Companies (Winding-up) Rules, 1909, the term "registrar" has a different meaning; see note (k), p. 553, *post*.

(t) See p. 171, *post*.

(u) The term "company" in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), includes an existing company; see p. 36, *ante*.

(w) See p. 34, *ante*.

SECT. 1.
In General.

company, as if the company had been formed and registered under the same Act as an unlimited company (x). Any reference, however, express or implied, to the date of registration is construed as a reference to the date at which the existing company was registered under the Joint Stock Companies Acts (y), or under the Companies Act, 1862, as the case may be (a).

One effect is that no re-registration is necessary, even to enable the company to wind up voluntarily (b).

Companies
previously
registered.

42. The Act of 1908 also applies to every company registered but not formed under the Joint Stock Companies Acts, or the Companies Act, 1862, in the same manner as it applies to companies registered, but not formed under the Act of 1908, subject to a similar provision as to the reference to the date of registration (c). A company registered under the Joint Stock Companies Acts may, however, cause its shares to be transferred in the manner previously in use, or in such other manner as the company may direct (d).

The provisions of the Act of 1908 apply, therefore, to companies which were formed before, but registered either under the Joint Stock Companies Acts or the Companies Act, 1862, without any necessity to re-register under the Act of 1908 (e).

Unlimited
companies
registered as
limited.

43. The Act of 1908 also applies to every unlimited company registered under the Companies Act, 1879 (f), as a limited company, in the same manner as it applies to an unlimited company registered under the Act of 1908 as a limited company, except that reference, express or implied, to the date of registration is construed as a reference to the date at which the company was registered under the Act of 1879 as a limited company (g). Therefore, where an unlimited company has registered under the Act of 1879, it need not re-register under the Act of 1908.

(x) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 245 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 176].

(y) For the definition of these Acts, see p. 37, *ante*.

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 245.

(b) *Re London Indiarubber Co.* (1866), 1 Ch. App. 329.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 246 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 177]; see *supra*. As to the application of the Act of 1908 to companies registered but not formed thereunder, see p. 39, *post*.

(d) *Ibid.*, s. 248 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 178]. As to the transfer of shares in a company under the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), see *ibid.*, s. 20, and Sched., Form F (which required the number of the shares to be stated, as also, subject to the regulations of the company, was required in a transfer of shares in a company under the Companies Act, 1844 (7 & 8 Vict. c. 110), s. 54, and Sched., Form K). The provisions of the Companies Act, 1862 (25 & 26 Vict. c. 89), as to the transfer of shares, were similar to those of the Act of 1908; see p. 186, *post*.

(e) By s. 249 (4) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), the registration under that Act of companies registered under the Act of 1862 is prohibited.

(f) 42 & 43 Vict. c. 76.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 247. The Companies Act, 1879 (42 & 43 Vict. c. 76), enabled companies registered before or after the passing of that Act as unlimited to register under the Acts of 1862 to 1879 as limited. The corresponding provision of the Act of 1908 is s. 57 see p. 63, *post*.

SUB-SECT. 5.—*Companies which may Register under the Act of 1908, although not formed thereunder.*

SECT. 1.
In General.

44. Any company consisting of seven or more members, which was in existence on November 2, 1862 (*h*), including any company registered under the Joint Stock Companies Acts (*i*), and any company formed after the date aforesaid, whether before or after April 1, 1909, in pursuance either of any Act of Parliament other than the Act of 1908 (such as a railway company incorporated by a special Act (*j*)), or of letters patent, or being a company within the stan-
naries (*k*), or being otherwise duly constituted by law, and consisting of seven or more members, may at any time, subject to certain exceptions (*l*) and qualifications (*m*), register under the Act of 1908 as an unlimited company, or as a company limited by shares, or as a company limited by guarantee; and the registration is not invalid because it takes place with a view to the company being wound up (*n*).

Companies which may register under Part VII. of the Act of 1908.

A company duly constituted by law is one which is constituted in some manner analogous to those previously mentioned, probably by the intervention of the legislature or other authority competent to constitute companies. It is doubtful whether a partnership of less than twenty persons constituted merely by the consensual agreement of the partners can be regarded as a company duly constituted by law. Such a partnership, however, if formed not for the purpose of carrying on a business, but simply for the purpose of being registered with a view to winding up, is not a company entitled to be registered under Part VII. (*o*) of the Act of 1908 (*p*). A company, governed by a deed of settlement, may re-register under the above provision with a view to going into voluntary liquidation, and then selling its assets to another company under the statutory provision as to winding up (*q*). On the other hand, a company may, by re-registering, lose powers which it possessed under its former constitution (*r*).

(*h*) The date when the Companies Act, 1862 (25 & 26 Vict. c. 89), came into operation.

(*i*) See p. 37, *ante*. A company registered under the Joint Stock Companies Acts need not re-register (*Re London Indiarubber Co.* (1866), 1 Ch. App. 329, 330).

(*j*) *Re Ennis and West Clare Rail. Co.* (1879), 3 L. R. Ir. 94, 106.

(*k*) See p. 672, *post*.

(*l*) See p. 46, *post*.

(*m*) See p. 40, *post*.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 249 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 180]. Industrial and provident societies and also friendly societies are by other statutes empowered to register themselves as companies under the Act of 1908; see titles FRIENDLY SOCIETIES; INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES. The court may order the conversion of certain collecting societies into mutual societies under the Act of 1908 (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 36); see p. 626, *post*.

(*o*) 8 Edw. 7, c. 69, Part VII., ss. 249—266, the provisions of which sections are practically similar to ss. 179—198 of the Companies Act, 1862 (25 & 26 Vict. c. 89).

(*p*) *R. v. Registrar of Joint Stock Companies, Ex parte Johnston*, [1891] 2 Q. B. O. A.

(*q*) *Southall v. British Mutual Life Assurance Society* (1871), 6 Ch. App. 614; p. 569, *post*.

(*r*) *Droitwich Salt Co. v. Curson* (1867), L. R. 3 Exch. 35.

SECT. 1. for any breach of contract under the terms of which there was
In General. only a limited liability (t). If a company originally registered with unlimited liability re-registers with limited liability, its members as between themselves are not, in a winding up, liable beyond the amount unpaid upon their shares (a).

Pending
actions and
proceedings.

50. All actions and other legal proceedings which at the time of registration are pending by or against the company, or the public officer or any member thereof, may be continued in the same manner as if registration had not taken place (b). Execution cannot, however, issue against the effects of any individual member of the company on any judgment, decree, or order obtained in any such proceeding; but in the event of the property and effects of the company being insufficient to satisfy the judgment, decree, or order, an order may be obtained for winding up the company (b).

Where a member of an unregistered company who is personally liable to be sued for the price of goods supplied to the company has parted with his shares before registration, and so has not become a member of the registered company, he is not, by reason only of the registration, released from his pre-existing liability (c).

The provisions of the Act of 1908 with respect to staying and restraining actions and proceedings against a company at any time after the presentation of a petition for winding up, and before the making of a winding-up order, where the application to stay or restrain is by a creditor, extend to actions and proceedings against any contributory of a company registered under Part VII. (d).

Where a winding-up order has been made no action or proceeding can be commenced or proceeded with against the company or any contributory in respect of any debt of the company, except by leave of the court, and subject to such terms as it may impose (e).

Provisions
which do
not apply.

51. The regulations in Table A (f) do not apply unless adopted by special resolution (g). Nor do the provisions of the Act of 1908 as to numbering shares (h) apply to any joint stock company whose shares are not numbered (i).

(t) *Lethbridge v. Adams, Ex parte International Life Assurance Society (Liquidator)* (1872), L. R. 13 Eq. 547.

(a) *Re Sheffield and Hallamshire etc. Society, Ltd., (Fountain's Case, Swift's Case)* (1865), 4 De G. J. & Sm. 699. This may, however, be effected by s. 263 (ii.) (f) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); see p. 41, *ante*.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 262 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 195].

(c) *Lanyon v. Smith* (1863), 3 B. & S. 938; *Harvey v. Clough* (1863), 8 L. T. 324.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 265 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 197]; see pp. 533 *et seq.*, *post*.

(e) *Ibid.*, s. 266 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 198]; see p. 538, *post*.

(f) *Ibid.*, Sched. I.

(g) *Ibid.*, s. 263 (ii.) (a). As to special resolutions, see p. 259, *post*.

(h) See p. 172, *post*.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 263 (ii.) (b) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 196].

52. All provisions contained in any Act of Parliament, deed of settlement, contract of copartnership, cost-book regulations, letters patent, or other instrument constituting or regulating the company, including, in the case of a company registered as limited by guarantee, the resolution declaring the amount of the guarantee, become conditions and regulations of the company, in the same manner and with the same incidents as if so much thereof as would, if the company had been formed under the Act of 1908, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles (*k*).

SECT. 1.
In General.
Continuance
of existing
constitution.

53. The company retains any power of altering its constitution or regulations which is vested in it by virtue of its existing constitution (*l*); but in the absence of any such power it cannot alter any provision contained in any Act of Parliament relating to it (*m*), nor without the sanction of the Board of Trade can it alter any provision contained in any letters patent relating to it (*n*). It has no power at all to alter any provision contained in a royal charter or letters patent with respect to its objects (*o*).

Power to
alter
constitution.

Further, the company cannot alter any such provisions of its existing constitution as would, if it had originally been formed under the Act of 1908, have been required to be contained in its memorandum of association and are not authorised to be altered by that Act (*p*).

54. The company may by special resolution alter the form of its constitution by substituting a memorandum and articles for its deed of settlement (*q*). The provisions of the Act of 1908 as to

Substitution
of memo-
randum and
articles.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 263 (i.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 196]. As to what must be contained in the memorandum and articles of association respectively, see pp. 65, 66, *post*.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 263 (v.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 196]; and see *Droitwich Salt Co. v. Curzon* (1867), L. R. 3 Exch. 35; *Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co.* (1875), 1 Ch. D. 682.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 263 (ii.) (c); [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 196].

(*n*) *Ibid.*, s. 263 (ii.) (d) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), ss. 1 (1), 3 (3)].

(*o*) *Ibid.*, ss. 263 (ii.) (e).

(*p*) *Ibid.*, s. 263 (iv.). The provisions of the memorandum of association which may be altered are, (1) without the sanction of the court, change of name (*ibid.*, s. 8 (3)), increase of capital (*ibid.*, s. 41 (1) (a)), cancellation of capital not issued or agreed to be issued (*ibid.*, s. 41 (1) (e)), conversion of fully paid shares into stock and re-conversion of stock into shares (*ibid.*, s. 41 (1) (c)), consolidation of shares into shares of larger amount (*ibid.*, s. 41 (1) (b)), subdivision of shares into shares of smaller amount (*ibid.*, s. 41 (1) (d)), and rendering the liability of directors unlimited (*ibid.*, s. 61); (2) subject to confirmation by the court, reduction of paid or unpaid capital (*ibid.*, s. 46), alteration of objects (*ibid.*, s. 9), reorganisation of capital by consolidation of shares of different classes, or division of shares into shares of different classes (*ibid.*, s. 45); see p. 116, *post*.

(*q*) Which includes any contract of copartnership or other instrument constituting or regulating the company, not being an Act of Parliament, a royal charter or letters patent (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69),

SECT. 1.
In General

confirmation by the court and registration of an alteration of the objects of a company then apply so far as applicable with the following modifications: (1) that instead of the printed copy of the altered memorandum required to be delivered to the registrar a printed copy of the substituted memorandum and articles must be delivered; (2) that on the registration of the alteration being certified by the registrar the substituted memorandum and articles apply to the company as if it were a company registered under the Act of 1908 with that memorandum and those articles; and (3) that the company's deed of settlement ceases to apply to the company (r). The alteration may be made either with or without any alteration of the objects of the company (s).

A company registered under the Joint Stock Companies Act, 1856, or the Companies Act, 1862, may, with the confirmation of the court, alter its objects, or substitute a memorandum and articles for its deed of settlement without re-registering under the Act of 1908 (t).

SUB-SECT. 6.—Companies which must be registered under the Act of 1908.

Banking companies.

55. No company, association, or partnership (a) consisting of more than ten persons can be formed for the purpose of carrying on the business of banking, unless it is registered as a company under the Act of 1908 or is formed in pursuance of some other Act of Parliament, or of letters patent (b).

Other companies.

56. No company, association, or partnership consisting of more than twenty persons can be formed for the purpose of carrying on any business (other than banking) that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under the Act of 1908, or is formed in pursuance of some

s. 264 (1), (2), (4) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62)].

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 264 (1), (2), (4).

(s) *Ibid.*, s. 264 (3).

(t) *Ibid.*, ss. 245, 246; *Re Nitrophosphate and Odams Chemical Manure Co.*, [1893] W. N. 141; *Re Hong Kong and China Gas Co.*, [1898] W. N. 158; *Re Copiapo Mining Co.*, [1899] W. N. 25; *Re Euphrates and Tigris Steam Navigation Co., Ltd.*, [1904] 1 Ch. 360 (not following *Re General Credit Co.*, [1891] W. N. 153).

(a) As to the meaning of "company" and "association," see pp. 12, 36, *ante*. As to the meaning of "partnership," see title PARTNERSHIP.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4]; see *Re District Savings Bank, Ex parte Coe* (1861), 3 De G. F. & J. 335, O. A. The words "or is formed in pursuance of some other Act of Parliament" probably mean formed and having its existence recognised by another statute (*Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102). Friendly societies, building societies, industrial and provident societies, at any rate if registered under the Acts relating to those societies, are not within the prohibition; see titles BUILDING SOCIETIES; FRIENDLY SOCIETIES; INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES. Nor are companies incorporated by or under special Acts of Parliament, whether governed by the Companies Clauses Acts or not.

other Act of Parliament, or of letters patent (c), or is a company engaged in working mines within the stannaries and subject to the jurisdiction of the court exercising the stannaries jurisdiction (d).

SECT. 1.
In General.

Although the members do not, at its inception, exceed twenty, the company nevertheless becomes illegal if they subsequently exceed that number (e). But some associations, as, for instance, mutual assurance associations, consisting of more than twenty persons, could be lawfully formed before 1862 (f), and if so formed did not require registration; any such association, if formed before 1862, and consisting of a fluctuating number of members, some members quitting and new members joining the association from time to time, is not formed afresh whenever a new member joins it (g).

57. Carrying on business only exists where there is a joint relation of more than twenty persons for the common purpose of performing jointly a succession of acts, and not where the relation exists for a purpose which is to be completed by the performance of one act. If, therefore, more than twenty persons between whom no contractual relation exists subscribe to a fund to be invested in the shares of companies by trustees for the subscribers, the subscribers do not carry on a business, and probably the trustees, even if more than twenty, do not either (h).

"Business" is a wider term than "trade," and may include hiring land and employing a manager to farm it (i); but it does not include the case of a mutual land society, composed of a number of persons who subscribe to form a fund to be used in buying land which is to be divided among the subscribers (k).

"Gain" is not limited to pecuniary gain or confined to commercial profits only, and a company is formed for the acquisition of gain which is formed to acquire something, as distinguished from a company formed for spending something (l).

Mutual insurance companies (m), mutual loan societies (n), and

(c) The expression "formed in pursuance of letters patent" must be read in connection with the power of the Crown to incorporate companies, and the statutory provisions in relation to quasi-corporations; see pp. 744, 751, *post*; *Re Henley & Co.* (1878), 9 Ch. D. 469, C. A.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7. c. 69), s. 1 (2) [Companies Act, 1862 (25 & 25 Vict. c. 89), s. 4]. In s. 4 of the Companies Act, 1862 (25 & 26 Vict. c. 89), the words are "formed after the commencement of this Act." As to stannaries companies, see pp. 659 *et seq.*, *post*.

(e) *Re Thomas, Ex parte Poppleton* (1884), 14 Q. B. D. 379.

(f) *Bear v. Bromley* (1852), 18 Q. B. 271.

(g) *Shaw v. Simmons* (1883), 12 Q. B. D. 117.

(h) *Smith v. Anderson* (1880), 15 Ch. D. 247, C. A., overruling *Sykes v. Beadon* (1879), 11 Ch. D. 170.

(i) *Harris v. Amery* (1865), L. R. 1 C. P. 148.

(k) *Wigfield v. Potter* (1881), 45 L. T. 612; *Crowther v. Thorley* (1884), 32 W. R. 330, C. A.; *Re Siddall (a Person of Unsound Mind)* (1885), 29 Ch. D. 1, C. A.

(l) *Re Arthur Average Association for British, Foreign and Colonial Ships, Ex parte Hargrove & Co.* (1875), 10 Ch. App. 542, 547, n.

(m) *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, C. A.

(n) *Jennings v. Hammond* (1882) 9 Q. B. D. 225; *Shaw v. Benson* (1883), 11 Q. B. D. 568, C. A.

SECT. 1. building societies (*o*) are within the prohibition because their objects
In General. are the acquisition of gain by their individual members (*p*).

SUB-SECT. 7.—*New Companies incorporated after March 31, 1909.*

Incorporation of new companies under Act of 1908.

58. On or after April 1, 1909, any seven or more persons, or where the company to be formed will be a private company, any two or more persons, associated for any lawful purpose (*q*), may form an incorporated company with or without limited liability, that is to say, either (1) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in the Act of 1908 termed a company limited by shares); or (2) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in the Act termed a company limited by guarantee); or (3) a company not having any limit on the liability of its members (in the Act termed an unlimited company) (*r*).

SUB-SECT. 8.—*Companies which cannot be registered under the Act of 1908.*

Trade unions etc.

59. The companies or associations which cannot be registered under the Act of 1908 are (1) trade unions (*a*); (2) persons associated together for any unlawful purpose (*b*); and (3) companies prohibited in express terms by the Act of 1908 from so registering, namely, (i.) any company formed under the Companies Act, 1862 (*c*); (ii.) any company formed under the Act of 1908 (*d*); (iii.) any company having the liability of its members limited by Act of Parliament or letters patent, and not being a joint stock company, as above defined (*e*). Registration after the commencement of a winding up (*f*) is a mere nullity (*g*).

(*o*) *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102.

(*p*) The Companies Act, 1844 (7 & 8 Vict. c. 110), and the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), did not prohibit a mutual association formed for the purpose of acquiring profit or gain for its individual members, and not for the association itself, and accordingly the Act of 1844 did not apply to mutual associations (*Bear v. Bromley* (1852), 18 Q. B. 271 (mutual loan society); *R. v. Whitmarsh* (1850), 15 Q. B. 600; *Moore v. Rawlins* (1859), 6 C. B. (N. S.) 289 (mutual land societies)).

(*q*) As to the effect of the company being illegal, see p. 767, *post*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 2 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 6, 7; Companies Act, 1907 (7 Edw. 7, c. 50), s. 37]; see p. 79, *post*.

(*a*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 5, which is not affected by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); see *ibid.*, s. 294; and title TRADE AND TRADE UNIONS.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 2; see p. 766, *post*.

(*c*) *Ibid.*, s. 249 (4); but see *ibid.*, s. 57

(*d*) *Ibid.*, s. 249 (1).

(*e*) *Ibid.*, s. 249 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 179].

(*f*) See p. 419, *post*.

Re Hercules Insurance Co. (1871), L. R. 11 Eq. 321, 323.

SECT. 2.—*Promotion of Companies.*SUB-SECT. 1.—*Meaning of the Term "Promoter."*

60. The term "promoter" is not defined in the Act of 1908 (*h*), except in connection with the liability for statements in a prospectus (*i*). In this connection the word is defined to mean a promoter who was a party to the preparation of the prospectus, not, however, including any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company (*j*). The meaning of the term has, however, been dealt with in numerous cases.

The term "promoter" is not a term of law, but of business (*k*). It is a short and convenient way of designating those who set in motion the machinery by which the Act of 1908 enables them to create an incorporated company (*l*). It involves the idea of exertion for the purpose of getting up and starting a company, or what is called "floating" it (*m*), and also the idea of some duty towards the company imposed by, or arising from, the position which the so-called promoter assumes towards it (*n*).

The term is ambiguous, and it is necessary to ascertain in each case what the so-called promoter really did before his legal liabilities can be accurately ascertained (*o*).

The question whether a person is or is not a promoter is a question of fact (*p*), and a judge in summing up to a jury is not bound to define the term (*q*).

A person who as principal procures or aids in procuring the incorporation of a company is generally a promoter thereof (*r*), and he does not escape from liability by acting through agents (*s*). But persons who act professionally only, such as counsel, solicitors, accountants, printers of prospectuses, and the like, are not promoters (*t*).

SECT. 2.
Promotion
of
Companies.
—
Definition of
promoter.

(*h*) By the Companies Act, 1844 (7 & 8 Vict. c. 110), s. 3, the term was defined as meaning "every person acting by whatever name in the forming and establishing of a company at any period prior to the company obtaining complete registration," as to which, see p. 26, *ante*.

(*i*) See note (*h*), p. 136, *post*.

(*j*) Companies Consolidation Act, 1908 (8 Edw. 7, c. 69), s. 84 (*5*).

(*k*) *Whaley Bridge Printing Co. v. Green* (1879), 5 Q. B. D. 109, *per* BOWEN, J., at p. 111.

(*l*) *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, *per* Lord BLACKBURN, at p. 1268; see *Twycross v. Grant* (1877), 2 C. P. D. 469, 541, C. A.

(*m*) As to the meaning of "flotation" see *Gifford v. Willoughby's Mashonaland Expedition Co.* (1899), 16 T. L. R. 24, C. A.; *Torva Exploring Syndicate v. Kelly* (1900), 16 T. L. R. 495, P. O.

(*n*) *Emma Silver Mining Co. v. Lewis* (1879), 4 C. P. D. 396, 407; *Re Great Wheal Polgooth Co.* (1883), 53 L. J. (C.H.) 42.

(*o*) *Lydney and Wigpool Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85, 93, C. A.

(*p*) *Twycross v. Grant*, *supra*, at pp. 476, 541; *Emma Silver Mining Co. v. Lewis*, *supra*.

(*q*) *Emma Silver Mining Co. v. Lewis*, *supra*.

(*r*) *Re Hereford and South Wales Waggon and Engineering Co.* (1876), 2 Ch. D. 621, C. A.; *Re Madrid Bank, Ex parte Williams* (1866), L. R. 2 Eq. 216; *Atwood v. Merryweather* (1867), 37 L. J. (C.H.) 35.

(*s*) *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394, C. A.

(*t*) See *Re Great Wheal Polgooth Co.*, *supra* (solicitors); compare the

SECT. 2.
Promotion
of
Companies.

Instances
 showing
 who are
 promoters.

61. Instances of persons who are promoters are as follows: Where a person desirous of selling property agrees with others that they shall form a company, and that he shall sell the property to it, the others receiving part of the purchase-money, then, when the agreement is performed, the others are promoters (*u*); and the owner of the property is also a promoter (*w*). A man who joins with other persons in agreeing to purchase property with the view of selling it to a company, which they then intend to form, and subsequently do form, is a promoter (*x*).

Where the owner of a concession agrees with a financial agent that the concession shall be sold to contractors with a view to its being sold by them to a company to be forthwith formed for the purpose, the contractors finding funds necessary for such formation, the owner, the agent, and the contractors are all promoters (*y*). So where the agent of a syndicate, or trustee for a company, purchases property and sells it to a new company formed forthwith by the syndicate or company for the purpose, the members of the syndicate, or the company, as the case may be, are promoters (*a*).

Where the owners of property agree with two persons that they shall form a company to purchase it, and one of such persons agrees with a third person to carry out the scheme, and all three take part in procuring a board for the company, and in the preparation and issue of a prospectus, all the three are promoters (*b*). Brokers who, in consideration of being paid part of the purchase-money, assist a person in selling property to a proposed company and allow their names to appear on the company's prospectus as being ready to answer any inquiries relating to the property, and answer such inquiries, are promoters (*c*).

If a man purchases property with the view of selling it to a company which he subsequently forms, and another man enters into a sham contract with him for the purchase of the property, to be used in negotiating the sale to the company, and the company subsequently buys on terms which give a profit, they are both promoters (*d*). If a man agrees with the owners of property to form a company to purchase it at cost price, the company agreeing to pay a commission to him, and he thereupon forms the company, and is a party to the preparation and issue of the prospectus and the procuring of a board of directors, he is a promoter (*e*).

definition of "promoter" in relation to the issue of prospectuses, note (*h*), p. 136, *post*.

(*u*) *Hitchens v. Congreve* (1831), 4 Sim. 420; see *Bagnall v. Carlton* (1877), 6 Ch. D. 371, C. A.

(*w*) *Beck v. Kantorowicz* (1857), 3 K. & J. 230; see *Gluckstein v. Barnes*, [1900] A. C. 240, 249.

(*x*) *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. C. 221.

(*y*) *Twycross v. Grant* (1877), 2 C. P. D. 469, C. A.

(*a*) *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218.

(*b*) *Bagnall v. Carlton* (1877), 6 Ch. D. 371, C. A.; compare *Re Leeds and Hanley Theatre of Varieties, Ltd.*, [1902] 2 Ch. 809, C. A., where a company was held to be a promoter.

(*c*) *Emma Silver Mining Co. v. Lewis* (1879), 4 O. P. D. 396.

(*d*) *Whaley Bridge Printing Co. v. Green* (1879), 5 Q. B. D. 109.

(*e*) *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918.

62. Persons do not become promoters by purchasing a property, which they shortly afterwards sell at a profit to a company subsequently formed to buy it, if at the time of the contract they have taken no step to form a company (*f*), even though the price is agreed to be paid partly in shares of a company to be formed (*g*). If, however, the contract for purchase is made in pursuance of an agreement between the purchasers which provides for the formation of a company to buy the property from them, they are promoters when they enter into the agreement (*h*).

SECT. 2.
Promotion
of
Companies.
When persons
are not
promoters.

63. It is a question of fact in each case at what time a person begins (*i*) or ceases to be a promoter of a company.

A person may become a promoter of a company either before or after its incorporation (*k*). A person, although he is not a director, may be a promoter of a company which is already incorporated, but the capital of which has not been taken up, and which is not yet in a position to perform the obligations imposed upon it by its creators (*l*).

When
promotion
begins and
ends.

A promoter does not cease to be such by reason only of the formation of the company and the appointment of its directors, but only when the directors take into their own hands what remains to be done in the way of forming the company (*m*), and there is no question open between the promoter and the company (*n*).

64. Compliance with the statutory requirements as to what must be stated in a prospectus does not absolve a promoter from any liability which he may incur under either the general law or the Act of 1908 (*o*).

Liability of
promoters.

SUB-SECT. 2.—Fiduciary Relation of Promoters to the Company.

65. A promoter stands in a fiduciary position with respect to the company which he promotes from the time when he first becomes until he ceases to be a promoter thereof (*p*). But his

Nature of
relation.

(*f*) *Ladywell Mining Co. v. Brookes* (1887), 35 Ch. D. 400, 409, C. A.; *Re Cape Breton Co.* (1885), 29 Ch. D. 795, C. A.; *Gluckstein v. Barnes*, [1900] A. C. 240; *Re Lady Forrester (Murchison) Gold Mine*, [1901] 1 Ch. 582.

(*g*) *Re Coal Economising Gas Co., Gover's Case* (1875), 1 Ch. D. 182, C. A.

(*h*) *Gluckstein v. Barnes*, *supra*; efforts to cloak the real fact that promotion has commenced are generally unavailing (*ibid.*, at p. 247; *Hichens v. Congreve* (1831), 4 Sim. 420; *Mann v. Edinburgh Northern Tramways Co.*, [1893] A. C. 69).

(*i*) *Ladywell Mining Co. v. Brookes*, *supra*; *Re Olympia, Ltd.*, [1898] 2 Ch. 153, 181, C. A.; see also *Gluckstein v. Barnes*, *supra*; *Tyrrell v. Bank of London* (1862), 10 H. L. Cas. 26, 40; *Albion Steel and Wire Co. v. Martin* (1875), 1 Ch. D. 580.

(*k*) *Twycross v. Grant* (1877), 2 O. P. D. 469, 503, C. A.; see *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, 428, C. A.

(*l*) *Emma Silver Mining Co. v. Lewis* (1879), 4 C. P. D. 396, 407.

(*m*) *Twycross v. Grant*, *supra*.

(*n*) *Eden v. Ridedales Railway Lamp and Lighting Co.* (1889), 23 Q. B. D. 368, C. A.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (9).

(*p*) *Twycross v. Grant*, *supra*, at p. 538; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1236, 1269; *Lagunas Nitrate Co. v. Lagunas Syndicate*, *supra*, at p. 422; *Gluckstein v. Barnes*, *supra*. As to the rights of a purchaser who has resold, see *Edinburgh United Breweries v. Molleson*, [1894] A. C. 96.

SECT. 2. relation to the company is not that of trustee and *cestui que trust*, Promotion of Companies. or agent and principal (*q*), and he may, as vendor or agent to the vendors, make a profit upon a sale to the company, even if he is also its director, or one of its directors, if he make full disclosure to the company (*r*).

Secret profits. **66.** A promoter cannot retain any profit made out of a transaction to which the company is a party without full disclosure (*s*) to the company (*t*). When disclosure has not been made the company can affirm the contract and sue him for an account and payment of profits (*u*) and interest thereon at 8 per cent. or a higher rate (*w*). His liability can also be enforced in a winding up of the company by a misfeasance summons (*a*).

The burden of proving that profit has in fact been made by a promoter lies on the company (*b*).

If the vendors to a company are the same persons as its shareholders, and the consideration is shares of the company, the profit, if any, is not secret and the company cannot recover it (*c*).

Amount of profit. **67.** In estimating the amount of secret profit for which a promoter is liable, deductions are made for legitimate expenses incurred in forming and bringing out the company, such as fees for reports of surveyors, charges of solicitors and brokers, sums *bonâ fide* expended in securing the services of directors and providing their qualifications, and payments to officers of the company and

(*q*) *Lydney and Wigpool Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85, C. A.; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, 426, C. A. As to the position of a promoter under the Debtors Act, 1869 (32 & 33 Vict. c. 62), see *Phosphate Sewage Co. v. Hartmont* (1877), 25 W. R. 743.

(*r*) *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas., 1218, 1236; *Salomon v. Salomon & Co.*, [1897] A. C. 22, reversing *Broderip v. Salomon*, [1895] 2 Ch. 323, 326, C. A., where the facts are set out; *Lagunas Nitrate Co. v. Lagunas Syndicate*, *supra*, at p. 422.

(*s*) See p. 52, *post*.

(*t*) See p. 53, *post*.

(*u*) *Lydney and Wigpool Iron Ore Co. v. Bird*, *supra*; *Beck v. Kantorowicz* (1857), 3 K. & J. 230; *Hichens v. Congreve* (1831), 4 Sim. 420; *Fuwett v. Whitehouse* (1829), 1 Russ. & M. 132; *Whaley Bridge Printing Co. v. Green* (1879), 5 Q. B. D. 109; *Emma Silver Mining Co. v. Lewis* (1879), 4 C. P. D. 396; *Bagnall v. Carlton* (1877), 6 Ch. D. 371, C. A.; *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918; *Mann v. Edinburgh Northern Tramways Co.*, [1893] A. C. 69; *Gluckstein v. Barnes*, [1900] A. C. 240; see *Re Sale Hotel and Botanical Gardens Co.*, *Ex parte Hesketh* (1898), 78 L. T. 368, C. A.

(*w*) *Gluckstein v. Barnes*, *supra*, at p. 255; *Nant-y-glo and Blaina Ironworks Co. v. Grave* (1878), 12 Ch. D. 738; and see title TRUSTS AND TRUSTEES.

(*a*) *Pearson's Case* (1877), 5 Ch. D. 336, C. A.; *Gluckstein v. Barnes*, *supra*; *Nant-y-Glo and Blaina Ironworks Co. v. Grave*, *supra*; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 217 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 10]. But the promoters taking fully paid up shares, although they may have to pay the nominal value of them, are not contributories in respect of them (*Carling, Hespeler, and Walsh's Cases* (1875), 1 Ch. D. 115, C. A.; *De Ruigne's Case* (1877), 5 Ch. D. 306, C. A.; see p. 499, *post*).

(*b*) *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652, 659.

(*c*) *Re Ambrose Lake Tin and Copper Mining Co.*, *Ex parte Taylor*, *Ex parte Moss* (1880), 14 Ch. D. 390, C. A.

the public press in relation to the company (*d*). Deductions cannot, however, be claimed for sums paid in obtaining from another person a guarantee for the taking of shares (*e*), nor sums paid to the company by the vendors to compromise the company's proceedings against them to rescind the purchase (*f*), nor the difference (arranged under a compromise to which the company is not a party) between what was to be paid by the promoter to the agent of the company and what was actually paid (*g*), nor the value of the services in respect of which the profit is paid to him (*h*).

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68. Promoters are jointly and severally liable in respect of secret profits (*i*), and if one pays under the joint liability he can recover the proper proportion from his co-promoters (*j*).

Joint and
several
liability.

69. Instead of claiming an account of the secret profits, the company may, at any rate where the vendor can be restored to the position in which he was at the date of the contract (*k*), bring an action for rescission of the contract for sale and return of the consideration and payment of dividends and interest paid on shares and debentures; and if the latter have been sold, the company may claim payment of the proceeds with interest (*l*). The company, notwithstanding any provision in the articles of association as to entering into the contract, may also repudiate the contract without risk of being ordered to specifically perform it (*m*).

Rescission of
the contract.

(*d*) *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918; *Bagnall v. Carlton* (1877), 6 Ch. D. 371, C. A.; *Lydney and Wigpool Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85, C. A.; *Benson v. Heathorn* (1842), 1 Y. & C. Ch. Cas. 326, 340.

(*e*) *Lydney and Wigpool Iron Ore Co. v. Bird*, *supra*. But this was because such a payment would, then, have been an improper payment out of the capital of the company. As to this, see p. 92, *post*.

(*f*) *Bagnall v. Carlton*, *supra*. As to claims by a purchaser of the benefits of a voidable contract, see *Fleming v. Loe*, [1902] 2 Ch. 359, C. A.; affirmed *sub nom. Mackusick v. Fleming* (1904), 73 L. J. (CH.) 826, H. L.

(*g*) *Grant v. Gold Exploration and Development Syndicate*, [1900] 1 Q. B. 233, C. A.

(*h*) *Re Sale Hotel and Botanical Gardens Co., Ex parte Heskeith* (1897), 77 L. T. 681, reversed on other grounds (1898), 78 L. T. 308, C. A.

(*i*) *Gluckstein v. Barnes*, [1900] A. C. 240, 247, 255; see *Gerson v. Simpson*, [1903] 2 K. B. 197, C. A.

(*j*) *Boulter v. Peplow* (1850), 9 C. B. 493; *Batard v. Hawes* (1853), 2 E. & B. 287; *Edger v. Knapp* (1843), 7 Jur. 583; *Lefroy v. Gore* (1844), 1 Jo. & Lat. 571.

(*k*) *Clarke v. Dickson* (1858), E. B. & E. 148; *Sheffield Nickel Co. v. Unwin* (1877), 2 Q. B. D. 214, 223; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, C. A. But although as a general rule rescission can only be obtained where the purchaser can restore the property to the vendor, this rule does not apply where the property has been reduced or altered by the mere fault of the vendor, and where compensation can be made for deterioration, that is not an objection to rescission, but only a ground for compensation; see *Lagunas Nitrate Co. v. Lagunas Syndicate*, *supra*, per BIGBY, L.J., at pp. 445, 446; *Mutual Reserve Life Insurance Co. v. Foster* (1904), 20 T. L. R. 715, H. L.; *Croes v. Mutual Reserve Life Insurance Co.* (1904), 21 T. L. R. 15.

(*l*) *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Phosphate Sewage Co. v. Hartmont* (1877), 6 Ch. D. 394, C. A.; *Lagunas Nitrate Co. v. Lagunas Syndicate*, *supra*. As to the rate of interest, see p. 50, *ante*.

(*m*) *Ellis v. Colman* (1858), 25 Beav. 662.

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Where rescission is claimed, and there is a fiduciary relation, the onus lies on the promoter to show that he made full disclosure (n). The remedy by rescission may be the only remedy where the promoter has bought and paid for the property before he sells it to the company, and was not at the time of his purchase in a fiduciary relation to the company (o).

Other
remedies.

70. If the remedy by rescission is not open, or if the company elects to affirm the contract, the company may have a good cause of action in respect of deceit or fraud, or breach of duty. Where there has been a breach of duty, nominal damages, or if the breach has resulted in loss to the funds and assets of the company, substantial damages, may be recovered (p). The liability for breach of duty cannot be enforced by a contributory in a winding up by means of a misfeasance summons unless the breach of duty has resulted in a loss to the assets of the company (q).

A promoter may also, in an action by the shareholder or debenture or debenture stock holder who has been injured, be made liable in respect of a prospectus either for compensation for the statutory liability (r) or for damages for deceit (s). Where a prospectus has been issued by or on behalf of a promoter, non-compliance with the statutory requirements as to its contents renders him guilty of a misdemeanour (t).

A promoter may be privately examined in any winding up (a), and may be publicly examined in a winding up by order of the court (b).

Promoters may also, in certain cases, be indicted for conspiracy (c).

Where a vendor has agreed to give to a promoter a profit undisclosed by him, the company can recover from the vendor any part of such profit which has not been paid over (d).

SUB-SECT. 3.—Disclosure necessary to avoid Liability.

Duty of full
disclosure.

71. In order to be in a position to retain any profit made by him, or to resist an action for rescission or damages, a promoter

(n) *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652, 661.

(o) *Ladywell Mining Co. v. Brookes* (1887), 35 Ch. D. 400, C. A.; *Re Cape Breton Co.* (1885), 29 Ch. D. 795, C. A.; *Burland v. Earle*, [1902] A. C. 83, P. C.

(p) *Cavendish Bentinck v. Fenn*, *supra*, at pp. 658, 662, 664; *Re Leeds and Hanley Theatre of Varieties, Ltd.*, [1902] 2 Ch. 809, 826, 830, C. A.

(q) *Ibid.*; *Re Cape Breton Co.*, *supra*. As to such a summons, see pp. 478 *et seq.*, *post*.

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84 [Directors Liability Act, 1890 (53 & 54 Vict. c. 64)]; see p. 136, *post*.

(s) See p. 132, *post*.

(t) See note (n), p. 125, *post*.

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 115]; see pp. 474 *et seq.*, *post*. But see *Re Great Kruger Gold Mining Co., Ex parte Barnard*, [1892] 3 Ch. 307, 325, C. A.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8]; see pp. 430 *et seq.*, *post*.

(c) *Re Thompson* (1876), 2 Q. B. D. 42, C. A.

Whaley Bridge Printing Co. v. Green (1879), 5 Q. B. D. 109; see *Grant Exploration and Development Syndicate*, [1900] 1 Q. B. 233, C. A.

must, before the transaction out of which the profit is made is completed, have made full disclosure to the company of the fact that he is interested in the transaction, of the nature of his interest, and of all other material facts (e).

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Whether the exact amount of profit is required (apart from the provisions of the Act of 1908) to be stated has not yet been settled (f).

72. Disclosure may be made in any one of several ways, as, for instance, by the memorandum or articles of association of the company (g), by communication to such shareholders of the company as become such by applying for shares on the footing of a prospectus which makes due disclosure (h), by communication to a board of directors of the company which is independent of the promoters (i), by communication in any way to the original shareholders, at any rate if no future shareholders are contemplated (k).

What
amounts to
disclosure.

It may be that the fiduciary relation between the promoters and the company extends also to future shareholders, in the sense that although original shareholders have disclosure, or cannot complain of the want of it, future shareholders may have reason to complain on the ground of insufficient disclosure to them (l).

73. A board of directors, whether provided by the promoters or otherwise, is an independent executive when its members are aware that the property which the company is asked to buy is the property of the promoters, and when they are competent and intelligent judges as to whether the purchase ought or ought not to be made, and exercise an intelligent and independent and impartial judgment on

What is an
"independent
executive."

(e) See cases cited in note (d), p. 51, ante.

(f) See *Chesterfield and Boythorpe Colliery Co. v. Black* (1877), 37 L. T. 740; *Re Lady Forrest (Murchison) Gold Mine, Ltd.*, [1901] 1 Ch. 582; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, C. A.; *Gluckstein v. Barnes*, [1900] A. C. 240, 258. A man may buy a property at one price and sell it to a company at a higher price without disclosing even the fact that he is getting a profit, provided that he is not a promoter (*Re Coal Economising Gas Co., Gover's Case* (1875), 1 Ch. D. 182, C. A.).

(g) *Re British Seamless Paper Box Co.* (1881), 17 Ch. D. 467, 475, C. A. Because of the notice which every member and outsider dealing with it has of the contents of the articles (*Re Bank of Hindustan, China and Japan, Campbell's Case* (1873), 9 Ch. App. 1, 22; *Griffith v. Paget* (1877), 6 Ch. D. 511, 517; *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, 893; see p. 81, post), and possibly because of the statutory effect of the articles; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 14 (1); *Lagunas Nitrate Co. v. Lagunas Syndicate*, *supra*, at p. 424. But see *Gluckstein v. Barnes*, *supra*.

(h) *Lagunas Nitrate Co. v. Lagunas Syndicate*, *supra*, at p. 428; *Gluckstein v. Barnes*, *supra*, at p. 249.

(i) *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1236; *Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319, C. A.; *Re Fitzroy Bessemer Steel Co.* (1884), 32 W. R. 475; *Gluckstein v. Barnes*, *supra*.

(k) *Salomon v. Salomon & Co.*, [1897] A. C. 22; see *Re Ambrose Lake Tin and Copper Mining Co., Ex parte Taylor, Ex parte Moss* (1880), 14 Ch. D. 390; *Re British Seamless Paper Box Co.*, *supra*.

(l) See *Re British Seamless Paper Box Co.*, *supra*; *Re Postage Stamp Automatic Delivery Co.*, [1892] 3 Ch. 566; *Bland's Case*, [1893] 2 Ch. 612, C. A.; *Lagunas Nitrate Co. v. Lagunas Syndicate*, *supra*, at p. 428; *Re Leeds and Hanley Theatre of Varieties, Ltd.*, [1902] 2 Ch. 809, 827, C. A.

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the transaction(m). Directors appointed by the vendors do not generally constitute an independent board, and the only effective way of making disclosure in such cases is by the articles, and, if a prospectus is issued, by such prospectus also(n). Where promoters appoint themselves, or some of their number, sole guardians and protectors of their creature, the company, they are not an independent board, and the fact that the articles purport to protect them from the liability to account as persons standing in a fiduciary relation to the company will not help them(o). But if a company is avowedly formed with a board of directors who are not independent, but who are stated to be the intended vendors of property to the company, or their agents, the company cannot set aside the purchase agreement merely on the ground that the directors are not independent(p).

Where a company is one which does not invite the public to subscribe for its shares (although it is not a private company within the meaning of the Act of 1908(q)), and every shareholder is aware of all the circumstances attending the formation of the company, the absence of an independent board of directors is immaterial(r).

SUB-SECT. 4.—Acceptance of Presents from Promoters.

Gifts from
promoters.

74. Directors or other officers of the company or its agents at the time of promotion accepting gifts from promoters are liable to account to the company for the money or shares or other property received(s), and in the case of fully-paid shares which have diminished in value the nominal amount of the shares must be accounted for(t). An article authorising directors to receive shares

(m) *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1236.

(n) *Gluckstein v. Barnes*, [1900] A. C. 240; *Re Olympia, Ltd.*, [1898] 2 Ch. 153, O. A.

(o) *Gluckstein v. Barnes*, *supra*, at p. 248; *Bland's Case*, [1893] 2 Ch. 612, O. A.

(p) *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, 425, O. A.; but compare *Gluckstein v. Barnes*, *supra*, at p. 258, where a clause in the articles purporting to exonerate promoters from liability to account for profits on the ground of their standing in a fiduciary relation to the company was held to be unavailing.

(q) See p. 10, *post*.

(r) *Salomon v. Salomon & Co.*, [1897] A. C. 22, 36, 57; *Larocque v. Beauchemin*, [1897] A. C. 358, 364, P. C.; *Hadley (Felix) & Co., Ltd. v. Hadley* (1897), 77 L. T. 131; *Re Innes & Co.*, [1903] 2 Ch. 254, 260, C. A.

(s) *Pearson's Case* (1877), 5 Ch. D. 336, O. A.; *De Ruigne's Case* (1877), 5 Ch. D. 306, O. A.; *Nant-y-glo and Blaiva Ironworks Co. v. Graves* (1878), 12 Ch. D. 738; *Metcalfe's Case* (1879), 13 Ch. D. 169, C. A.; *Re Carriage Co-operative Supply Association* (1884), 27 Ch. D. 322; *Eden v. Ridsdals Railway Lamp and Lighting Co.* (1889), 23 Q. B. D. 369, C. A.; *McKay's Case* (1875), 2 Ch. D. 1, C. A.; *Re Howatson Patent Furnace Co.* (1887), 4 T. L. R. 152; *Archer's Case*, [1892] 1 Ch. 322, O. A. (agreement by promoters to buy directors' shares at par); see further, p. 480, *post*.

(t) See cases referred to in note (s), *supra*, and *Hay's Case* (1875), 10 Ch. App. 593; *Weston's Case* (1879), 10 Ch. D. 579, C. A.; *Bland's Case*, *supra*, where the directors were inaccurately stated in the contract with the company to be part vendors.

or money from the promoters may be rejected as fraudulent (*u*), but full disclosure in the promoters' contract with the company will prevent liability (*w*). Knowledge by all the actual members of the company will absolve the directors, but only if it is intended that there should be no future members (*x*). Where several directors receive presents with mutual knowledge, they are jointly and severally liable for the whole amount (*y*).

The acceptance of gifts by agents of the company may be a ground for the company rescinding the purchase contract (*a*). If the promised gift be not handed over, the agent cannot recover it (*b*). Solicitors acting for both the promoters and the company—as they often do—may be under serious liabilities, at any rate as to costs (*c*).

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SUB-SECT. 5.—*Termination of Promoters' Liability.*

75. After the dissolution of the company no proceedings can be taken against the promoter on behalf of the company, unless the dissolution is set aside (*d*). Dissolution.

Where a promoter is adjudicated bankrupt, his order of discharge releases him from any debt or liability to the company which is provable in the bankruptcy, unless it was incurred by means of any fraud or fraudulent breach of trust to which he was a party, or in respect of which he has obtained forbearance by any fraud to which he was a party (*e*). Bankruptcy
of promoters.

A promoter who takes a secret profit cannot avail himself of the privileges as regards pleading lapse of time given by the Trustee Act, 1888 (*f*), in any proceeding to recover such profit (*g*). But, apart from that statute, a promoter can set up the Statute of Limitations, or an analogous defence, and such proceedings will be barred if not commenced within six years from the time when the company becomes aware of the fraud (*h*). Statute of
Limitations.

(*u*) *Re Eskern Slate and Slab Quarries Co. (Clarke and Helden's Case)* (1877), 37 L. T. 222; compare *Miller's Case* (1877), 5 Ch. D. 70, C. A.

(*w*) *Re Postage Stamp Automatic Delivery Co.*, [1892] 3 Ch. 566; *Re Olympia, Ltd.*, [1898] 2 Ch. 153, 169, 174, C. A.

(*x*) *Ibid.*; *Re British Seamless Paper Box Co.* (1881), 17 Ch. D. 467, C. A.; *Re Innes & Co., Ltd.*, [1903] 2 Ch. 254, 265, 266, C. A.

(*y*) *Re Carriage Co-operative Supply Association* (1884), 27 Ch. D. 322.

(*a*) *Panama and South Pacific Telegraph Co. v. India Rubber, Gutta Percha, and Telegraph Works Co.* (1875), 10 Ch. App. 515; *Smith v. Sorby* (1875), 3 Q. B. D. 552, n.

(*b*) *Harrington v. Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549.

(*c*) *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394, C. A.; *Mann v. Edinburgh Northern Tramways Co.*, [1893] A. C. 69.

(*d*) See p. 567, post.

(*e*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 270; *Emma Silver Mining Co. v. Grant* (1880), 17 Ch. D. 122.

(*f*) 51 & 52 Vict. c. 59, s. 8; see title LIMITATION OF ACTIONS.

(*g*) *Re Sale Hotel and Botanical Gardens, Ltd., Ex parte Hesket* (1897), 77 L. T. 681, reversed on other grounds (1898), 78 L. T. 368, C. A.

(*h*) *Ibid.*, applying *Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319, C. A.; see *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, 172, C. A. As to defences founded on laches, see *Lindsay Petroleum Co. v. Hurd* (1874), L. R. 5 P. O. 221, 239; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Re Sharpe, Re Bennett, Masonic and*

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In the case of breach of a *quasi*-contract, where the claim is founded on breach of a fiduciary relation or on failure to perform a duty, the losses arising from the breach can be followed up against the estate of the person liable, after his death (i).

SUB-SECT. 6.—*Payment by Company of Promoters' Expenses.*

Company not
liable for pro-
moter's
expenses
without new
contract.

76. A promoter has no right of indemnity against the company which he promotes in respect of any obligation undertaken on its behalf before its incorporation (k), and he cannot sue it upon a contract, made by him with an agent or trustee on its behalf before its incorporation, stipulating that it shall pay the promoters a certain sum for preliminary expenses, even where the articles of association provide that the company shall defray the preliminary expenses (l). Thus, in spite of such a provision, the solicitor who prepares the memorandum and articles cannot sue the company for his costs of doing so (m), and the promoter, or his solicitor, who has paid the fees on registering the company, cannot recover them from the company (n). Nor is the promoter, or a person employed by him, entitled to sue the company in respect of any payment for services rendered or expenses incurred before its incorporation in promoting it, unless after its incorporation it expressly agrees with him to make such payment, or, from other facts, the court can infer a new contract to reimburse him (o). The company cannot ratify an agreement purporting to be made on its behalf before its incorporation (p); and its acts cannot be evidence of a new agreement to reimburse the promoter if they can be shown to have been made with reference to the obligations of the company to indemnify a third person (q). Nor is a company bound in equity to pay the preliminary expenses because it has adopted and derived benefit from services previous to its incorporation (r). Where a promoter

General Life Assurance Co. v. Sharpe, [1892] 1 Ch. 154, 168, C. A.; *Dagnall v. Carlton* (1877), 6 Ch. D. 371; *Concha v. Murietta* (1889), 40 Ch. D. 543, 553, C. A.; *Phillips v. Homfray* (1883), 24 Ch. D. 439, C. A.

(i) See *Re Lands Allotment Co.*, [1894] 1 Ch. 616, C. A.

(k) *Melhado v. Porto Alegre Rail. Co.* (1874), L. R. 9 C. P. 503.

(l) *Ibid.*

(m) *Re English and Colonial Produce Co., Ltd.*, [1906] 2 Ch. 435, C. A.

(n) *Re National Motor Mail-Coach Co., Ltd., Clinton's Claim*, [1908] 2 Ch. 515, C. A., overruling the last case on this point.

(o) *Melhado v. Porto Alegre Rail. Co.*, *supra*; *Re Hereford and South Wales Waggon and Engineering Co.* (1876), 2 Ch. D. 621, C. A.; *Re Empress Engineering Co.* (1880), 16 Ch. D. 125, C. A.; *Re Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 103, C. A.; *Hutchison v. Surrey Consumers Gas Co.* (1851), 11 O. B. 689; *Payne v. New South Wales Coal and Intercolonial Steam Navigation Co.* (1854), 10 Exch. 283.

(p) *Kelner v. Baxter* (1866), L. R. 2 C. P. 174; *Re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16, C. A.; *Re Dale and Plant, Ltd.*, [1889] W. N. 131; *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, 249, C. A.; *Natal Land etc. Co. v. Pauline Colliery Syndicate*, [1904] A. C. 120, P. C.; and see p. 297, *post*.

(q) *Re Rotherham Alum and Chemical Co.*, *supra*.

(r) *Re English and Colonial Produce Co., Ltd.*, *supra*, overruling the dictum in *Re Hereford and South Wales Waggon and Engineering Co.* (1876), 2 Ch. D. 621, 624, C. A., and probably some similar observations in *Re Empress Engineering Co.*, *supra*; see *Re National Motor Mail-Coach Co., Ltd., Clinton's Claim*, *supra*.

procures a company to be formed by fraudulent means and by fraud induces shareholders to join it, he may be thereby debarred from recovering expenses which he otherwise might recover (s).

Whether there is a fresh contract between the company and the promoters after incorporation is a question of fact (t). Debts of or claims against promoters cannot be entertained in the winding up of the company (u).

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77. Although not bound to do so, the directors of a company may (probably even where no express power is given by the articles of association) pay a promoter legitimate expenses incurred by him in forming and bringing it out (b), such as registration fees, a sum charged for a report on the value of property to be purchased by it, law costs, advertisements, printing and brokers' fees (c), but not for underwriting its capital (d), except under statutory authority (e). Generally, a company by its memorandum of association, and its directors by its articles, are expressly empowered to pay all expenses of and incident to its incorporation and floating, and Table A to the Act of 1908 empowers the directors to pay all expenses incurred in getting up and registering the company (f). Even where there is express general power to pay preliminary expenses to a promoter, payment should not be made without vouchers or investigation (g); but if the memorandum of association empowers the directors without further authority to pay a specific sum for the costs and expenses of promoters, payment without taxation may be made (h). Directors may be made personally liable for sums improperly paid to promoters (i). Where the articles state the amounts to be paid to promoters for procuring concessions and for preliminary expenses, shareholders cannot complain that the amounts are excessive (j) unless the promoter has acted fraudulently (k). If, however, the money is paid and an action to recover it is

Power of
company to
pay registra-
tion expenses.

(s) *Re Hereford and South Wales Waggon and Engineering Co.* (1876), 2 Ch. D. 621, C. A.

(t) *Browning v. Great Central Mining Co.* (1860), 5 H. & N. 856; *Re Patent Ivory Manufacturing Co.*, *Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156, 165, with which compare *Re English and Colonial Produce Co., Ltd.*, [1906] 2 Ch. 435, C. A.

(u) *Re London Marine Insurance Association* (1869), L. R. 8 Eq. 176; *Wryght's Case* (1852), 2 De G. M. & G. 636, C. A.

(b) *Melhado v. Porto Alegre Rail. Co.* (1874), L. R. 9 C. P. 503; *Touche v. Metropolitan Railway Warehousing Co.* (1871), 6 Ch. App. 671 (as to which see *Gandy v. Gandy* (1885), 30 Ch. D. 57, 67, C. A.).

(c) *Lydney and Wiggpool Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85, C. A.

(d) *Ibid.*, overruling on this point *Emma Silver Mining Co. v. Grant* (1878), 11 Ch. D. 941; *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141.

(e) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 89.

(f) *Ibid.*, Table A, clause 71.

(g) *Re Englefield Colliery Co.* (1878), 8 Ch. D. 388, 401, where directors' calls were paid out of payments to promoters.

(h) *Croskey v. Bank of Wales* (1863), 4 Giff. 314.

(i) *Re Anglo-French Co-operative Society, Ex parte Pelly* (1882), 21 Ch. D. 492, C. A.; *Re London and Provincial Starch Co.* (1869), 20 L. T. 390; *Re Brighton Brewery Co.*, *Hunt's Case* (1868), 37 L. J. (CH.) 278.

(j) *Re Anglo-Greek Steam Co.* (1866), L. R. 2 Eq. 1.

(k) *Re Madrid Bank, Ex parte Williams* (1866), L. R. 2 Eq. 216.

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of
Companies.**

SUB-SECT. 7.—*Promoters' Liability to Outsiders and to each Other.*

**Liability to
outsiders.**

78. A promoter, even although he expressly purports to act as agent or trustee, is personally liable upon all contracts made with him on behalf of the intended company (*m*), until the contract has been performed or rescinded by either party under some power in the contract or by consent of all parties, or until the company has, with the consent of the other contracting party, undertaken the liability of the promoter under the contract (*n*). But where there is a contract to pay out of a specific fund, the personal liability only exists to the extent of the fund if there is an existing one (*o*).

**Promoters
as partners.**

79. Promoters associated only to form a company are not in partnership (*p*). Where, however, they incur joint liability, each is liable to make contribution to the extent of his share measured by the number of them (*q*). Thus, each is liable for and may tax the bill of a solicitor retained by them (*r*). They are partners if they join together in buying property in order to sell it at a profit to a company which they form to purchase it (*s*).

**Liability to
each other.**

80. In the absence of an express contract, one of several promoters cannot sue another for remuneration for promoting services (*t*); but a person assisting promoters can sue for remuneration for his services if there is a contract to pay for them (*a*).

Agency.

Promoters are not as such agents for each other, or liable for each other's acts, but an authority to act for each other may be inferred from the terms of a public prospectus or from conduct (*b*).

(*l*) *Re General Exchange Bank, Ex parte Preston* (1868), 37 L. J. (CH.) 618, C. A. (*m*) *Nockells v. Crosby* (1825), 3 B. & C. 814; *Re Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 103, C. A.; *Mant v. Smith* (1859), 4 H. & N. 324; *Lake v. Argyll (Duke)* (1844), 6 Q. B. 477; *Barton v. Hutchinson* (1849), 2 Car. & Kir. 712.

(*n*) *Re English and Colonial Produce Co., Ltd.*, [1906] 2 Ch. 435, C. A.; *Kelner v. Baxter* (1866), L. R. 2 C. P. 174; *Re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16, C. A.; *Scott v. Ebury (Lord)* (1867), L. R. 2 C. P. 255.

(*o*) *Giles v. Smith* (1847), 11 Jur. 334; *Andrews v. Ellison* (1821), 6 Moore (C. P.), 199; *Gurney v. Rawlins* (1836), 2 M. & W. 87, 90; *Re Athenæum Society and Prince of Wales Society, Durham's Case* (1858), 4 K. & J. 517.

(*p*) See title **PARTNERSHIP**.

(*q*) *Boulter v. Peplow* (1850), 9 O. B. 493; *Batard v. Hawes* (1853), 2 E. & B. 287, 290; *Edger v. Knapp* (1843), 7 Jur. 583.

(*r*) *Mant v. Smith* (1859), 4 H. & N. 324.

(*s*) See Lindley, *Law of Companies*, 6th ed., 193; and title **PARTNERSHIP**. As to the liability of the directors of a promoting syndicate, see *Glazier v. Rolls* (1889), 42 Ch. D. 436, C. A.; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. D. 392, C. A. As to the liability in respect of secret profits of one promoter to another, see *Beck v. Kantorowicz* (1857), 3 K. & J. 230.

(*t*) *Holmes v. Higgins* (1822), 1 B. & C. 74.

(*a*) *Mant v. Smith*, *supra*; *Lucas v. Beach* (1840), 1 Man. & G. 417.

(*b*) *Reynell v. Lewis*, *Wyld v. Hopkins* (1846), 16 M. & W. 517; *McEwan v. Campbell* (1857), 2 Macq. 499.

SECT. 3.—*Formation and Registration.*SECT. 3.
Formation
and
Registration.

SUB-SECT. 1.—*In General.*(i.) *Registration Offices.*Registration
offices.

81. For the purposes of the registration of companies under the Act of 1908 there are offices in England, Scotland, and Ireland, at places fixed by the Board of Trade. The Board may appoint and remove such registrars, assistant registrars, clerks, and servants as it thinks necessary for the registration of companies, make regulations with respect to their duties, and, with the concurrence of the Treasury, fix their salaries, which are paid out of money provided by Parliament(c), and may direct seals to be prepared for the authentication of documents connected with the registration of companies(d).

The Board may also require the office of the registrar of the court exercising the stannaries winding-up jurisdiction to be one of the offices for the registration of companies within that jurisdiction(e).

The offices, officers, and salaries existing when the Act of 1908 came into force are continued by that statute(f), and whenever any act is by that statute directed to be done to or by the registrar of companies, it must, until the Board otherwise directs, be done in England to or by the existing Registrar of Joint Stock Companies, or in his absence to or by such person as the Board may for the time being authorise; but in the event of the Board altering the constitution of the existing registry offices or any of them, any such act must be done to or by such officer and at such place with reference to the local situation of the registered offices of the companies to be registered as the Board may appoint(g).

82. Any person may inspect the documents kept by the Registrar of Joint Stock Companies on payment of the fees appointed by the Board of Trade, not exceeding 1s. for each inspection; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part

Inspection of
documents.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7 c. 69), s. 243 (1), (2), (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 174 (1), (2), (3)].

(d) *Ibid.*, s. 243 (5) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 174 (4)].

(e) *Ibid.*, s. 243 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 174 (3)]. The Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45), s. 1, abolished the Court of the Vice-Warden of the Stannaries as from January 1, 1897. By an order of the Board of Trade of April 1, 1897, the duties of the assistant registrar at Truro were transferred to the Registrar of Joint Stock Companies at Somerset House, London. S. 31 of the Stannaries Act, 1887 (50 & 51 Vict. c. 43), which required duplicate registration of certain matters both in London and at Truro, is repealed by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286, and Sched. VI., Part I.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 289.

(g) *Ibid.*, s. 243 (8) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 174 (8)]. There is no power to change the part of the memorandum of association which states in what part of the United Kingdom the registered office of the company is to be situated.

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Formation
and
Registra-
tion.

of any other document, to be certified by the registrar on payment of such fees as the Board may appoint, not exceeding 5s. for a certificate of incorporation, or 6d. for each folio of a certified copy or extract (*h*).

A copy of or extract from any document kept and registered at any registration office certified to be a true copy under the hand of the registrar or an assistant registrar (whose official position it is not necessary to prove) is in all legal proceedings admissible in evidence as of equal validity with the original document (*i*).

Registration
fees.

83. The fees payable on registration to the registrar are those specified in Table B in the First Schedule to the Act of 1908, or such smaller fees as the Board of Trade may from time to time direct, and these fees are paid into the Exchequer (*k*).

No fees are payable on registration under Part VII. of the Act of 1908 if the company is not a limited company, or if, before registration as a limited company, the shareholders' liability was limited by some other statute or by letters patent (*l*). In other cases of registration, and as regards other matters, the fees payable to the registrar are those specified in Table B in the First Schedule to the Act of 1908, or such smaller fees as the Board of Trade from time to time directs (*m*).

In the case of any company to be registered with limited liability there must also be delivered to the registrar a statement of the amount which is to form the nominal share capital of the company, charged with an *ad valorem* stamp duty of 5s. for every £100, and any fraction of £100 over any multiple of £100 of the amount of such capital (*n*).

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 243 (6) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 174 (5)].

(*i*) *Ibid.*, s. 243 (7) [Companies Act, 1877 (40 & 41 Vict. c. 26), s. 6].

(*k*) *Ibid.*, s. 244 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 17].

(*l*) *Ibid.*, s. 257 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 189]. Part VII. relates to the registration of companies not formed under the Act; see *infra*.

(*m*) *Ibid.*, s. 244 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 17, and Tables B and C]. The fees payable under Table B by a company having a share capital are—£1 per £1,000 up to £5,000, 5s. per £1,000 (original or added) after £5,000, 1s. per £1,000 after £100,000, with a minimum of £2 and a maximum of £50. In the case of companies not having share capital, the fees are 5s. for each 20 members up to 100, 5s. for each 50 members (original or added) after 100, with a minimum of £2 and a maximum of £20, and £20 for companies with an unlimited number of members. For registration of documents (except those specially provided for), or any facts required to be recorded, 5s.

(*n*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 112, as amended by Finance Act, 1899 (62 & 63 Vict. c. 9, s. 7). On any increase of the capital of such a company duty of the like amount has to be paid on the increase (*ibid.*), and in this case the stamped statement must be delivered within fifteen days after the passing of the resolution for increase, interest at 5 per cent. being, in case of default, charged as from the date of the passing of the resolution (Revenue Act, 1903 (3 Edw. 7, c. 46), s. 5). The duty on an increase must be paid, although the new shares are merely substituted for cancelled or other shares (*Midland Rail. Co. v. A.-G.*, [1902] A. C. 171; *A.-G. v. Gas Light and Coke Co.* (1902), 19 T. L. R. 12, C. A.; *A.-G. v. Regent's Canal and Dock Co.*, [1904] 1 K. B. 263,

(iii.) *Registration under Part VII. of the Act.*

SECT. 3.

Formation
and
Registra-
tion.Assent of
members
required.

84. In order to register a company (which has already been incorporated) under Part VII. of the Act of 1908 (*o*) there must be obtained the assent of a majority of such of its members as are present in person or by proxy (*p*) at a general meeting summoned for the purpose. In the case where a company the liability of whose members is not limited by Act of Parliament or letters patent is about to register as a limited company, a majority of not less than three-fourths of the members present in person or by proxy at the meeting is required. Where a company is about to register as limited by guarantee, the assent to its being so registered must be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount (*q*).

In computing any majority when a poll is demanded regard must be had to the number of votes to which each member is entitled according to the regulations of the company (*r*).

85. In the case of a joint stock company (*s*) there must be delivered to the registrar the following documents:—(1) a list showing the names, addresses, and occupations of all persons who on a day named in the list, not being more than six clear days before the day of registration, were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number; (2) a copy of any Act of Parliament, royal charter, letters patent, deed of settlement, contract of copartnery, cost-book regulations, or other instrument constituting or regulating the company; and (3) if the company is intended to be registered as a limited company, a statement specifying the following particulars: (i.) the nominal share capital of the company and the number of shares into which it is divided, or the amount of stock of which it consists; (ii.) the number of shares taken and the

Documents to
be delivered
in case of
joint stock
company.

C. A.; *A.-G. v. London and India Docks Co.* (1906), 95 L. T. 536). As to when the duty becomes payable on an increase, see *A.-G. v. Anglo-Argentine Tramways Co., Ltd.*, [1909] 1 K. B. 677.

(*o*) As to the companies which can register under Part VII. of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), see p. 39, *ante*. As to the effect as regards construction of dividing a statute into parts, or arranging it under headings, see *Eastern Counties etc. Cos. v. Marriage* (1860), 9 H. L. Cas. 32; *Falls v. Belfast and Ballymena Rail. Co.* (1849), 12 I. L. R. 233, Ex. Ch.; *Union Steamship Co. of New Zealand v. Melbourne Harbour Trust Commissioners* (1884), 9 App. Cas. 365, 369, P. C.

(*p*) That is, where proxies are allowed by the regulations of the company; see p. 268, *post*.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 249 (2) (d), (e), (f) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 179 (4) (5) (6)].

(*r*) *Ibid.*, s. 249 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 179]. As to the voting at meetings, see p. 255, *post*.

(*s*) As to the meaning of "joint stock company," see p. 36, *ante*.

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Formation
and
Registration.

amount paid on each share; (iii.) the name of the company, with the addition of the word "limited" as the last word thereof; and (iv.), in the case of a company intended to be registered as a company limited by guarantee, the resolution declaring the amount of the guarantee (*t*).

The registrar may require such evidence as he thinks necessary to satisfy himself whether the company is or is not a joint stock company as defined by the Act (*u*).

Company
not joint
stock
company.

86. In the case of any company not being a joint stock company, there must be delivered to the registrar:—(1) a list showing the names, addresses, and occupations of the directors or other managers (if any) of the company; (2) a copy of any Act of Parliament, letters patent, deed of settlement, contract of copartnership, cost-book regulations, or other instrument constituting or regulating the company; and (3) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee (*w*).

Verification
of particulars.

87. The lists of members and directors and any other particulars relating to the company required to be delivered to the registrar must be verified by a statutory declaration of any two or more directors or other principal officers of the company (*a*).

"Limited."

88. Where the company registers with limited liability, the word "Limited" must form and be registered as part of its name (*b*).

Banking
company
registering
as limited
company.

89. Where a banking company which was in existence on August 7, 1862 (*c*), proposes to register as a limited company, it must, at least thirty days before so registering, give notice of its intention so to register to every person who has a banking account with the company, either by delivery of the notice to him or by posting it to him at, or delivering it at, his last known address; and if the company omits to give this notice, then as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects the account down to the time at which notice is given, but not further or otherwise, the certificate of registration with limited liability has no operation (*d*).

A bank of issue registered under the Companies (Consolidation) Act, 1908, as a limited company is not entitled to limited liability in respect of its notes (*e*).

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 252 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 183, 185]. For the forms, see *Encyclopædia of Forms*, Vol. IV., pp. 159—163.

(*u*) *Ibid.*, s. 255 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 187].

(*w*) *Ibid.*, s. 253 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 184].

(*a*) *Ibid.*, s. 254 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 186]. For the form, see *Encyclopædia of Forms*, Vol. IV., p. 164.

(*b*) *Ibid.*, s. 258 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 190]. As to the effect of registering under Part VII., see p. 40, *ante*.

(*c*) The date when the Companies Act, 1862 (25 & 26 Vict. c. 89), was passed. Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 252.

(*e*) *Ibid.* s. 251 [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 6]; see p. 62, *post*.

(iv.) *Registration of Unlimited Company as Limited and Re-registration of Limited Company.*SECT. 3.
Formation
and
Registration.Registration
of unlimited
company as
limited.

90. No company, whether limited or unlimited, which is registered under the Companies Act, 1862 (*f*), can register under Part VII. of the Act of 1908 (*g*). Under Part II. of the Act of 1908, however, any company already registered as unlimited may register as limited, or any company already registered as a limited company may re-register (*h*).

On such registration the registrar closes the former registration of the company, and may dispense with the delivery of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company; in other respects the registration takes place in the same manner and has effect as if it were the first registration of the company under the Act of 1908, and as if the provisions of the Acts under which the company was previously registered and regulated had been contained in different Acts of Parliament from those under which the company is registered as a limited company (*i*).

The registration of an unlimited company as a limited company does not affect any debts, liabilities, obligations, or contracts incurred or entered into by, to, with, or on behalf of the company before the registration, and these may be enforced as if the company was registered in pursuance of Part VII. of the Act of 1908 (*k*).

A resolution of the members of the company is required for registration, at any rate where it is unlimited and is registering as limited (*l*); but the Act does not require the resolution to be either a special or an extraordinary resolution (*m*).

An unlimited company having a share capital may, by its resolution for registration as a limited company, do either or both

(*f*) 25 & 26 Vict. c. 89.

(*g*) 8 Edw. 7, c. 69, s. 249 (4). The object of Part VII. of the Act of 1908 is to enable certain companies which are governed by different laws to bring themselves by registration within its general provisions (*ibid.*, s. 263).

(*h*) *Ibid.*, s. 57 (1) [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 4]. The provision of s. 10 of the Act of 1879, that any company authorised to register under that Act might register thereunder and avail itself of the privileges thereby conferred "notwithstanding any provisions contained in any Act of Parliament, royal charter, deed of settlement, contract of co-partnery, cost book regulations, letters patent, or other instrument constituting or regulating the company" is not re-enacted in Part II. of the Act of 1908, although it is in Part VII. (*ibid.*, s. 263 (iii.)); but the section in which the re-enactment occurs is prefaced with the words "When a company is registered in pursuance of this part of this Act."

(*i*) *Ibid.*, s. 57 (2) [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 9]. It is doubtful whether the provisions of *ibid.*, s. 256, are applicable to a banking company existing on August 7, 1862, and registering under Part II. with limited liability.

(*k*) *Ibid.*, s. 57 (1) [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 4]; see p. 41, *ante*.

(*l*) *Ibid.*, s. 58 [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 5, as amended by Companies Act, 1907 (7 Edw. 7, c. 50), s. 50].

(*m*) Compare *ibid.*, s. 249 (2) (e), which requires the assent of a three-fourths majority where a company which has not its liability limited by statute or letters patent registers as a limited company under *ibid.*, Part VII.

SECT. 3.
Formation
and
Registration.
—

of the following, namely:—(1) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which the share capital is so increased shall be capable of being called up except in the event and for the purposes of the company being wound up; (2) provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up (*n*).

Charging
reserve
capital.

The company has no power to create any charge on the reserved uncalled capital (*o*). And if the capital which may be called up before liquidation is exhausted, a shareholder may be able to obtain a winding-up order against the company (*p*).

(v.) *General Provisions as to New Companies.*

How a new
company may
be formed.

91. Any seven or more persons (or, where the company is to be a private company (*q*), any two or more persons) associated for any lawful purpose (*r*) may, by subscribing their names to a memorandum of association and otherwise complying with the statutory requirements in respect of registration, form an incorporated company, with or without limited liability (*s*). The company thus formed may be either (1) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (termed a company limited by shares); or (2) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (termed a company limited by guarantee) (*t*); or (3) a company not having any limit on the liability of its members (termed an unlimited company) (*a*).

Meaning of
"persons."

92. The word "persons" includes aliens, although residing abroad (*b*), even when the company is formed to own a British ship, which could not be owned by aliens (*c*), married women (*d*), persons who are trustees for other subscribers (*e*), persons who sign by agents,

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 58 [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 5, as amended by Companies Act, 1907 (7 Edw. 7, c. 50), s. 50, and Sched. III.]

(*o*) *Re Mayfair Property Co.*, *Bartlett v. Mayfair Property Co.*, [1898] 2 Ch. 28, C. A.; *Re Pyle Works* (1890), 44 Ch. D. 534, C. A.; *Re Irish Club Co., Ltd.*, [1906] W. N. 127; and see *Newton v. Anglo-Australian Investment Co. (Debtors-holders etc.)*, [1895] A. C. 244, P. C.

(*p*) *Re Bristol Joint Stock Bank* (1890), 44 Ch. D. 703.

(*q*) See p. 73, *post*.

(*r*) As to companies which are not formed for a lawful purpose, see p. 766, *post*.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 2 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 6].

(*t*) *Ibid.* [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 7].

(*a*) *Ibid.* [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 6].

(*b*) *Reuss (Princess) v. Bos* (1871), L. R. 5 H. L. 176.

(*c*) *B. v. Arnaud* (1846), 9 Q. B. 806; see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1; and title ALIENS, Vol. I., p. 306.

(*d*) *Matthewman's (Mrs.) Case* (1866), L. R. 3 Eq. 781.

(*e*) *Salomon v. Salomon & Co.*, [1897] A. C. 22, 46.

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Registration.
—

although only orally appointed (*f*). It may perhaps also include infants (*g*) and corporations, although limited companies (*h*).

If a firm name is, with the authority of the firm, subscribed to a memorandum, the partners are joint holders of the shares subscribed for (*i*). If an individual subscribes in his own name as agent for a firm, and the firm takes up the shares subscribed for, he is absolved from liability (*k*).

Whether the memorandum is properly signed matters little, if at all, for the registrar's certificate of incorporation is conclusive evidence that all requirements of the Act have been complied with (*l*).

A company which has not a capital divided into shares cannot be registered with less than seven members, for the definition in the Act of 1908 of a private company, which may consist of two or more members, contemplates the possession of a share capital (*m*).

93. Whether the company is limited by shares or guarantee, or is unlimited, the memorandum of association must (*n*) state the name of the company (*o*), the part of the United Kingdom, whether England (*a*), Scotland, or Ireland, in which its registered office is to be situate (*b*), and its objects (*c*), and every subscriber of the memorandum must subscribe it, if it has a share capital, for the shares (if any), not being less than one share, which he takes (*d*). In the case of a company limited by shares, or limited by guarantee and having a share capital, the memorandum must state the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount (*e*).

Contents
of memo-
randum.

(*f*) *Re Whitley Partners, Ltd.* (1886), 32 Ch. D. 337, C. A. But in order to comply with s. 72 (1) (ii.) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), the agent must be authorised in writing; see p. 213, *post*.

(*g*) See *Re Laxon & Co.* (2), [1892] 3 Ch. 555; *Re Nassau Phosphate Co.* (1876), 2 Ch. D. 610.

(*h*) In any Act passed after 1889 the expression "person," unless the contrary intention appears, includes any body of persons corporate or unincorporate (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 19); and see *Re Barned's Banking Co., Ex parte Contract Corporation* (1867), 3 Ch. App. 105; *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857; *Union Steamship Co. of New Zealand v. Melbourne Harbour Trust Commissioners* (1864), 9 App. Cas. 365, P. C.

(*i*) *Weikersheim's Case* (1873), 8 Ch. App. 831; and see *Niemann v. Niemann* (1889), 43 Ch. D. 198, C. A.

(*k*) *Dunster's Case*, [1894] 3 Ch. 473, C. A.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 17 (1) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 1]; see p. 67, *post*. The decisions in *Re National Debenture and Assets Corporation*, [1891] 2 Ch. 505, C. A., and *Ladies' Dress Association v. Pulbrook*, [1900] 2 Q. B. 370, C. A., that, if the memorandum is signed by less than seven persons, the company does not become a corporation, although the registrar has given his certificate of incorporation, were given before the enactment now in force was the law.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 121; see p. 73, *post*.

(*n*) *Ibid.*, ss. 3, 4, 5 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 8, 9, 10, 14]. In other respects, the memorandum differs as regards companies (1) limited by shares; (2) limited by guarantee; (3) unlimited.

(*o*) As to the name, see p. 84, *post*.

(*a*) Which includes Wales (Wales and Berwick Act, 1746 (20 Geo. 2, c. 42), s. 3).

(*b*) As to the registered office, see p. 82, *post*.

(*c*) See p. 283, *post*.

(*d*) See note (*n*), *supra*.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 3, 4.

SECT. 3.
Formation and Registration.

Statement of company's objects.

Every company registered under the Act of 1908, or the Acts which it consolidates, must have a registered office (*f*).

94. The objects should be clearly defined, as the company, whether limited or unlimited, can only do what is within or is incidental to the objects stated in its memorandum (*g*). The objects to be stated are those which the company during its corporate life is to pursue, and by the fulfilment of which it is to earn profit, and have no relation to acts to be done after the corporate life has come to an end. Thus, the distribution of the corporate assets in a liquidation cannot be defined by the memorandum so as to deprive shareholders of the rights given them by statute (*h*).

Stamp on memorandum.

95. The memorandum must be stamped as if it were a deed, and must be signed by each subscriber in the presence of at least one witness, who must attest the signature (*i*). The deed stamp is 10s. (*j*).

Registration of articles of association.

96. There may, in the case of a company limited by shares, and there must, in the case of a company limited by guarantee or unlimited, be registered with the memorandum articles of association signed by the subscribers to the memorandum of association (*k*) prescribing regulations (*l*) for the company. The articles may adopt all or any of the regulations contained in Table A in the First Schedule to the Act of 1908 (*m*); and articles may effectually prohibit or restrict the power to re-issue redeemed debentures (*n*).

Requirements as to articles.

Where a company, not relying simply on Table A, has any articles of association, the articles must be printed (*o*), divided into

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 62 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 39]; see p. 82, *post*.

(*g*) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653; see p. 283, *post*.

(*h*) *Bisgood v. Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 743, 757, O. A., overruling *Cotton v. Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454, and *Fuller v. White Feather Reward, Ltd.*, [1906] 1 Ch. 823, and approving *Bisgood v. Nile Valley Co., Ltd.*, [1906] 1 Ch. 747.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 6 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 11].

(*j*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1. As to the fees payable, see p. 60, *ante*.

(*k*) Articles duly registered and acted on for many years may be held binding, though not signed (*Ho Tung v. Man On Insurance Co.*, [1902] A. C. 232, P. C.).

(*l*) Throughout the Act the term "regulations" of a company means its articles of association either express or as contained in Table A, and not the provisions of its memorandum. The Act of 1908 requires many powers of companies to be expressly taken by articles in contradistinction to their memoranda.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 10 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 14]. The clauses of Table A are set out under the headings devoted to the matters to which they respectively relate. Any company, whether limited by shares or by guarantee, or unlimited, may adopt any provisions of Table A. As to the effect of not registering articles in the case of a company limited by shares, see p. 70, *post*.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 104 (1); see p. 355, *post*.

(*o*) *Ibid.*, s. 12 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 16].

paragraphs numbered consecutively (*p*), bear the same stamp as if they were contained in a deed (*q*), and be signed by each subscriber of the memorandum of association in the presence of at least one witness, who must attest the signature (*a*).

97. The memorandum and articles (if any) must be delivered to the Registrar of Companies for that part of the United Kingdom in which the registered office of the company is stated by the memorandum to be situate, and he must retain and register them (*b*).

A statutory declaration by a solicitor of the Supreme Court (*c*), engaged in the formation of the company, or by a person named in the articles as a director or secretary of the company, of compliance with all or any of the requirements of the Act, must be produced to the registrar, who may accept the declaration as sufficient evidence of compliance (*d*).

98. On the registration of the memorandum (*e*) of a company the registrar must certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited (*f*). The duty of the registrar to certify can be enforced by mandamus (*g*).

The registrar's certificate of incorporation of any association is conclusive (*h*) evidence that all the requirements of the Act of 1908, in respect of registration and of matters precedent and incidental thereto, have been complied with, and that the association is a company

SECT. 3.
Formation
and
Registration.

Delivery of
documents to
registrar.

Certificate of
incorporation.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 12 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 14].

(*q*) Namely, 10s. (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1).

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 12 [Companies Act, 1862 (25 & 26 Vict. c. 89) s. 16].

(*b*) *Ibid.*, s. 15 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 17].

(*c*) High Court in the Act is a mistake.

(*d*) *Ibid.*, s. 17 (2) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 1 (2)]. For the form of declaration see the Board of Trade Order of March 39, 1909; a 5s. stamp is required (*ibid.*, Form 42).

(*e*) Articles of association must also be delivered in the case of an unlimited company or a company limited by guarantee; see pp. 76, 79, *post*.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 16 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 18].

(*g*) *R. v. Whitmarsh* (1850), 15 Q. B. 600; *R. v. Registrar of Joint Stock Companies* (1847), 10 Q. B. 839.

(*h*) The word "conclusive" occurs several times in the Act, as it did in previous Companies Acts. It has generally been held to mean absolutely conclusive, and not *prima facie* conclusive; see *McGlade v. Royal London Mutual Insurance Society, Ltd.* (1910), 26 T. L. R. 471, C. A.; *Peel's Case* (1867), 2 Ch. App. 674; *Oakes v. Turquand and Harding* (1867), L. R. 2 H. L. 325, 354; *Re Yolland, Husson, and Birkett, Ltd.*, *Leicester v. Yolland, Husson and Birkett, Ltd.*, [1908] 1 Ch. 152, C. A.; *Re Laxon & Co.* (2), [1892] 3 Ch. 555. But some other cases threw doubts on the meaning of the word (*Re Northumberland and Durham District Banking Co.* (1868), 2 De G. & J. 357, C. A.; *Re National Debenture and Assets Corporation*, [1891] 2 Ch. 505, C. A.); see also *Ladies' Dress Association v. Pulbrook*, [1900] 2 Q. B. 370, C. A.; *Re Hercules Insurance Co.* (1871), L. R. 11 Eq. 321, where the registration of a company whilst in course of being wound up was said to be a nullity. Accordingly, s. 1 of the Companies Act, 1900 (63 & 64 Vict. c. 48), for which s. 17 (1) of the Act of 1908 is substituted, was enacted in place of part of s. 18 of the Companies Act, 1862 (25 & 26 Vict. c. 89). As to the possibility of a proceeding in the nature of a *scire facias*, see *Salomon v. Salomon & Co.*, [1897] A. C. 22, 30; and for *scire facias*, see titles CORPORATIONS, Vol. VIII., p. 400; CROWN PRACTICE, Vol. X., p. 35.

SECT. 3.
Formation
and
Registra-
tion.

Effect of
incorporation.

authorised to be registered (i) and duly registered under that Act (j). A certified copy of the certificate is admissible in evidence in legal proceedings (k), and, as against the company itself, registration may be evidenced by other means, as, for instance, by producing its sealed share certificate (l).

99. From the date of incorporation mentioned in the certificate, the subscribers of the memorandum, together with such other persons as from time to time become members of the company, are a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power (subject as mentioned below) to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of its becoming wound up as is mentioned in the Act (m).

The company when incorporated is a legal entity or *persona*, distinct from its members (n), and its property is not the property of the members (o). In this and some other respects it is like a corporation at common law; but it is only a statutory corporation (p), and has not, as a corporation at common law has, *prima facie* the power to deal with its property and to bind itself by contract in the same way as an ordinary individual (q). The statute creating it is not to be taken as if under it there was created a corporation at common law, and then scrutinised to see whether it has taken away any of the incidents of a corporation at common law; but it must be ascertained what the statutory creature is, and what it is meant to do (r). To find out what are its powers, only the statute must be looked at, and if that does not give it particular powers, the use of those powers must, as a general rule, be taken to be prohibited or non-existent (r). The memorandum of the company is, as it were, its charter, and defines the limitation of its powers (a); but where there is no express

(i) *McGlade v. Royal London Mutual Insurance Society, Ltd.* (1910), 26 T. L. R. 471, C. A., distinguishing *Blythe v. Birtley*, [1910] 1 Ch. 228, C. A.

(j) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 17 (1) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 1].

(k) *Ibid.*, s. 243 (7) [Companies Act, 1877 (40 & 41 Vict. c. 26), s. 6].

(l) *Mostyn v. Calcott Hall Mining Co.* (1858), 1 F. & F. 334.

(m) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 16 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 18]. As to holding lands, see p. 334, *post*; and as to the liability in winding up, pp. 487 *et seq.*, *post*.

(n) *Prescott, Dimesdale, Cave, Tugwell & Co. v. Bank of England*, [1894] 1 Q. B. 351, C. A.; *Foster (John) & Son v. Inland Revenue Commissioners*, [1894] 1 Q. B. 516, C. A.; *Salomon v. Salomon & Co.*, [1897] A. C. 22; *Farrar v. Farrars, Ltd.* (1888), 40 Ch. D. 395, C. A.; *Re Sheffield and South Yorkshire Permanent Building Society* (1889), 22 Q. B. D. 470, 476; *National Sporting Club, Ltd. v. Cope* (1900), 82 L. T. 352.

(o) *Re Newman (George) & Co.*, [1895] 1 Ch. 674, 685, C. A.

(p) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653, 693.

(q) *Wenlock (Baroness) v. River Dee Co.* (1883), 36 Ch. D. 675, n., 685, n., C. A.; see title CORPORATIONS, Vol. VIII., pp. 356 *et seq.*

(r) *Ibid.*

(a) *Ashbury Railway Carriage and Iron Co. v. Riche*, *supra*, at pp. 667, 668.

prohibition against the exercise of a power, it may be exercisable if it is properly incidental to the course and conduct of the business (b).

A company, unless it is a private company, cannot exercise all its functions on incorporation, inasmuch as it has to comply with certain statutory requirements before it can commence business or exercise its borrowing powers (c).

100. Every limited company must have a common seal (d), with its name engraved on it in legible characters (e), and any director, manager, or officer of a limited company, or any person on its behalf, using or authorising the use of any seal purporting to be a seal of the company not so engraved is liable to a fine not exceeding £50 (f).

101. Every company must send to every member, at his request, and on payment of 1s. or such less sum as the company may prescribe, a copy of the memorandum and of the articles (if any), the penalty for each default being a fine not exceeding £1 (g).

102. The conditions contained in the memorandum of association, even though their insertion is not required by the Act (h), cannot be altered, except in the cases, in the mode, and to the extent for which express provision is made (i).

The alterations which may be made in the memorandum are:

(1) Without the confirmation of the court, change of name (j), increase of capital (k), cancellation of capital not issued or agreed to be issued (l), conversion of fully-paid shares into stock (m), reconversion of stock into shares (n), consolidation of shares into shares of larger amount (o), sub-division of capital into shares of smaller amount (p) rendering the liability of officers unlimited (q);

(b) *Blackburn Building Society v. Cunliffe, Brooks & Co.* (1882), 22 Ch. D. 61, 70, C. A.; affirmed *sub nom. Brooks & Co. v. Blackburn Benefit Society* (1884), 9 App. Cas. 857.

(c) See p. 262, *post*.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 16 (2).

(e) *Ibid.*, s. 63 (1) (b) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 42].

(f) *Ibid.*, s. 63 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 42]. In practice all companies incorporated under the Act of 1908, or any Acts which it replaces, whether limited or unlimited, have common seals. Contracts which, if made by individuals, would be required by English law to be under seal, may be made under the common seal of any company (*ibid.*, s. 76 (1)), and any company whose objects require or comprise the transaction of business in foreign countries may, if authorised by its articles, have an official seal for use there (*ibid.*, s. 79); see, further, p. 292, *post*.

(g) *Ibid.*, s. 18 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 19].

(h) *Ashbury v. Watson* (1885), 30 Ch. D. 376, C. A.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 7 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 12].

(j) See p. 86, *post*.

(k) See p. 95, *post*.

(l) See p. 101, *post*.

(m) See p. 99, *post*.

(n) *Ibid.*

(o) See p. 98, *post*.

(p) See p. 99, *post*.

(q) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 61 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 8]; see p. 235, *post*.

SECT. 3.
Formation
and
Registration.

Seal of
limited
company.

Copies of
memo-
randum and
articles.

Alteration
of memo-
randum.

SECT. 3.
Formation and Registration.

and (2), subject to confirmation by the court, reduction of paid or unpaid capital (*r*), alteration of objects (*s*), reorganisation of capital by consolidating shares of different classes, or dividing shares into shares of different classes (*a*).

The articles of association may from time to time be altered by special resolution (*b*).

SUB-SECT. 2.—Company Limited by Shares.

(i.) *Memorandum and Articles.*

Contents of memorandum.

103. Besides complying with the general provisions as to memoranda of association (*c*), the memorandum must, in the case of a company limited by shares, state (1) the name of the company, with "Limited" as the last word in its name (except where the word "Limited" is dispensed with) (*d*); (2) the part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate (*e*); (3) the objects of the company (*f*); (4) that the liability of members is limited; (5) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount (*g*).

Each subscriber must write opposite to his name the number of shares he takes, being at least one share (*h*). If he does not write a number after his name he is liable to pay for one share at least (*i*).

Unlimited liability of directors.

The memorandum, in the case of a limited company, may also provide that the liability of the directors or managers, or of the managing director (*j*), shall be unlimited (*k*).

Table A.

104. Where articles of association are not registered (*l*), or, if articles are registered, in so far as they do not exclude or modify the regulations in Table A, those regulations, so far as applicable, are

(*r*) See p. 103, *post*.

(*s*) See p. 328, *post*.

1) See p. 116, *post*.

2) See p. 207, *post*.

3) See p. 64, *ante*.

4) See p. 77, *post*.

(*e*) See p. 59, *ante*.

(*f*) See p. 283, *post*.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 3 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 8]. As to capital, see p. 87, *post*.

(*h*) *Ibid.*, s. 3 (2), (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 8]. The form of memorandum of a company limited by shares is given in *ibid.*, Sched. III., Form A, and such form, or a form as near thereto as circumstances will admit, is to be used (*ibid.*, s. 118 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 71]). The only case in which the memorandum is not signed is where it and articles are substituted for a deed of settlement.

(*i*) *Portal v. Emmens* (1876), 1 O. P. D. 664, 667, O. A. As to subscribers, see further, p. 144, *post*.

(*j*) A managing director is an ordinary director intrusted with special powers (*Re Newspaper Proprietary Syndicate, Ltd.*, *Hopkinson v. Newspaper Proprietary Syndicate, Ltd.*, [1900] 2 Ch. 349, 350).

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 60 (1) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 4]; see p. 235.

(*l*) As to the registration of articles, see p. 66.

the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles (m).

If the company intends to issue share warrants, special authority for that purpose must be given by the articles (n).

The articles may also authorise the company to increase its capital, to consolidate its shares into shares of larger amount, to convert paid-up shares into stock and to reconvert stock into paid-up shares, to sub-divide its shares into shares of smaller amount, and to cancel shares not taken or agreed to be taken (o); also to reduce its capital (p).

If so desired, the articles may authorise the company to alter its memorandum so as to impose unlimited liability on its directors or managers, or any managing director (a).

SECT. 8.
Formation
and
Registra-
tion.

Alteration of
capital etc.

(ii.) *Public Company*

105. A "public company" within the meaning of the Act of 1908 is a company, limited by shares, which, whether it does or does not invite the public to subscribe for its shares, is not a "private company" as defined by that Act (b).

Definition.

Public companies, in this sense, are divided into two classes, those which invite the public to subscribe for their shares, and those *quasi* private companies which do not issue such invitations (c).

106. A public company which invites the public to subscribe for its shares is formed and registered in the manner pointed out above (d). The articles of association cannot appoint a person as a director of the company unless before registration of the articles he has, by himself or his agent authorised in writing, (1) signed and filed with the registrar a consent in writing to act as such director; and (2) either signed the memorandum of association for a number of shares not less than his qualification (if any), or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any) (e).

Special
requirements.

On the application for registration of the memorandum and articles the applicant must deliver to the registrar a list of the persons who have consented to be directors of the company, and if

(m) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 11 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 15]. As to the importance of using words clearly excluding Table A, see *Fisher v. Black and White Publishing Co.*, [1901] 1 Ch. 174, C. A.

(n) Companies (Consolidation) Act, 1908 8 Edw. 7, c. 69), s. 37 (1); see p. 185, *post*.

(o) *Ibid.*, s. 41; see pp. 95 *et seq.*, 101, *post*.

(p) *Ibid.*, s. 46; see p. 100, *post*.

(a) *Ibid.*, s. 61; see p. 235, *post*.

(b) *Ibid.*, s. 121 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 37]; see p. 73, *post*. Prior to the Companies Act, 1907 (7 Edw. 7, c. 50), the term "public company" was understood to mean a company which invited the public to subscribe for its shares; see also *Re Lysaght, Lysaght v. Lysaght*, [1898] 1 Ch. 115, 122.

(c) As to the latter, see p. 72, *post*.

(d) See pp. 64, 70, *ante*.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 72 (1) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 2 (1)]. For the forms, see *Encyclopædia of Forms*, Vol. IV., pp. 155—157.

SECT. 3.	this list contains the name of any person who has not so consented, the applicant is liable to a fine not exceeding £50 (<i>f</i>).
Formation and Registration.	Either the memorandum or the articles should fix the amount which is to be the minimum subscription for shares upon which the directors may proceed to the allotment of shares, as otherwise no allotment can be made of the shares offered for public subscription unless the whole amount of the share capital so offered has been subscribed (<i>g</i>). Allotments made in contravention of this provision may be avoided and render directors liable in damages (<i>h</i>). It is sufficient to state, as the minimum subscription, the percentage of the shares to be offered, without stating the actual number of shares or amount of capital to be subscribed (<i>i</i>).
Minimum subscription.	The articles should also state the amount, not being less than 5 per cent. of the nominal amount of a share, payable on application on each share (<i>k</i>).
Application money.	If any shares are to be underwritten at a commission, the authority to pay the commission must be given by the articles and the amount or rate per cent. of it must be stated (<i>l</i>).
Underwriting commission.	

(iii.) *Quasi private Company.*

Definition.	107. The term " <i>quasi private company</i> " is used in this article to denote a company limited by shares which does not invite the public to subscribe for its shares, but which is a "public company" and not a "private company" within the meaning of the Act of 1908 (<i>m</i>).
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Special requirements.	The articles of association of a <i>quasi private company</i> cannot appoint a person to be a director unless before the registration of the articles he has, by himself or his agent authorised in writing, complied with the statutory requirements as to the
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(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 72 (2) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 2 (2)]. For the form, see *Encyclopædia of Forms*, Vol. IV., p. 158.

(*g*) *Ibid.*, s. 85 (1) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4 (1)]; see p. 177, *post*.

(*h*) *Ibid.*, s. 86 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 5]; see p. 177, *post*.

(*i*) *Re West Yorkshire Darracq Agency, Ltd.*, [1908] W. N. 236.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 85 (3) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4 (3)].

(*l*) *Ibid.*, s. 89 (1); see p. 92, *post*.

(*m*) Prior to the passing of the Companies Act, 1907 (7 Edw. 7, c. 50), these *quasi private companies* were frequently called private companies and are so described in many judgments (see *Re British Seamless Paper Box Co.* (1881), 17 Ch. D. 467, 473, C. A.; *Re Newman (George) & Co.*, [1895] 1 Ch. 674, 685; *Salomon v. Salomon & Co.*, [1897] A. C. 22, 43; *Re Wragg, Ltd.*, [1897] 1 Ch. 796, 807, C. A.), although the legal status of such a company is that of a public company (*Re Sharp, Rickett v. Sharp* (1890), 45 Ch. D. 286, 290, C. A.; *Re Lysaght, Lysaght v. Lysaght*, [1898] 1 Ch. 115, 122, C. A.; *Trevor v. Whitworth* (1887), 12 App. Cas. 409, 434). Such companies were exempted by the Companies Act, 1900 (63 & 64 Vict. c. 48), from many of the stringent provisions of that Act with respect to public companies which invited the public to subscribe for their shares. The Companies Act, 1907 (7 Edw. 7, c. 50), applied to *quasi private companies*, but subject to certain modifications, many provisions (re-enacted by the Act of 1908) which formerly applied only to public companies. Where a private company within the meaning of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), turns itself, under s. 121 (2), into a "public company" the company will thenceforth be what is above called a *quasi private one*.

consent to act and otherwise as in the case of a director of a public company (n). The applicant for registration must, as in the case of a public company, file a list of persons consenting to act as directors (o).

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Formation
and
Registra-
tion.

Either the memorandum or articles of a *quasi* private company should state the amount of the minimum subscription of shares upon which the directors may proceed to allotment. Otherwise, on the first allotment of share capital payable in cash, the whole amount of the share capital (other than that which is issued or agreed to be issued as fully or partly paid up otherwise than in cash) must be subscribed, before the allotment is made (p).

If any shares are to be underwritten at a commission the articles must so provide (q).

A special form of declaration is required on the registration of a *quasi* private company (r).

A *quasi* private company cannot make its first allotment of shares or debentures without filing a statement in lieu of a prospectus (s).

(iv.) *Private Company.*

108. A "private company" within the meaning of the Act of 1908 means a company which by its articles restricts the right to transfer its shares; limits the number of its members (exclusive of persons who are in the employment of the company) to fifty (two or more persons holding one or more shares jointly being treated as a single member); and prohibits any invitation to the public to subscribe for any shares or debentures of the company (t). Definition.

The restrictions as to transfer of shares must apply to all the shares, and it is apparently sufficient to provide that the directors may in their uncontrolled and uncontrollable discretion refuse to register any transfer of shares to a transferee of whom they do not approve.

Any two or more persons may form a private company (u).

109. The advantages of a private company are :

(1) That persons less than seven in number may be the original corporators (a); Advantages
of private
company.

(2) That the directors appointed by its articles need not sign

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 72 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 1]; see p. 71, *ante*; and p. 213, *post*.

(o) *Ibid.*

(p) *Ibid.*, s. 85 (7) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 1 (3)]; see p. 92, *post*. It may be possible to escape from some of the provisions of the Act with reference to *quasi* private companies by registering as a private company and subsequently turning the company into a *quasi* private one; see p. 75, *post*.

(q) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 89 (1); see p. 93, *post*.

(r) Board of Trade Rules, March 29, 1909, Form 44a.

(s) See p. 141, *post*.

(t) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 121 (1), (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 37].

(u) *Ibid.*, s. 2 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 37]. The view, generally entertained in Lincoln's Inn, that a company registered as a public or *quasi* private company, by altering its articles so as to make them comply with the statutory requirements, can turn itself into a private company, has been frequently acted on.

(a) *Ibid.*

SECT. 3.
Formation
and
Registra-
tion.

Advantages
of private
company.

any consent to act, or memorandum of association or contract, before the registration of the company (b);

(3) That no list of its consenting directors need be filed before its registration (c);

(4) That although no minimum subscription be stated in its memorandum or articles, it may allot its shares regardless of the number of shares subscribed for or the amount paid on application for them (d);

(5) That it may commence business and exercise borrowing powers immediately after its incorporation without complying with the statutory requirements applicable to public and *quasi* private companies (e);

(6) That it need not, before allotting shares or debentures, file any statement in lieu of a prospectus (f);

(7) That it may prior to the statutory meeting (g) vary the terms of any contract into which it has entered without such variance being subject to the approval of the meeting (h);

(8) That it need not forward, or file, or apparently even make, the statutory report required in the case of other companies for submission to the statutory meeting (i);

(9) That it need not, in its annual summary, include the audited statement, in the form of a balance-sheet, containing a summary of its share capital, liabilities and assets, which is required of other companies (k);

(10) That the holders of its preference shares and debentures have no such statutory right to inspect its balance-sheets, and auditors' and other reports, as is given to preference shareholders and debenture-holders of other companies (l);

(11) That its members, unless there is only one left, are not, because the number is under seven, severally liable for the payment of the company's debts incurred in carrying on business after six months subsequent to the time when the number has been reduced (m);

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 72 (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 1].

(c) *Ibid.*

(d) *Ibid.*, s. 85 (7) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 1]. A private company can, if authorised so to do by its articles, pay a commission for the underwriting of its shares if it complies with the provisions of *ibid.*, s. 89 (1).

(e) *Ibid.*, s. 87 (6) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 1]; see p. 262, *post.*

(f) *Ibid.*, s. 82 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 1]; see p. 141, *post.*

(g) See p. 248, *post.*

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 83 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 1]. It cannot issue a prospectus, and need not file a statement in lieu of a prospectus.

(i) *Ibid.*, s. 65 (10) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 22 (2)]; see p. 248, *post.*

(k) *Ibid.*, s. 26 (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 21]; see p. 264, *post.*

(l) *Ibid.*, s. 114 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 23 (2)]; see p. 287, *post.*

(m) *Ibid.*, s. 115 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 48; Com-

(12) That it is not a ground for winding up the company that the number of members is reduced to less than seven, unless there is only one member left (*n*).

SECT. 3.
Formation
and
Registra-
tion.

110. The principal advantage of a private company, as compared with a limited partnership, is that share or debenture holding directors can have in their hands the whole of, or take part in, the management of the business without incurring the risk of being under unlimited liability for the debts incurred (*o*).

As compared
with a
limited
partnership.

111. A private company may, subject to anything contained in the memorandum or articles (*p*), turn itself into a public company by passing a special resolution (*q*) and by filing with the registrar of companies such a statement in lieu of prospectus as the company, if a public company (*r*), would have had to file before allotting any of its shares or debentures, together with such a statutory declaration as the company, if a public company, would have had to file before commencing business (*s*).

Conversion
into public
company.

SUB-SECT. 3.—*Company Limited by Guarantee.*

112. In the case of a company limited by guarantee the memorandum of association must state (1) the name of the company, with "Limited" as the last word in its name (except where dispensed with by the Board of Trade (*a*)); (2) the part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate; (3) the objects of the company; (4) that the liability of the members is limited; and (5) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a

Guarantee
company.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 129 (iv.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 79; Companies Act, 1907 (7 Edw. 7, c. 50), s. 37 (4)].

(*o*) See Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 6 (1); and title PARTNERSHIP.

(*p*) If there is in the memorandum of association a prohibition against, or restriction on, turning the company into a public company, the prohibition or restriction cannot be abolished by a special resolution or otherwise; see *Ashbury v. Watson* (1885), 30 Ch. D. 376, C. A. But if the prohibition or restriction is only contained in the articles, this will not prevent a private company from turning itself into a public company, as there is a statutory right to alter by special resolution any provisions of the articles (see p. 207, *post*); a prohibition or restriction in articles will, however, require removal by special resolution before the special resolution referred to in the section can be passed.

(*q*) The statute does not prescribe what the special resolution is to contain, but it should contain a provision that thenceforward the company be turned into a public company instead of being a private company. The special resolution may also alter the articles by striking out the provisions restricting the right to transfer, limiting the number of members, and prohibiting invitations to the public.

(*r*) The kind of public company into which the company will be turned is a *quasi* private company (as to which see p. 72, *ante*). As to the statement in lieu of a prospectus, see p. 141, *post*.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 121 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 37 (2)].

(*a*) See *ibid.*, s. 20 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 23]; and p. 77, *post*.

SECT. 3.
Formation and Registration.

member, and of the costs, charges, and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount (b).

If the company has a share capital the memorandum must also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount, and each subscriber must write opposite to his name the number of shares he takes, not being less than one share (c).

Division of undertaking into shares.

113. For the purpose of the provisions of the Act of 1908 relating to the memorandum of a guarantee company and of s. 21, every provision in the memorandum or articles, or in any resolution of a guarantee company registered on or after January 1, 1901, purporting to divide the undertaking of the company into shares or interests, is treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby (d).

Void provisions.

114. If a guarantee company has no share capital, and is registered on or after January 1, 1901, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member is void (e).

Memorandum of association.

115. There are statutory forms of the memoranda of association of guarantee companies without or with a share capital (f).

The memorandum may provide that the liability of the directors, or managers, or of the managing director, shall be unlimited (g).

The memorandum must be signed, attested, stamped and filed in accordance with the general provisions above stated (h).

Articles.

116. There must, in the case of a company limited by guarantee, be registered with the memorandum of association, articles of

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 4 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 9].

(c) *Ibid.*, s. 4 (2) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 27 (1), which only applied to companies registered after January 1, 1901 (*ibid.*, s. 27 (4))]. Prior to 1901 the articles had, "in the case of a company limited by guarantee, . . . that has a capital divided into shares," to "state the amount of capital with which the company proposes to be registered," and this provision is re-enacted in s. 10 (3) of the Act of 1908.

(d) *Ibid.*, s. 21 (2) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 27]. A guarantee company, without a share capital, registered before January 1, 1901, could, by special resolution, divide its undertaking into a specified number of shares or interests of no defined or fixed monetary amount, each share or interest being merely a certain proportion of the whole undertaking (*Malleson v. General Mineral Patents Syndicate, Ltd.*, [1894] 3 Ch. 538).

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 21 (1) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 27 (3)]. This clause prevents a person from sharing in the profits of a guarantee company registered on or after January 1, 1901, unless he is a member, and as such is under a liability to contribute to the assets of the company in the event of its being wound up.

(f) *Ibid.*, Sched. III., Forms B and C.

(g) *Ibid.*, s. 60 (1) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 4]; see p. 235, *post*.

(h) See nn. 64—67. *ante*.

SECT. 3.
Formation
and
Registration.

association, prescribing regulations for the company, which may adopt all or any of the clauses of Table A (i); but none of the clauses of Table A apply except such of them as are expressly adopted. If so desired the articles may give the company power to alter its memorandum so as to impose unlimited liability upon its directors or managers or any managing director (k).

If the company has a share capital the articles must state the amount of share capital with which the company proposes to be registered (l), but this does not dispense with the necessity of stating the capital in the memorandum (m). The articles of a guarantee company with a share capital, registered on or after January 1, 1901, may also authorise the company to increase and reduce its share capital (n).

If the company has not a share capital, the articles must state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration (o).

There are statutory forms of articles of guarantee companies without or with a share capital (p). The articles must be signed by the subscribers to the memorandum (q), and must be printed, divided into numbered paragraphs, attested, stamped, and filed pursuant to the general provisions above stated (r).

SUB-SECT. 4.—*Limited Company registered without the Word
“Limited”.*

117. Where it is proved to the satisfaction of the Board of Trade that an association about to be formed as a limited company (s) is to be formed for promoting commerce, art, science, religion, charity, or any other useful object, and intends to apply its profits (if any) or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Board may by licence direct that the association be registered as a company with

Limited
company
without the
word
“Limited.”

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 10 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 14].

(k) *Ibid.*, s. 61 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 8]; see p. 235,

(l) *Ibid.*, s. 10 (3) [Companies Act, 1862 (25 & 26 Vict. c. 49), s. 14]. This re-enactment was probably due to inadvertence, as the amount of share capital must now be stated in the memorandum.

(m) See p. 65, *ante*.

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 56; see pp. 95, 100, *post*.

(o) *Ibid.*, s. 10 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 14].

(p) *Ibid.*, Sched. III., Forms B and C. But Form C, which relates to a company having a share capital, does not contain any statement as to the amount of share capital, and therefore does not comply with s. 10 (3) of the Act of 1908; see note (l), *supra*.

(q) *Ibid.*, s. 10 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 14].

(r) See pp. 66, 67, *ante*.

(s) These companies are generally guarantee companies, as no object is to be gained by having shares, on which calls may be made before a winding up, on which no dividends can be received, and in respect of which, according to the existing practice of the Board of Trade, there can, on a winding up, be no distribution of the surplus assets of the company among the members.

SECT. 3.
Formation
and
Registra-
tion.

limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly (t).

"Science" is not confined to pure or speculative science, or science generally, but includes various branches of science, such as mechanical or engineering science (a). "Charity" is liberally construed, and is not confined to such charity as consists in affording relief from poverty (b).

Board of
Trade licence.

118. The licence may be granted on such conditions and subject to such regulations as the Board of Trade thinks fit, and those conditions and regulations are binding on the company, and must, if the Board so directs, be inserted in the memorandum and articles, or in one of those documents (c).

The Board has an uncontrolled discretion with regard to the grant of a licence, and can attach such conditions thereto as it thinks fit (d). Its invariable practice is not only to prohibit the payment of dividends to the members of the company (e), but to provide by the memorandum that in case of liquidation the surplus assets shall not be distributed among the members, but shall be given to some other institution having similar objects. The Board also imposes restrictions on the dealing, before winding up, with property of the company which is subject to the jurisdiction of the Charity Commissioners. Before the licence is granted a draft of the memorandum and articles must be submitted for the consideration of the counsel for the Board, whose fee must be paid by the applicant for registration. Any provisions inserted in the memorandum of association are unalterable (f) except with regard to the objects of the company (g), but any clause in the articles which is deemed objectionable may at once be struck out or amended by special resolution (h) at the risk, perhaps, of having the licence revoked (i).

Under the conditions ordinarily imposed, a solicitor, when he is also a vice-chairman or other officer of the company, cannot charge it with profit costs in respect of work done for it (j).

Effect of
registration.

119. The company on registration enjoys all the privileges of limited companies, and is subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, and of sending lists of members and directors and managers to the registrar (k). It cannot, however,

(t) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 20 (1) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 23].

(a) *Inland Revenue Commissioners v. Forrest* (1890), 15 App. Cas. 334.

(b) *Income Tax Commissioners v. Pemsel*, [1891] A. C. 531; see title CHARITIES, Vol. IV., pp. 105 *et seq.*, 304.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 20 (2) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 23].

(d) See *Re St. Hilda's Incorporated College, Cheltenham*, [1901] 1 Ch. 558.

(e) For a form, see *Bray v. Ford*, [1896] A. C. 44, 45, n.

(f) *Ashbury v. Watson* (1885), 30 Ch. D. 376, O. A.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 9; see p. 79, *post*.

(h) See p. 207, *post*.

(i) See p. 79, *post*.

(j) *Bray v. Ford*, *supra*, at p. 51.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 20 (3) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 23]. As to the power to pension

without the Board of Trade's licence, hold more than two acres of land (l).

If the company desires to alter its memorandum with respect to its objects, it must apply in the first instance to the Board and submit to it the proposed alterations, and it is only after the Board's approval that the court will entertain the application for its sanction to the alterations (m).

The licence may at any time be revoked by the Board; the registrar then enters the word "Limited" at the end of the name of the company upon the register, and the company ceases to enjoy its former exemptions and privileges. Before a licence is revoked the Board must give to the company notice in writing of its intention, and afford it an opportunity of being heard in opposition to the revocation (n).

SECT. 3.
Formation
and
Registration.

Revocation
of licence.

SUB-SECT. 5.—*Unlimited Company.*

120. In the case of an unlimited company, the memorandum of association must state the name of the company, the part of the United Kingdom (England, Scotland, or Ireland) in which the registered office of the company is to be situate, and the objects of the company (o).

Contents
of memo-
randum.

If the company has a share capital, each subscriber of the memorandum must write opposite to his name the number of shares he takes, not being less than one (p).

There is a statutory form of a memorandum of association of an unlimited company with a share capital (q); and whether the company has or has not a share capital, the memorandum must be signed, attested, stamped, and delivered in accordance with the general provisions above stated (r).

121. There must, in the case of an unlimited company, be registered with the memorandum of association articles of association which may adopt all or any of the provisions of Table A (s); but none of the clauses of Table A apply except such of them as are expressly adopted.

Articles.

retired servants, see *Cyclists Touring Club v. Hopkinson*, [1910] 1 Ch. 179. The exemptions are practically of no value, for the lists of members, directors, and managers are only required to be furnished by companies having a share capital (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 26), and companies incorporated without the word "Limited" have not as a rule any share capital. The reference to "publishing its name" is to the marginal note to *ibid.*, s. 63 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 41, 42]; see p. 84, *post*.

(l) *Ibid.*, s. 19 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 21]; see p. 68, *ante*. As to the power of such companies, though established for charitable purposes, to sell their lands, see *Ex parte Church Army* (1906), 75 L. J. (OH.) 467; *Re Society for Training Teachers of the Deaf and Whittle's Contract*, [1907] 2 Ch. 486. As to their exemption from increment value duty etc., see Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 37 (2).

(m) *Re St. Hilda's Incorporated College, Cheltenham*, [1901] 1 Ch. 556. As to the alteration of the memorandum, see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 9; and p. 328, *post*.

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 20 (4).

(o) *Ibid.*, s. 5 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 10].

(p) *Ibid.*, s. 5 (2).

(q) *Ibid.*, Sched. III., Form D. Neither the section referred to in the last note nor the Form requires the capital to be referred to in the memorandum.

(r) See pp. 64, 66, *ante*.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 10 (1), (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 14].

SECT. 3.
Formation and Registration.

If the company has a share capital, the articles must state the amount of share capital with which the company proposes to be registered; and if it has not a share capital, the articles must state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration (*t*).

There is a statutory form of articles of an unlimited company with a share capital (*u*); and the articles must be printed, divided into numbered paragraphs, stamped, signed, attested, and filed pursuant to the general provisions above stated (*w*).

A company registered as unlimited may register itself as a limited company (*x*).

SECT. 4.—Effect of Memorandum and Articles.

Binding as if under seal.

122. The memorandum and articles of association, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each, his heirs, executors and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of the Act of 1908 (*a*). All money payable by any member to the company under the memorandum or articles is a debt due from him to the company, of the nature of a specialty debt (*b*).

How far articles contract.

123. The question how far the memorandum and articles constitute a binding contract between a company and its members is one of great difficulty, and is not yet settled (*c*).

The articles do not in any circumstances constitute a contract of which a person who is not a member of the company can take advantage, as for instance where they provide that the preliminary expenses of forming the company shall be paid out of its assets (*d*). They do, however, constitute a binding contract between the members of the company, by which their rights, duties and obligations as members *inter se*—as, for instance, the preferential

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 10 (3), (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 14]. Where the company, not having a share capital, increases the number of its members beyond the registered number, it must, within fifteen days after the increase was resolved on or took place, give notice to the registrar as in the case of an increase of capital (*ibid.*, s. 44 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 34]); see p. 97, *post*.

(*u*) *Ibid.*, Sched. III., Form D. It states what the capital is and into what shares it is divided. It also adopts all the provisions of Table A, many of which are inapplicable to an unlimited company.

(*w*) See pp. 66, 67, *ante*.

(*x*) See p. 63, *ante*.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 14 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 11, 16].

(*b*) *Ibid.*, s. 14 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 16]. As to the relative position of the memorandum and articles, see p. 68, *ante*.

(*c*) *Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate*, [1899] 2 Ch. 80, C. A., where it was said, *per* LINDLEY, M.R., at p. 89, that they were clearly not a contract on which the company and a member can sue each other; see *Salmon v. Quin and Axtens, Ltd.*, [1909] 1 Ch. 311, 318, C. A.; affirmed *sub nom. Quin and Axtens, Ltd. v. Salmon*, [1909] A. C. 442, 443.

(*d*) See p. 56, *ante*; and p. 82, *post*; and compare *Pritchard's Case* (1873), 8 Ch. App. 956; *Re Rhodesian Properties, Ltd.*, [1901] W. N. 130.

rights of certain shares, the payment of dividends, or the votes of the members—are regulated (e).

Although the articles of association may be so framed as to impose on the members, *inter se*, a liability larger than that imposed upon them by the Act (f), it is doubtful whether the additional liability can be enforced in a winding up, or otherwise than by action (g). Where the articles purport to constitute a contract between the company and a member in respect of some matter unconnected with his rights and liabilities as such (h) the articles do not in themselves constitute a contract in respect of that matter. Thus, where the articles provide that a person who was not at the time of registration but afterwards becomes a member shall be the solicitor to the company, there is no contract by the company to employ him as its solicitor (i). Similarly, where articles provide that a director shall hold a certain number of shares, the provision does not constitute an agreement on his part to take the shares, even though he is already a member of the company (k). Sometimes, however, an agreement to act as director, on the terms as to qualification mentioned in the articles, may be inferred from the subsequent conduct of the parties (l).

SECT. 4.
Effect of
Memo-
randum and
Articles.

124. Members of a company are deemed to be aware of the contents of the memorandum and articles (m), and to understand their

Notice of
memo-
randum and
articles.

(e) *Johnson v. Lyttle's Iron Agency* (1877), 5 Ch. D. 687, C. A.; *Wood v. Odessa Waterworks Co.* (1889), 42 Ch. D. 636; approved in *Salmon v. Quin and Axtens, Ltd.*, [1909] 1 Ch. 311, C. A.; see also *Oakbank Oil Co. v. Crum* (1882), 8 App. Cas. 65; *Bradford Banking Co. v. Briggs* (1886), 12 App. Cas. 29; *Borland's Trustee v. Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279.

(f) *Peninsular Co. v. Fleming* (1872), 27 L. T. 93; *Maxwell's Case, Hill's Case* (1875), L. R. 20 Eq. 585; *McKewan's Case* (1877), 6 Ch. D. 447, C. A.; *Lion Insurance Association v. Tucker* (1883), 12 Q. B. D. 176, C. A.; *United Kingdom Mutual Steamship Association v. Nevill* (1887), 19 Q. B. D. 110, C. A.; *Ocean Iron Steamship Insurance Association v. Leslie* (1887), 22 Q. B. D. 722, n.; *Great Britain 100 A 1 Steamship Insurance Association v. Wyllie* (1889), 22 Q. B. D. 710, C. A. The liability is a specialty debt (*Peninsular Co. v. Fleming, supra*). As to the reasons for making the debt a specialty debt and why it may now be immaterial, see *Robinson's Executor's Case* (1856), 6 De G. M. & G. 572, C. A.; *Buck v. Robson* (1870), L. R. 10 Eq. 629, 631; Administration of Estates Act, 1869 (32 & 33 Vict. c. 46), s. 1; and, generally, title EXECUTORS AND ADMINISTRATORS.

(g) *Baird's Case*, [1899] 2 Ch. 593; *Indemnity Fire Office, Ltd. v. Cousins*, [1882] W. N. 16.

(h) *Eley v. Positive Government Security Life Assurance Co.* (1876), 1 Ex. D. 88, C. A.; and see *Browns v. La Trinidad* (1887), 37 Ch. D. 1, C. A.; *Re Dale and Plant* (1889), 61 L. T. 206.

(i) *Eley v. Positive Government Security Life Assurance Co., supra*.

(k) *Re Wheel Buller Consols* (1888), 38 Ch. D. 42, C. A.; *Re Printing Telegraph and Construction Co. of the Agence Havas, Ex parte Cammell*, [1894] 2 Ch. 392, C. A.; *Salisbury-Jones and Dale's Case*, [1894] 3 Ch. 356, C. A.

(l) *Isaacs' Case*, [1892] 2 Ch. 158, C. A.; *Re Hercynia Copper Co.*, [1894] 2 Ch. 403, C. A.; *Salton v. New Beeston Cycle Co.*, [1899] 1 Ch. 775; *Swabey v. Port Darwin Gold Mining Co.* (1889), 1 Meg. 385, C. A.; *Re London and Scottish Bank*; *Ex parte Logan* (1870), L. R. 9 Eq. 149; *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339, 366, C. A.

(m) *Peel's Case* (1867), 2 Ch. App. 674, 684; *Sewell's Case* (1868), 3 Ch. App. 131, 140; *Campbell's Case* (1873), 9 Ch. App. 1; *Griffith v. Puget* (1877), 6 Ch. D. 511, 517. Except in some cases where they were induced to become members by fraud (*Venezuela Central Rail. Co. (Directors etc.) v. Kisch* (1867), L. R. 2 H. L. 99, 123); compare *Downes v. Ship* (1868), L. R. 3 H. L. 343.

SECT. 4.
Effect of
Memo-
randum and
Articles.

meaning (n). Persons, other than members, who have dealings with a company are affected with notice of all that is contained in its memorandum and articles (o), but they are not bound to make further inquiries, and may assume that its internal management has been regular (p).

Inconsistency
between
memorandum
and articles.

125. The articles are subordinate to the memorandum; any clause in them, if and so far as it is at variance with the memorandum, is to that extent overruled by it and inoperative, the memorandum being the charter of the company and defining the limitation of its powers, while the articles of association play a subsidiary part, and define the duties, rights, and powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and in which changes in its internal regulations may from time to time be made (q). Any provision in them at variance with the provisions of the Act of 1908 is also void, as, for instance, an article purporting to authorise a company to extend its objects by passing a special resolution (r), or to buy its own shares (s), to pay dividends out of capital or issue shares at a discount (t), to limit the right of a member to present a winding-up petition (u), to shut dissentient shareholders out of their statutory rights on a reconstruction of the company (a), or to fetter the power of the company to alter its articles (b). But a provision in any articles, which is in accordance with those in Table A, although apparently at variance with the sections of the Act, as distinguished from the Table, is valid because the Table has statutory authority (c).

Table A

SECT. 5.—Registered Office.

Registered
office.

126. Every company must have a registered office (d).

The position of the office, namely, whether it is in England (e), Scotland, or Ireland, must be stated in the memorandum of

(n) *Oakbank Oil Co. v. Crum* (1882), 8 App. Cas. 65, 71.

(o) *Ernest v. Nicholls* (1857), 6 H. L. Cas. 401; *Royal British Bank v. Turquand* (1856), 6 E. & B. 327, Ex. Ch.; *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, 893; *Re Argus Life Assurance Co.* (1888), 39 Ch. D. 571, 580; *Whitechurch (George), Ltd. v. Cavanagh*, [1902] A. C. 117, 131.

(p) *Clarke v. Imperial Gas Co.* (1832), 4 B. & Ad. 315; *Smith v. Hull Glass Co.* (1852), 11 O. B. 897; *Royal British Bank v. Turquand*, *supra*; *Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, O. A.; *Premier Industrial Bank, Ltd. v. Carlton Manufacturing Co. and Crabtree, Ltd.*, [1909] 1 K. B. 106, *per* PICKFORD, J., at p. 112; and see title CORPORATIONS, Vol. VIII., p. 361; and p. 301, *post*.

(q) *Ashbury v. Watson* (1865), 30 Ch. D. 376, O. A.

(r) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653.

(s) *Trevor v. Whitworth* (1887), 12 App. Cas. 409.

(t) *Welton v. Saffery*, [1897] A. C. 299.

(u) *Re Peveril Gold Mines, Ltd.*, [1898] 1 Ch. 122, O. A.

(a) *Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate*, [1899] 2 Ch. 80, O. A.

(b) *Malleon v. National Insurance and Guarantee Corporation*, [1894] 1 Ch. 200.

(c) *Lock v. Queensland Investment and Land Mortgage Co.*, [1896] A. C. 461.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 62 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 39].

(e) Which includes Wales (Wales and Berwick Act, 1746) (20 Geo. 2, c. 42), s. 3.

association (*f*). This fixes the country in which the company is to be registered; and as in this respect the provisions of the memorandum are unalterable (*g*), the situation of the office cannot be changed from one part of the United Kingdom to another.

SECT. 5.
Registered
Office.

Notice of the situation of the registered office, and of any change therein, must be given to the registrar, who records the same (*h*).

To some extent the situation of the registered office points out where the domicile of the company is (*i*), and it is important as regards the court which has the jurisdiction to wind up the company (*k*).

127. All communications and notices may be addressed to the company at its registered office (*l*); and in particular a document (*m*) may be served on the company by leaving it or sending it by post to the registered office (*n*). A summons to appear before a magistrate must be served at the registered office, and appearance by a solicitor to raise a point of substance only is not a waiver of the objection (*o*). But service need not be by post; the document may be left with a director at the office (*p*). Service of
process.

Service on the solicitor of the company is only sufficient where the company agrees to accept it and enters appearance (*q*). The secretary may waive service on him at the registered office by requesting that it may be served on him elsewhere (*r*).

Where there is no registered office, service at the office in fact used by the company will be sufficient (*s*). Where there is no office, the company having ceased to carry on business, service on some of the late officers may be allowed (*t*).

128. Every limited company (except one which is registered without the word "Limited" as part of its name (*a*)) must paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a Affixing
company's
name.

(*f*) See p. 65, *ante*.

(*g*) See p. 69, *ante*.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 62 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 40]. If a company carries on business without complying with these requirements it is liable to a fine not exceeding £5 for every day during which it so carries on business (*ibid.*, s. 62 (3)).

(*i*) See p. 14, *ante*.

(*k*) See p. 392, *post*. As to service in winding up, see pp. 406 *et seq.*, *post*.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 62 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 39].

(*m*) As to the meaning of document, see p. 36, *ante*; *White v. Land and Water Co.*, [1883] W. N. 174. It includes a writ of summons (*Vignes v. Smith (Stephen) & Co.* (1909), 53 Sol. Jo. 716).

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 116 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 62]; see pp. 14, 16, *ante*. As to service on foreign corporations, see p. 19, *ante*.

(*o*) *Pearks, Gunston and Tee, Ltd. v. Richardson*, [1902] 1 K. B. 91.

(*p*) *Watson v. Sheather, Sons & Co.* (1886), 2 T. L. R. 473.

(*q*) *Re Denver United Breweries, Ltd.* (1890), 63 L. T. 96.

(*r*) *Re Taylor, Ex parte Railway Steel and Plant Co.* (1878), 8 Ch. D. 183, 189, 190; but see *Wood v. Anderston Foundry Co.* (1888), 36 W. R. 918.

(*s*) *Re British and Foreign Gas Generating Apparatus Co.* (1865), 13 W. R. 649; *Re Fortune Copper Mining Co.* (1870), L. R. 10 Eq. 390.

(*t*) *Gaskell v. Chambers (No. 1)* (1858), 26 Beav. 252.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 20; see p. 78, *ante*.

SECT. 5. conspicuous position, in letters easily legible (*b*). In case of
Registered non-compliance the company is liable to a fine not exceeding £5
Office. for not so painting or affixing its name, and for every day during
 — which its name is not so kept painted or affixed; and every director
 and manager of the company who knowingly and wilfully authorises
 or permits the default is liable to the like penalty (*c*).

Registers to **129.** The register of members must be kept at the registered
be kept there. office (*d*) until the company is in winding up (*e*); and so, probably,
 must the register of specific mortgages and charges of a limited
 company (*f*), and a copy of every mortgage or charge requiring
 registration (*g*).

SECT. 6.—*Name and Change of Name.*

Name to be **130.** Every company registered under the Act of 1908, whether
stated in limited by shares or by guarantee, or unlimited, must, in its memo-
memo- randum of association, state the name of the company, and, if it is
randum. limited by shares or guarantee, must have the word "Limited" as
 the last word of its name (*h*), unless, being a company not formed
 for profit, it is, with the licence of the Board of Trade, registered
 as a company with limited liability, but without the addition of the
 word "Limited" to its name (*i*).

Choice of **131.** The word "Limited" can be lawfully used as the last word
name. of a trading name only by a company incorporated with limited
 liability (*j*); and the registrar will not register a name of which the
 word "Royal" forms part, save in certain exceptional circum-
 stances (*k*). But the word "company," or any similar word, need
 not form part of the company's name (*l*); and the subscribers of the
 memorandum may choose any name they please (*m*).

A company may not, however, be registered by a name identical

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 63 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 41].

(*c*) *Ibid.*, s. 63 (2), (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 42].

(*d*) *Ibid.*, s. 30 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 32].

(*e*) *Re Kent Coalfields Syndicate*, [1898] 1 Q. B. 754, C. A.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 100 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 43].

(*g*) *Ibid.*, s. 101 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (8); Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14 (9)].

(*h*) *Ibid.*, ss. 3, 4, 5 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 8, 9, 10]. There are special provisions as to the contents of the memorandum in the case of each sort of company; see pp. 65, 70, 75, 79, *ante*.

(*i*) *Ibid.*, s. 20 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 23]; see p. 77, *ante*.

(*j*) A fine not exceeding £5 a day is incurred by any person or persons, not incorporated as above, trading or carrying on business under a name or title of which "Limited" is the last word (*ibid.*, s. 282 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 48]).

(*k*) The sanction of the Home Office is requisite. As to the use of the word "Royal" by a company as part of a trade mark, see *Re Carron Co.'s Application* (1910), 26 T. L. R. 458.

(*l*) Such names as "Smith Brothers, Limited," and "X Gold Mines, Limited," are common.

(*m*) A company cannot, however, monopolise a word in ordinary use in the English language (*Aerators, Ltd. v. Tollit*, [1902] 2 Ch. 319).

with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires (n).

SECT. 6.
Name and
Change of
Name.

132. A company which, through inadvertence or otherwise, is, without such consent, registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, may, with the sanction of the registrar, change its name (o). With this exception, the Act does not provide any means whereby, after the new company has been registered, the old company can take proceedings to alter such registration.

Deceptive
names.

Nor does the Act provide for the case where a new company is registered under a name identical with or similar to the name of some subsisting company or firm not registered under the Act. In such cases the old company or firm, whether registered under the Act or not, can apply to the court for an injunction, and the principles then apply which apply to individuals trading under identical or similar names (p). Thus, a company registered under the Act is not entitled to carry on its business in such a way, or under such a name, as to represent that its business is the business of any other company or firm or person; and the absence of fraud is immaterial (q).

In some cases the court will grant an injunction before the new company has been registered (r), and will protect a foreign trader

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 8 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 20]. As to the change of name in other cases, see p. 86, *post*.

(o) *Ibid.*, s. 8 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 20].

(p) See title TRADE AND TRADE UNIONS.

(q) *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, [1899] A. C. 83; *Merchant Banking Co. of London v. Merchants' Joint Stock Bank* (1878), 9 Ch. D. 560; *Croft v. Day* (1843), 7 Beav. 84; *Burgess v. Burgess* (1853), 3 De G. M. & G. 896, C. A.; *Du Boulay v. Du Boulay* (1869), L. R. 2 P. C. 430; *Singer Machine Manufacturers v. Wilson* (1877), 3 App. Cas. 376; *Street v. Union Bank of Spain and England* (1885), 30 Ch. D. 156; *Turton v. Turton* (1889), 42 Ch. D. 128, C. A.; *Saunders v. Sun Life Assurance Co. of Canada*, [1894] 1 Ch. 537; *Reddaway v. Banham*, [1896] A. C. 199. Injunctions were granted in *Lee v. Haley* (1869), 5 Ch. App. 155; *Guardian Fire and Life Assurance Co. v. Guardian and General Insurance Co., Ltd.* (1880), 43 L. T. 791; *Hoby v. Grosvenor Library Co.* (1880), 28 W. R. 386; *Hendriks v. Montagu* (1881), 17 Ch. D. 638, C. A.; *Accident Insurance Co. v. Accident, Disease, and General Insurance Corporation* (1884), 54 L. J. (CH.) 104; *Tussaud v. Tussaud* (1890), 44 Ch. D. 678; *Premier Cycle Co. v. Premier Tube Co.* (1896), 12 T. L. R. 481; *Brinsmead (John) & Sons v. Brinsmead (T. E.) & Sons, Ltd.* (1896), 13 T. L. R. 3, C. A.; *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.*, *supra*; and refused in *London and Provincial Law Assurance Society v. London and Provincial Joint-Stock Life Assurance Co.* (1847), 17 L. J. (CH.) 37; *Colonial Life Assurance Co. v. Home and Colonial Assurance Co.* (1864), 33 Beav. 548; *Merchant Banking Co. of London v. Merchants' Joint-Stock Bank* (1878), 9 Ch. D. 560; *Australian Mortgage Land and Finance Co. v. Australian and New Zealand Mortgage Co.*, [1880] W. N. 6, C. A. Compare *Turton v. Turton*, *supra*; *British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] 2 Ch. 312; and see *Society of Accountants and Auditors v. Goodway*, [1907] 1 Ch. 489; *Society of Architects v. Kendrick* (1910), 26 T. L. R. 433.

(r) *Hendriks v. Montagu*, *supra*; *Tussaud v. Tussaud*, *supra*.

SECT. 6.
Name and
Change of
Name.

Change of
 name.

who has a market in England from having the benefit of his name annexed by a trader in England through registration under the Act of a company which assumes the name without justification (*s*).

133. Any company may, by special resolution (*a*) and with the approval of the Board of Trade signified in writing, change its name (*b*).

Where a company changes its name the registrar must enter the new name on the register in place of the former name, and issue a certificate of incorporation altered to meet the circumstances of the case (*c*). The change of name is not complete until it has been made upon the register and the new certificate has been issued; and until the certificate is obtained the company exists under its original name, although notice of a call stating the new name which is sent before the certificate is obtained is sufficient (*d*).

If after the issue of the certificate it turns out that the special resolution was not duly passed application may be made to the registrar to vacate the registration (*e*).

Effect of
 change of
 name.

The change of name does not affect any rights or obligations of the company, or render defective any legal proceedings by or against it, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name (*f*).

Unlimited
 companies.

134. Where an unlimited company registers as one with limited liability the word "Limited" must form the last word of its name (*g*). Where a company is in the course of reducing its capital, if the reduction requires confirmation by the court, it must for the time being, and generally for some time longer, use the words "and Reduced" as the last words of its name (*h*).

Reduction of
 capital.

Alteration
 of objects.

135. Where a company applies to the court for an alteration of its objects, and such alteration makes the existing name misleading, the court as a condition of giving its sanction usually requires the company to change its name (*i*).

Trade marks.

136. Where a registered trade mark contains, or consists of, the name of a company, and the name of the company is subsequently changed, application should be made to the Registrar of Trade Marks to enter the change of name in the register (*k*).

(*s*) *La Société Anonyme des Anciens Établissements Panhard et Levassor v. Panhard Levassor Motor Co., Ltd.*, [1901] 2 Ch. 513.

(*a*) As to special resolutions, see p. 259, *post*.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 8 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 13].

(*c*) *Ibid.*, s. 8 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 13].

(*d*) *Shackleford, Ford & Co. v. Dangerfield* (1868), L. R. 3 C. P. 407, 411.

(*e*) *Re Australasian Mining Co.*, [1893] W. N. 74.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 8 (5) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 13].

(*g*) See pp. 70, 75, *ante*.

(*h*) See p. 108, *post*.

(*i*) See p. 331, *post*.

(*k*) Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 9, 32; *Ex parte New Ormonds Cycle Co., Ltd.*, [1898] 2 Ch. 520.

Where the registered proprietors of a mark turn themselves into a company under the same name with the addition of the word "Limited," that word will be allowed to be added to the mark (a), but the word "Limited" must not be abbreviated (b).

A company which has carried on business under another name may obtain protection for the latter as a trade name (c)

SECT. 6.
Name and
Change of
Name.

SECT. 7.—Capital.

SUB-SECT. 1.—In General.

137. The word "capital," as used in the Act of 1908 and the statutes which it replaces, always means share capital in contradistinction to borrowed money, which is sometimes referred to as loan capital (d). It sometimes means the "nominal" capital of the company, namely, that which is stated in the memorandum of association of any company, limited by shares or by guarantee with a share capital, or in the articles of an unlimited company which has a capital divided into shares (e), and any increase of that nominal capital which has been made in the manner required by statute (f). This "nominal" capital does not at the outset, or necessarily at any time, represent money in the coffers of the company, or assets of any kind, but the amount limits the potentiality of the company to issue the shares into which that capital is divided (g).

Definition.

138. The nominal capital stated in the memorandum or articles, as the case may be, or in the resolution for increase (h), is at first, and may for the most part always be, "unpaid" capital; but some of it, namely, the shares subscribed for by the signatories to the memorandum of association, is at once "issued" capital (i). Shares registered in anyone's name (k), or in respect of which a share

Issued and
unissued
capital.

(a) *Re Guinness & Co.'s Trade Mark* (1888), 5 R. P. C. 316.

(b) *Re Hayward & Sons' Trade Mark* (1896), 13 R. P. C. 729; *Re Holbrooks' Trade Mark* (1901), 18 R. P. C. 447; see title TRADE MARKS AND DESIGNS.

(c) *Randall (H. E.), Ltd. v. British and American Shoe Co., Ltd.*, [1902] 2 Ch. 354; *Pearks, Gunston and Tee, Ltd. v. Thompson, Talmey & Co.* (1901), 18 R. P. C. 185.

(d) The company is not debtor to capital; the capital is not a debt of the company even to its shareholders (*Lee v. Neuchatel Asphalte Co.* (1889), 41 Ch. D. 1, 23, C. A.; *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239, 264, C. A.).

(e) See pp. 70, 76, 79, *ante*.

(f) See p. 95, *post*.

(g) Persons who conspire to issue shares beyond the number into which the nominal amount of capital is divided may be indicted for conspiracy (*R. v. Mott* (1827), 2 C. & P. 521).

(h) Or the resolution of the general meeting authorising the directors to increase the capital (*A.-G. v. Anglo-Argentine Tramways Co., Ltd.*, [1909] 1 K. B. 677).

(i) *Dalton Time Lock Co. v. Dalton* (1892), 66 L. T. 704, C. A.; *Re Whitehead & Brothers, Ltd.*, [1900] 1 Ch. 804; *Re Timmins (Ebenezer) & Sons, Ltd.*, [1902] 1 Ch. 238; *Re Jarvis (F. W.) & Co., Ltd.*, [1899] 1 Ch. 193; *Re Dawnay (Archibald D.), Ltd.*, [1900] W. N. 152.

(k) *Blyth's Case* (1876), 4 Ch. D. 140, C. A.; *Clarke's Case* (1878), 8 Ch. D. 635, 641, C. A.

SECT. 7.
Capital.

certificate has been issued (*l*), are part of the "issued" capital (*m*). Shares, too, which are properly allotted stand in the same position. The residuum of the "nominal" capital, or at any rate such of it as has not been agreed to be taken by any person, is "unissued" capital (*n*). Even when capital has been "issued," the result is not always a contribution to the company's coffers. In the absence of special regulations requiring the memorandum signatories to pay for their shares, they are not liable to do so until a call has been regularly made upon them (*o*). Companies which invite the public to subscribe for their shares invariably require something on account of their nominal amount to be paid on application, and some other sum to be paid on allotment. The sums paid represent "partly paid" capital. Calls may be made for the difference between what has been paid and the nominal amount of the shares (*p*); when the difference has been paid the share is "fully paid," and the aggregate amount of such payments of application moneys, allotment moneys, and calls (if paid) represents "paid up" capital (*q*). Where there is no invitation to the public, contributions, voluntary or enforced, of any person becoming a member render the shares which he takes "partly paid" or "paid up" capital, as the case may be.

Paid up
capital

139. The Act of 1908 limits the liability of the members of a company limited by shares to the amount, if any, unpaid on the shares respectively held by them (*r*). This means that the liability continues so long as anything remains unpaid upon a share, and can only be put an end to by payment in full (*s*). When that payment is made it represents "paid up" capital. But a share may be fully paid without any cash passing from the shareholder to the company. The circuitous process of paying up the nominal amount of the share and then taking back the money in satisfaction of the company's indebtedness for goods or other property sold to it is unnecessary. Thus, shares may be lawfully issued as "fully paid" for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares (*t*), and it is now immaterial whether the shares are or are not shares subscribed for in the memorandum of association (*u*). Whilst the

(*l*) *Bush's Case* (1874), 9 Ch. App. 554.

(*m*) The above cited cases were decided on the construction of s. 25 of the repealed, and not re-enacted, Companies Act, 1867 (30 & 31 Vict., c. 131), in which the word "issued" occurred.

(*n*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 41; and p. 101, *post*.

(*o*) *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, C. A.

(*p*) As to calls, see p. 162, *post*.

(*q*) Where shares are issued at a premium, the sums paid up will partly represent the premium, and the shares will not of course be "fully paid" until the full nominal amount has been paid in addition to the premium.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 2 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 7]; and see *ibid.*, s. 123 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38]; and p. 492, *post*.

(*s*) *Ooregum Gold Mining Co. of India v. Roper*, [1892] A. C. 125, 145. As to the issue of shares at a discount, see p. 91, *post*.

(*t*) *Ibid.*, at p. 136; *Chapman's Case*, [1895] 1 Ch. 771; see p. 180, *post*. As to filing a contract in such a case, see p. 179, *post*.

(*u*) *De Beville's (Baron) Case* (1868), L. R. 7 Eq. 11, 15; *Re Baglan Hall Brewery Co.* (1870), 5 Ch. App. 346; see p. 180, *post*.

transaction is unimpeached the court will not inquire into the value of the consideration (a), and it will not rip up a transaction which is not impeached as and proved to be dishonest merely because the company may have paid an extravagant price for the property (b).

SECT. 7.
Capital.

140. The word "capital" is also used to mean the assets which represent the money which has been subscribed in respect of shares of a company (c), as, for instance, its lands, works, book debts, and stock in trade.

Other meanings of "capital."

The terms "fixed capital" and "floating" or "circulating capital" are also used, principally with reference to the subject of paying dividends out of capital. "Fixed capital" is the money expended in purchasing assets, which is sunk once for all; and "floating" or "circulating capital," is capital, such as stock in trade, which in the ordinary course of business is parted with and replaced by other capital (d).

141. "Reserve" capital is the capital which is not capable of being called up except in the event and for the purposes of the company being wound up. The postponed liability can be created—(1) by an unlimited company on registering as a limited company either in respect of an increase of nominal capital on such registration, or in respect of any portion of its existing uncalled capital (e); or (2) by a limited company in respect of any portion of its share capital which has not been already called up (f). In the latter case the reserve liability must be determined by special resolution (g). In either case the reserve capital cannot be mortgaged or charged by the company (h).

Reserve capital.

142. The amount of share capital of a company, whether limited by shares or guarantee, or unlimited, must be stated in the memorandum of association in the case of a company limited by

Statements as to capital.

(a) *Pell's Case* (1869), 5 Ch. App. 11; *Re Wragg, Ltd.*, [1897] 1 Ch. 796, C. A.; *Chapman's Case*, [1895] 1 Ch. 771. It is otherwise where the consideration is illusory or capable of obvious money measure (*Chapman's Case*, *supra*; *Re Wragg, Ltd.*, *supra*, at p. 836). See also *Re Leicester Contract Corporation*, [1902] 1 I. R. 349; *Brownlie, Petitioner* (*Scottish Heritages Co.*) (1899), 6 Sc. L. T. 326.

(b) *Ooregum Gold Mining Co. of India v. Roper*, [1892] A. C. 125, 143; *Re Innes & Co., Ltd.*, [1903] 2 Ch. 252, C. A.

(c) *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239, 265, C. A.

(d) See *Lee v. Neuchatel Asphalte Co.* (1889), 41 Ch. D. 1, 13, C. A.; *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, 670, C. A.; *Verner v. General and Commercial Investment Trust*, *supra*, at p. 266; *Bond v. Barrow Haematite Steel Co.*, [1902] 1 Ch. 353, 366; and see *City Property Investment Trust Corporation, Ltd. v. Thorburn* (1897), 25 R. (Ct. of Sess.) 361. But "the distinction between fixed and floating capital, which may be appropriate enough in an abstract treatise like Adam Smith's 'Wealth of Nations,' may with reference to a concrete case be quite inappropriate" (*Dovey v. Cory*, [1901] A. C. 477, *per* Lord HALSBURY, L.C., at p. 487). And see p. 272, *post*.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 58.

(f) *Ibid.*, s. 59 [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 5].

(g) *Ibid.*

(h) *Re Pyle Works* (1890), 44 Ch. D. 534, C. A., *per* LINDLEY, L.J., at p. 587; *Re Mayfair Property Co.*, *Bartlett v. Mayfair Property Co.*, [1898] 2 Ch. 28, C. A.; *Re Irish Club Co., Ltd.*, [1906] W. N. 127. As to the object of creating reserve capital in the case of an unlimited company, see *Re Mayfair Property Co.*, *Bartlett v. Mayfair Property Co.*, *supra*, at p. 36.

SECT. 7.
Capital.

shares (i), and in both memorandum and articles in the case of a company limited by guarantee which has a share capital (k), and in the articles in the case of an unlimited company which has a share capital (l). The number and fixed amount of the shares must also be stated in the memorandum of a company limited by shares or by guarantee (m), and each share in a company having a share capital must be distinguished by an appropriate number (n) which is for the purpose of identification.

Alterations
to capital.

143. The fixed amount of a company's capital cannot be altered except in pursuance of the statute or instrument by which the company is governed (o). Profits do not cease to be such in the sense of their being distributable among the shareholders by having been used for a length of time in the company's business, although for other purposes they may have been capitalised (p). The fixed amount of a share must be a monetary amount, but it is not necessary for the shares to be all of the same amount (q).

Preference
shares.

144. It is not necessary that equal rights and privileges should be attached to all shares; some may be preferential either as to capital or as to dividend, or as to both, or may have peculiar privileges in the matter of voting, or in other respects (r).

If provisions as to priorities or privileges of shares are inserted in the memorandum of association, they cannot be altered except

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 3; and see p. 70, *ante*.

(k) *Ibid.*, ss. 4, 10 (3); and see pp. 76, 77, *ante*. In the case of a guaranteed company with a share capital, registered before January 1, 1901, the amount of capital need only be stated in the articles (Companies Act, 1862 (25 & 26 Vict. c. 89), s. 14; Companies Act, 1900 (63 & 64 Vict. c. 48), s. 27; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 21).

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 5, 10 (3); and see p. 79, *ante*.

(m) *Ibid.*, ss. 3, 4.

(n) *Ibid.*, s. 22 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 22]. That is to say, when it is issued. As to a joint stock company registered under Part VII. of the Act of 1908, whose shares are not numbered, see p. 42, *ante*.

(o) *Bouch v. Sproule* (1887), 12 App. Cas. 385; *Smith v. Goldsworthy* (1843), 4 Q. B. 430, 466; *Re Financial Corporation, Holmes's, Pritchard's, and Adams's Cases* (1867), 2 Ch. App. 714, 732.

(p) *Bouch v. Sproule*, *supra*.

(q) A capital of, say, £100,000 may be divided into 50,000 shares of £1 each and 5,000 shares of £10 each.

(r) These are generally called "preference" shares, as distinguished from those which are not so privileged, generally called "ordinary" or "deferred" shares. There may be preference, ordinary and deferred shares, or shares of more classes than three, each of which has particular rights and conditions attached to it. Founders' shares are shares issued to recompense "founders" or promoters of the company, or to pay underwriters of its capital the equivalent for commissions which they could not lawfully accept before 1901; see *Re Fuure Electric Accumulator Co.* (1888), 40 Ch. D. 141. They are usually shares of small nominal amount, which although deferred in priority as to dividends, entitle the holders to the whole or a large percentage of the surplus profits remaining after payment of fixed dividends on the shares having priority to the founders' shares. As to their liability to be wiped out by a reduction of capital, see *Re Floating Dock Co. of St. Thomas, Ltd.*, [1895] 1 Ch. 691; and see *General Phosphate Corporation v. Horrocks* (1892), 8 T. L. R. 350.

on reduction of capital or reorganisation by special resolution confirmed by an order of the court, or under a scheme of arrangement sanctioned by the court (s).

But if there are no provisions in the memorandum as to preferential rights being attached to any shares, the company may by its articles of association attach to certain of its shares such preferential rights as it pleases; for there is no implied condition in the memorandum that equal rights shall be attached to all the shares (t). The memorandum, while defining the rights of shares of several classes, may subject such rights to modification under the powers contained in the articles (a), and such provisions of the articles may from time to time be altered by special resolution (b).

If preference shares confer a preferential right in respect of dividend, the dividend is *primâ facie* cumulative—that is to say, if the moneys applicable to dividend in one year are not sufficient to pay the preference dividend, the moneys so applicable in future years have to make up the deficiency, including arrears, before anything is paid as dividend to the holders of other shares (c). A preference share *primâ facie* only gives a right to a preferential dividend and not a right to a preferential payment of the amount of the share out of capital in case of a winding up (d).

If the preferential rights are declared by the articles it may be possible to create pre-preference shares having a priority over existing preference shares (e).

145. Subject to the statutory provision as to paying commissions for the underwriting of shares and as to paying brokerage (f), a company limited by shares cannot issue shares at a discount, that is to say, allot shares at their nominal value with a liability only to

(s) *Ashbury v. Watson* (1885), 30 Ch. D. 376, C. A. As to reduction, see p. 100, *post*; as to reorganisation, see p. 116, *post*; and as to schemes of arrangement, see pp. 602 *et seq.*, *post*. As to alteration of rights as to preference shares under a contract, see *Dickinson v. Holt* (1903), 19 T. L. R. 667.

(t) *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361, C. A., overruling *Hutton v. Scarborough Cliff Hotel Co. Ltd.* (1865), 2 Drew. & Sm. 521; see *British and American Trustee and Finance Corporation v. Couper*, [1894] A. C. 399, 417; *Harrison v. Mexican Rail. Co.* (1875), L. R. 19 Eq. 358; *Guinness v. Land Corporation of Ireland* (1882), 22 Ch. D. 349, 377, C. A.; *Re South Durham Brewery Co.* (1885), 31 Ch. D. 261, 270, C. A. If the sum of the interests of persons concerned in a joint adventure is divided into shares of equal amount, distinguished by numbers for the purpose of identification, but with no other distinction between them, the interests of the shareholders, in respect of their shares, as regards dividends and everything else must be equal (*British and American Trustee and Finance Corporation v. Couper*, *supra*, per Lord MACNAGHTEN, at p. 417).

(a) *Re Welsbach Incandescent Gas Light Co., Ltd.*, [1904] 1 Ch. 87, C. A.

(b) See p. 200, *post*.

(c) *Henry v. Great Northern Rail. Co.* (1857), 1 De G. & J. 606, C. A.; *Webb v. Earle* (1875), L. R. 20 Eq. 556; *Milne v. Arizona Copper Co.* (1899), 36 Sc. L. R. 741. As to the words which are sufficient to show that the dividend is to be non-cumulative, see *Staples v. Eastman Photographic Materials Co.*, [1896] 2 Ch. 303, C. A.; *Adair v. Old Bushmills Distillery Co.*, [1908] W. N. 24.

(d) *Re London India Rubber Co.* (1868), L. R. 5 Eq. 519. As to the words required to give a preference as to capital, see *Re Bagnor and Portmadoc Slate and Slab Co.* (1875), L. R. 20 Eq. 59; *Griffith v. Paget* (1877), 6 Ch. D. 511.

(e) *Underwood v. London Music Hall, Ltd.*, [1901] 2 Ch. 309.

(f) See p. 92, *post*.

Cumulative
dividends.

Issuing shares
at a discount.

SECT. 7.
Capital.

pay a sum smaller than the nominal value thereof either in money or money's worth (g). A contract to issue shares at a discount is void (h). The carrying out of a scheme under which it is proposed to allow debentures, lawfully issued at a discount, to be exchanged for fully paid up shares of the same nominal amount, will be restrained as involving the issuing of shares at a discount (i). Even as between contributories in a winding up, such shares will be treated as only partly paid (k). But if shares are taken in the ordinary course of business for valuable consideration without notice that they were not actually paid up, the share certificate stating that they are fully paid, the holder is a paid-up shareholder (l). The directors, however, in such a case will be answerable to the company for the discount allowed (m). A person who is put on the register in respect of shares issued at a discount may, if he has not assented and comes promptly, obtain the removal of his name from the register (n), but not after he has assented (o).

SUB-SECT. 2.—Underwriting and Brokerage.

**Underwriting
and broker-
age.**

146. "Underwriting" means agreeing to take so many shares, more or less in number, as are specified in the underwriting letter, if the public or other persons do not subscribe for them (p).

**Statutory
requirements.**

A company may pay a commission to any person in consideration of his subscribing (q) or agreeing to subscribe, whether

(g) *Ooregum Gold Mining Co. of India v. Roper*, [1892] A. C. 125; *Re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9, C. A., where bonus shares were issued as fully paid; *Hirsche v. Sims*, [1894] A. C. 654, P. C.; *Re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191, C. A.; *Re Almada and Tirito Co.* (1888), 38 Ch. D. 415, C. A.; *Re New Chile Gold Mining Co.* (1888), 38 Ch. D. 475; *Keatinge v. Paringa Consolidated Mines* (1902), 18 T. L. R. 266; overruling *Re Plaskynaston Tube Co.* (1883), 23 Ch. D. 542, and *Re Ince Hall Rolling Mills Co.* (1882), 23 Ch. D. 545, n. "Discount" in an underwriting letter has been construed as meaning commission, so that the allowance was lawful (*Re Licensed Victuallers' Mutual Trading Association, Ex parte Audain* (1889), 42 Ch. D. 1, C. A.; compare *West of England Paper Mills Co. v. Gilbert* (1891), 61 L. J. (CH.) 92). As to allowing a discount on prepayment of calls, see *Re Land Securities Co., Ex parte Farquhar*, [1896] 2 Ch. 320, C. A. As to a transfer of fully-paid shares in consideration of taking other shares for cash, see *Chapman v. Great Central Freehold Mines, Ltd.* (1905), 22 T. L. R. 90.

(h) *Welton v. Saffery*, [1897] A. C. 299, per Lord MACNAGHTEN, at p. 321.

(i) *Mosely v. Koffyfontein Mines, Ltd.*, [1904] 2 Ch. 108, C. A.; and see *Bury v. Famatina Development Corporation, Ltd.*, [1909] 1 Ch. 754, C. A.

(k) *R. v. Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66, C. A.; *Welton v. Saffery*, *supra*.

(l) *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004, 1017; *Waterhouse v. Jamieson* (1870), L. R. 2 Sc. & Div. 29; compare *Re London Celluloid Co.* (1888), 39 Ch. D. 190, C. A.; and see p. 182, *post*.

(m) *Hirsche v. Sims*, *supra*; compare *London Trust Co. v. Mackenzie* (1893), 62 L. J. (CH.) 870.

(n) *Re Almada and Tirito Co.*, *supra*.

(o) *Re Railway Time Tables Publishing Co., Ex parte Sandys* (1889), 42 Ch. D. 98, C. A.

(p) *Re Licensed Victuallers' Mutual Trading Association, Ex parte Audain*, *supra*, at p. 7; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 89 (1); *Re London and Paris Financial Mining Corporation* (1897), 13 T. L. R. 569.

(q) Probably "subscribing" means entering into an agreement to take shares by means of a formal application or otherwise, under which there is a liability to pay; see *Arnison v. Smith* (1889), 41 Ch. D. 348, 357, C. A.

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Capital.

absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares therein, provided that the payment of the commission is authorised by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorised (r). But the amount or rate per cent. of the commission paid or agreed to be paid must (1) in the case of shares offered to the public for subscription (s), be disclosed in the prospectus (t); or (2), in the case of shares not offered to the public for subscription, in the statement in lieu of prospectus (a), or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar (b), and where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, it must also be disclosed in that circular or notice (c).

With this exception, no company may apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase-money or contract price, or otherwise (d).

147. When shares are at par and the directors have power to allot shares at a premium, the company may, in consideration of a person taking or procuring subscriptions for shares, give him an option to take further shares within a limited period at par without complying with the above stated statutory provision (e). On a sale of a company's undertaking to guarantors, who agree to form a new company for the repurchase of the undertaking in consideration of shares to be allotted to the members of the selling company, any

Option to
take shares
at par.

Reconstruction.

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 89 (1) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 8 (1); Companies Act, 1907 (7 Edw. 7, c. 50), s. 8 (2)]. Prior to the Act of 1900, payment of underwriting commission was illegal (*Lydney and Wigpool Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85, 95, O. A.; *Re Canning Jarrah Timber Co. (Western Australia), Ltd.*, [1900] 1 Ch. 708, O. A.; *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141, 154). Any dicta to the contrary in *Re Licensed Victuallers' Mutual Trading Association, Ex parte Audain* (1889), 42 Ch. D. 1, O. A., cannot be supported. As to underwriting before the Act, see *Shaw v. Bentley & Co. and Yorkshire Breweries, Ltd.* (1893), 68 L. T. 812; *Ormerod's Case*, [1894] 2 Ch. 474.

(s) See *Shorto v. Colwill* (1909), 101 L. T. 598.

(t) See p. 123, *post*.

(a) See p. 142, *post*.

(b) See Board of Trade Regulations, March 29, 1909, Form 58.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 89 (1).

(d) *Ibid.*, s. 89 (2) [Companies (Consolidation) Act, 1900 (8 Edw. 7, c. 69), s. 8 (2)]. As to underwriting shares on a reconstruction, see *Barrow v. Paringa Mines* (1909), *Ltd.*, [1909] 2 Ch. 658.

(e) *Hilder v. Dexter*, [1902] A. C. 474, overruling on this point *Burrows v. Matabele Gold Reefs and Estates Co., Ltd.*, [1901] 2 Ch. 23, O. A.

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Capital.

Offer to the
public.

consideration paid by the new company to the guarantors beyond the shares is a commission within the above enactment (*f*). If the new company in such a case does not issue a prospectus, there is no offer of its shares to the public (*g*). Issuing a circular to the existing shareholders offering them new shares in proportion to those held by them is not such an offer (*h*). And where directors, without any authority from the company, send out prints of a prospectus, not issued by the company, to their friends, this is not necessarily an offer of shares to the public (*i*). Although there is no statutory limit on the amount of commission which may be paid, if authorised by the articles, transactions amounting to the issue of shares at a discount are not allowed under colourable attempts to comply with the statutory requirements (*j*).

Underwriting
letters.

148. The construction of each underwriting letter must depend upon its individual terms, and they differ exceedingly in different cases (*k*). Generally the letter is not in itself a contract, but a mere offer (*l*), which, like other offers, requires acceptance before a contract comes into existence (*m*). But the offer need not be accepted before the event on which it is to become operative is known (*n*). There may be acceptance without writing (*o*), and notice of acceptance may be inferred (*p*), or the writer of the letter may be estopped from setting up want of notice (*q*). In the case of an underwriting letter authorising some other person to apply for shares, for a valuable consideration, if the offer is accepted by him it constitutes an authority coupled with an interest, and is irrevocable (*r*).

(*f*) *Booth v. New Afrikander Gold Mining Co., Ltd.*, [1903] 1 Ch. 295, C. A.; compare *Barrow v. Paringa Mines (1909), Ltd.*, [1909] 2 Ch. 658.

(*g*) *Booth v. New Afrikander Gold Mining Co., Ltd.*, *supra*, where the question was also raised, at pp. 308, 309, whether the offer of a few shares to the public would justify payment of an underwriting commission on the rest of the shares which were not so offered.

(*h*) *Burrows v. Matabele Gold Reefs and Estates Co., Ltd.*, [1901] 2 Ch. 23, C. A. (not overruled on this point in *Hilder v. Dexter*, [1902] A. C. 474). Nor, it is submitted, is the issue of a similar circular as to shares to existing debenture-holders; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (7); and p. 121, *post*.

(*i*) *Sherwell v. Combined Incandescent Mantles Syndicate, Ltd.*, [1907] W. N. 110; and see p. 121, *post*.

(*j*) *Keatinge v. Paringa Consolidated Mines, Ltd.* (1902), 18 T. L. R. 266.

(*k*) *Re Consort Deep Level Gold Mines, Ltd., Ex parte Stark*, [1897] 1 Ch. 575, 593, C. A.

(*l*) As, for instance, in the case last cited.

(*m*) See title CONTRACT, Vol. VII., p. 345.

(*n*) *Hindley's Case*, [1896] 2 Ch. 121, 135, C. A.; *Re Consort Deep Level Gold Mines, Ltd., Ex parte Stark*, *supra*, at p. 592.

(*o*) *North Charterland Exploration Co. v. Riordan* (1896), 13 T. L. R. 80. As to the withdrawal of an offer to take shares before acceptance, see p. 173, *post*; and title CONTRACT, Vol. VII., p. 347.

(*p*) *Re Bultfontein Sun Diamond Mine* (1896), 12 T. L. R. 461; but see *Re Consort Deep Level Gold Mines, Ltd., Ex parte Stark*, *supra*, at p. 593.

(*q*) *Re Bentley (Henry) & Co. and Yorkshire Breweries, Ex parte Harrison* (1893), 69 L. T. 204, C. A.; *Re Consort Deep Level Gold Mines, Ltd., Ex parte Stark*, *supra*, at p. 592.

(*r*) *Re Hannan's Empress Gold Mining and Development Co. (Carmichael's Case)*, [1896] 2 Ch. 643; compare *Re Bentley (Henry) & Co. and Yorkshire Breweries*,

The contract, if made before the company is entitled to commence business, will not bind it until it has become so entitled (s).

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Capital.

149. A company may pay to brokers a reasonable sum by way of brokerage for placing shares (a). Brokerage.

150. A vendor, promoter, or other person who receives payment in money or shares from a company has, and is to be deemed always to have had, power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under the above provision (b). Payment of underwriting commission by promoters.

151. Where a company has paid any sums by way of commission in respect of any shares, the total amount so paid, or so much thereof as has not been written off, must be stated in every balance-sheet of the company until the whole amount has been written off (c). Statement and return as to commissions.

The total amount of the sums (if any) paid by way of commission in respect of any shares since the date of the last return must also be stated in the annual summary sent to the registrar (d).

SUB-SECT. 3.—Increase of Capital.

152. A company limited by shares (e) and a company limited by guarantee, with a share capital, and registered on or after January 1, 1901 (f), if so authorised by its articles, may alter Increase of capital.

Ltd., Ex parte Harrison (1893), 69 L. T. 204, C. A.; explained in *Re Consort Deep Level Gold Mines, Ltd., Ex parte Stark*, [1897] 1 Ch. 575, C. A. As to letters requiring the company to call on the writer to subscribe, see *Ormerod's Case*, [1894] 2 Ch. 474; *Re Bultfontein Sun Diamond Mine* (1896), 12 T. L. R. 461; *Brussels Palace of Varieties v. Prockter* (1893), 10 T. L. R. 72, C. A. As to the meaning of "irrevocably" applying for shares, see *Boyer (Paul), Ltd. v. Edwards* (1902), 18 T. L. R. 3. As to diminishing liability by underwriters' "firm" offers, see *Sydney Harbour Collieries, Ltd.* (1898), 14 T. L. R. 373.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 87 (3); see p. 263, *post*. As to an underwriter's position as regards obtaining relief where the prospectus is insufficient, see *Baty v. Keswick* (1901), 50 W. R. 14.

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 89 (3).

(b) *Ibid.*, s. 89 (3) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 8 (3); Companies Act, 1907 (7 Edw. 7, c. 50), s. 8 (1)]; *Metropolitan Coal Co. Association v. Scrimgeour*, [1895] 2 Q. B. 604, C. A., where the articles of association expressly authorised the payment of all brokerages payable in respect of the placing of any shares, and the commission paid to the stock-brokers for placing the shares was only 2½ per cent. on their nominal amount. The memorandum of association also stated one of the objects of the company to be the payment out of the funds of the company of all brokerages, commissions, and legal and other expenses for the issuing of the capital, but the authority (if necessary at all) is none the better for being in the memorandum (*ibid.*, at p. 607). Only ordinary brokerage in the regular way of expenditure can be paid (*ibid.*, at p. 610).

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 90 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 7].

(d) *Ibid.*, s. 262 (f) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 7]; see p. 264, *post*.

(e) *Ibid.*, s. 41 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 12].

(f) *Ibid.*, s. 56 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 27]. In the case of a guarantee company with a share capital registered before January 1,

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Capital.

the conditions of its memorandum by increasing its share capital by the issue of new shares of such amount as it thinks expedient.

An unlimited company with a share capital need not state the amount in its memorandum of association, but must state it in its articles (*g*), and may increase its share capital by special resolution (*h*).

If the company is governed by Table A the increase is made by the directors with the sanction of an extraordinary resolution (*i*) prescribing the amount of increase, and the shares into which it is divided (*j*). If there is no authority under the articles to increase capital, they may be altered by special resolution (*k*) so as to give the power (*l*). The increased capital may consist of preference shares if required, provided that it is not inconsistent with rights given by the memorandum of association (*m*).

Table A
provisions.

153. In the case of a company subject to Table A, the provision regulating the offer of the new shares (*n*) must be complied with ;

1901, the amount of capital was not required to be stated in the memorandum, although each subscriber of it was required to sign it for at least one share, but the articles had to state the amount of capital (Companies Act, 1862 (25 & 26 Vict. c. 89), s. 14, Sched. II., Form C). Such companies may, presumably, increase their capital, for the form of articles in Form C incorporates all the clauses of Table A to the Act of 1862, clause 26 of which expressly authorises an increase of capital. And probably no *ad valorem* duty is payable on such an increase, as s. 112 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), only applies to companies limited by shares. As to increasing the capital of cost-book mining companies, see p. 656, *post*.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 5, 10 (3).

(*h*) The form of articles in *ibid.*, Sched. III., Form D, incorporates Table A, clause 41 of which gives power to increase the capital. As to an unlimited company increasing its capital on registering as limited, see p. 98, *post*.

(*i*) As to extraordinary resolutions, see p. 259, *post*.

(*j*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 41. The fact that the section does not, but that Table A does, require an extraordinary resolution, seems to dispose of the point decided by KEKEWICH, J., but left undetermined by the Court of Appeal in *Ayre v. Skelsey's Adamant Cement Co.* (1905), 21 T. L. R. 464, C. A. In other cases the power depends on the articles, which sometimes require sanction to be given by a previous special or ordinary resolution ; but if the capital is increased without first obtaining the sanction, the irregularity is cured by the passing of subsequent resolutions (*Sewell's Case* (1868), 3 Ch. App. 131) ; *Re London and New York Investment Corporation*, [1895] 2 Ch. 860.

(*k*) See p. 207, *post*. "Articles" means the articles of association as originally framed or as altered by special resolution (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285). But if the power to increase, consolidate, convert, or reconvert is absent from the articles, a single special resolution authorising the particular operation is effective without a previous resolution altering the articles (*Campbell's Case* (1873), 9 Ch. App. 1, 21 ; *Taylor v. Pilsen Joel and General Electric Light Co.* (1884), 27 Ch. D. 268). As to the effect of the resolution being invalid for want of a proper interval between the meetings, see *Re Miller's Dale and Ashwood Dale Lime Co.* (1885), 31 Ch. D. 211 ; and p. 259, *post*.

(*l*) As to alteration of articles, see p. 207, *post*.

(*m*) *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361, C. A.

(*n*) Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of capital, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and

and in the case of other companies the articles generally contain special provisions as to the offer of the shares. Where, as in the original Table A to the Companies Act, 1862, the articles provide that new shares shall be offered to members (o), and the shares are created in the lifetime of a member of the company who dies before any offer is made, his legal personal representative stands in his shoes as regards the right to an allotment in proportion to his holding (p).

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Capital.

154. Every copy of the memorandum issued after the date of any increase of capital must be in accordance with the alteration; the penalty in default on the company, and on every director or manager who knowingly and wilfully authorises or permits the default, is a fine not exceeding £1 for each copy in respect of which default is made (q). Altering memorandum after increase

155. Where a company having a share capital, whether its shares have or have not been converted into stock (r), has increased its share capital beyond the registered capital, it must give to the registrar notice of the increase of capital within fifteen days after the passing (or in the case of a special resolution the confirmation) of the resolution authorising the increase (s). A similar notice must be given where a company not having a share capital has increased the number of its members beyond the registered number within fifteen days after the increase was resolved on or took place (t). The registrar must then Notice to registrar.

limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 42). The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original capital (*ibid.*, clause 43).

When a company is not governed by Table A, the articles usually contain a similar provision.

(o) Companies Act, 1862 (25 & 26 Vict. c. 89), Sched. I., Table A, clause 27.

(p) *James v. Buena Ventura Nitrate Grounds Syndicate, Ltd.*, [1896] 1 Ch. 456, C. A. It is doubtful whether a different mode of allotment than that prescribed by the articles can be sanctioned by the special resolution as to allotment without first altering the articles (*ibid.*; *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, 677, C. A.).

(q) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 41 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 12]. The penalty is new as to increase of capital.

(r) As to the conversion of shares into stock, see p. 99, *post*.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 44 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 34].

(t) *Ibid.*, s. 44 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 34]. The increase of numbers only requires registration when the company has not share capital.

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Capital.

record the increase (a). The penalty on the company for default, and on every director and manager of the company who knowingly and wilfully authorises or permits the default, is a fine not exceeding £5 a day (b).

Increase by
unlimited
company.

156. An unlimited company having a share capital may, by its resolution for registration as a limited company, increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purposes of the company being wound up (c).

SUB-SECT. 4.—Consolidation of Capital.

Consolidation
of capital.

157. A company limited by shares, if so authorised by its articles (d), may alter the conditions of its memorandum by consolidating and dividing all or any (e) of its share capital into shares of larger amount than existing shares (f). Unless so required by the articles, a special resolution is not necessary (g); but if a company is governed by Table A a special resolution is required (h). After the consolidation every copy of the memorandum of association which is issued must accord with the alteration, as in the case of an increase of capital, the same penalties being imposed in case of default (i).

Notice to
registrar.

Where a company having a share capital (k) has consolidated and divided its share capital into shares of larger amount than its existing shares, it must give notice to the registrar of the consolidation and division, specifying the shares consolidated and divided (l).

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 44 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 34].

(b) *Ibid.*, s. 44 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 34]; compare Revenue Act, 1903 (3 Edw. 7, c. 46), s. 5. As to the fees and stamp duty required, see p. 60, *ante*; and *A.-G. v. Anglo-Argentine Tramways Co., Ltd.*, [1909] 1 K. B. 677.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 58 [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 5]; see p. 63, *ante*.

(d) See note (k), p. 96, *ante*.

(e) The power to consolidate "any" of the shares is new; s. 12 of the Companies Act, 1862 (25 & 26 Vict. c. 89), only gave a company power to consolidate "its capital," and it has been doubted whether this gave a power to consolidate some only of its shares.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 41 (1) (b) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 12]. As to the consolidation of shares of different classes, see p. 116, *post*.

(g) *Ibid.*, s. 41 (2).

(h) *Ibid.*, Sched. I., Table A, clause 44. This clause should be varied by the articles, as it only authorises a consolidation of the company's share capital, not of any of it.

(i) *Ibid.*, s. 41 (3). The provision as to penalties is new as regards consolidation of shares.

(k) The enactment refers to a company "having a share capital," but only authorises a company "limited by shares" to consolidate its share capital, and does not in terms apply to a company limited by guarantee or an unlimited company.

(l) *Ibid.*, s. 42 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 28].

SUB-SECT. 5.—*Sub-division of Shares.*

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Capital.Sub-division
of shares.

158. A company limited by shares (*m*), if so authorised by its articles (*n*), may by special resolution (*o*) alter the conditions of its memorandum by sub-dividing its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, provided that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share is the same as it was in the case of the share from which the reduced share is derived (*p*).

After the sub-division every copy of the memorandum of association which is issued must accord with the alteration, as in the case of an increase of capital, the same penalty being imposed in case of default (*q*).

The power to sub-divide cannot be given by the memorandum of association (*r*). Where, however, the company purports to sub-divide without having the power, a transfer of sub-divided shares, if they can be identified, is effectual to pass the original shares (*s*).

SUB-SECT. 6.—*Conversion of Shares into Stock and Reconversion.*

159. A company limited by shares, if so authorised by its articles (*t*), may alter the conditions of its memorandum by converting all or any of its paid-up shares into stock (*a*) and, if so desired, subsequently reconverting that stock into paid-up shares of any denomination (*b*).

Conversion
of shares into
stock and
reconversion.

(*m*) Companies limited by guarantee or unlimited are not referred to.

(*n*) Sub-division and reduction of capital are the only alterations of capital which require a special resolution, and the articles cannot dispense with this statutory requirement. Clause 44 of Table A provides that "the company may, by special resolution by sub-division of its existing shares, or any of them, divide the whole, or any part, of its capital into shares of smaller amount than is fixed by the memorandum of association, subject, nevertheless, to the provisions of para. (d) of sub-s. (1) of s. 41 of the Companies (Consolidation) Act, 1908."

(*o*) As to special resolutions, see p. 259, *post*.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 41 (1) (d) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 21].

(*q*) *Ibid.*, s. 41 (3); see p. 97, *ante*. No notice of the sub-division other than such as is conveyed by filing a copy of the special resolution, as required by *ibid.*, s. 70, need be given to the registrar; see p. 261, *post*. But the number of the shares into which the capital is divided must appear in the annual summary required by *ibid.*, s. 28; see p. 264, *post*.

(*r*) *Feiling's and Rimington's Case*, *King's Case*, *Holmes's*, *Pritchard's*, and *Adams's Cases* (1867), 2 Ch. App. 714.

(*s*) *Ibid.*; as to forfeiture, see *ibid.*

(*t*) See note (*k*), p. 96, *ante*. Clause 31 of Table A gives power to convert shares into stock and reconvert them.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 41 (1) (c) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 12]. "Stock" is the aggregate of fully-paid shares legally consolidated and portions of which aggregate may be transferred split up into fractions of any amount, without regard to the original nominal amount of the shares; see *Morrice v. Aylmer* (1875), L. R. 7 H. L. 717, 724. "Share" includes stock, except where a distinction between stock and shares is expressed or implied (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285).

(*b*) *Ibid.*, s. 41 (1) (c) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 29]. The power to convert or reconvert only exists where the company is limited by shares.

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Capital.

After the conversion or reconversion, as the case may be, every copy of the memorandum of association which is issued must accord with the alteration, as in the case of an increase of capital, the same penalty being imposed in case of default (c). Notice must be given to the registrar of the conversion or reconversion, specifying the shares converted or the stock reconverted (d).

**Effect of
conversion.**

After the company has given notice of the conversion of shares into stock to the registrar, all the provisions of the Act of 1908 which are applicable to shares only cease as to the share capital converted into stock; and the register of members, and list of members to be forwarded to the registrar, must show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares required by the Act (e).

SUB-SECT. 7.—Reduction of Capital.

(i.) *In General.*

**Reduction of
capital.**

160. In speaking of reduction of capital the word "capital" includes nominal share capital, whether issued or unissued, and issued capital, whether uncalled or partly or fully paid up. Every reduction of capital (except by returning accumulated profits) must reduce the nominal capital, and may reduce such part of it as is unissued, or is issued, whether the latter is uncalled, or is fully or partly paid up (f).

**Reductions
expressly
referred to
in the Act
of 1908.**

161. Reductions of capital are of two kinds, namely, those which may be effected without the confirmation of the court, and those which can only be effected with such confirmation. In the case of a company limited by shares or by guarantee, which is registered after January 1, 1901, the reductions which can be effected without such confirmation are a reduction effected by a company limited by shares cancelling nominal capital which has not been taken or agreed to be taken by any person (g), and a reduction by returning

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 99), s. 41.

(d) *Ibid.*, s. 42 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 28, as amended by Companies Act, 1907 (7 Edw. 7, c. 50), s. 50, and Sched. III.].

(e) *Ibid.*, s. 43 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 29]; and see clauses 32—34 of Table A. As to the statements with reference to stock in the annual summary, see *ibid.*, s. 26; and p. 264, *post*.

(f) *Re Anglo-French Exploration Co.*, [1902] 2 Ch. 845, 852; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 40; and see p. 105, *post*. The Companies Act, 1862 (25 & 26 Vict. c. 89), did not expressly provide for any reduction of capital, but clauses 17—22 of the Table A annexed to that Act enabled the directors of companies regulated by that Table to forfeit shares on non-payment of calls. This forfeiture worked a reduction of capital not provided for in the body of the Act, but as it had legislative sanction it was undoubtedly legal, and similar provisions in the articles of association of companies which had not adopted Table A were also lawful and effective (*Trevor v. Whitworth* (1887), 12 App. Cas. 409, 417; *Lock v. Queensland Investment and Land Mortgage Co.*, [1896] A. C. 461). An article providing that shares of a member shall be forfeited if he takes any proceedings against the company is invalid (*Hope v. International Financial Society* (1876), 4 Ch. D. 327, C. A.).

(g) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 41 (1) (e); and p. 101, *post*.

accumulated profits to shareholders in reduction of the paid-up capital, the unpaid capital being increased by a similar amount, in which case the nominal capital is not altered (*h*).

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Capital.

A guarantee company registered before January 1, 1901, may reduce its share capital by special resolution altering its articles, without the court's sanction (*i*). There is nothing to prevent an unlimited company, whenever registered, from providing by its memorandum and articles for a return of capital to its members (*j*).

162. There are, moreover, two modes of reducing capital, which are not expressly referred to in the Act of 1908, namely, by forfeiture of shares for non-payment of calls, or by a surrender of shares which is made in circumstances which would justify a forfeiture (*k*).

Reductions
not expressly
referred to.

(ii.) *Without Confirmation by the Court.*

(a) *Cancellation of Unissued Shares.*

163. A company limited by shares, if so authorised by its articles (*l*), may alter the conditions of its memorandum by cancelling shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and by diminishing the amount of its share capital by the amount of the shares so cancelled (*m*).

Cancelling
unissued
shares.

Such a cancellation is not a reduction of share capital within the meaning of the Act of 1908 (*n*), and, therefore, does not require the confirmation of the court (*o*).

After the cancellation every copy of the memorandum of association

(*h*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 40; and p. 102, *post*.

(*i*) See Companies Act, 1862 (25 & 26 Vict. c. 89), Sched. II., Form C.

(*j*) *Re Borough Commercial and Building Society*, [1893] 2 Ch. 242, 252. If the company has a share capital, the memorandum need not state the amount of it, although the articles must (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 5, 10 (3)); and see *ibid.*, Sched. III., Form D. Regulations in the memorandum as to the amount and distribution of capital may be altered by special resolution (*ibid.*, s. 13 (2)).

(*k*) *Bellerby v. Rowland and Marwood's Steamship Co., Ltd.*, [1902] 2 Ch. 14, 32, C. A.; see pp. 198, 200, *post*. As to payment of interest out of capital, see p. 117, *post*.

(*l*) That is to say, its articles of association as originally framed or as altered by special resolution (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285). A special power to cancel unissued shares ought to be taken by the articles, as the cancellation is not a reduction of share capital within the meaning of the Act of 1908; see *ibid.*, s. 41 (4). Clause 44 (c) of Table A gives the special power.

(*m*) *Ibid.*, s. 41 (1) (e) [Companies Act, 1877 (40 & 41 Vict. c. 26), s. 5].

(*n*) *Ibid.*, s. 41 (4).

(*o*) *Re Anglo-French Exploration Co.*, [1902] 2 Ch. 845, 852. Having regard to the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 41 (2), only an ordinary resolution of the company is necessary, although in the case of companies governed by Table A a special resolution is required; see *ibid.*, clause 44. Unless the cancellation is by special resolution, the Act does not apparently require any notice of the alteration to be given to the registrar; but the information will have to be given in the annual list, which must state the amount of the share capital and the number of shares into which it is divided; see p. 264, *post*.

SECT. 7. which is issued must accord with the alteration, as in the case of an
Capital. increase of capital, the same penalties being imposed in case of
 default (p).

(b) *Return of Accumulated Profits.*

Return of
 accumulated
 profits.

164. When a company has accumulated a sum of undivided profits, which with the sanction of the shareholders may be distributed among the shareholders in the form of a dividend or bonus, it may, by special resolution (q), return the same, or any part thereof, to the shareholders in reduction of the paid-up capital of the company, the unpaid capital being thereby increased by a similar amount (r). The special resolution cannot have a retrospective or prospective effect, but can only be made applicable to the profits of the year (s).

The resolution does not take effect until a memorandum, showing the particulars required on a reduction of share capital (t), has been produced to and registered by the registrar (u); but the other statutory provisions relating to reduction of share capital do not apply (w).

Retention
 of profits.

165. When paid-up capital is thus reduced, any shareholder, including one or more of several joint shareholders, may, within one month after the passing of the resolution for reduction, require the company to retain, and the company must then retain, the whole of the money actually paid on the shares held by him either alone or jointly with any other person, which, in consequence of the reduction, would otherwise be returned to him or them (a). Thereupon those shares are, as regards the payment of dividend, deemed to be paid up to the same extent only as the shares on which payment has been accepted by the shareholders in reduction of paid-up capital (b). The company must invest and keep invested the money so retained in such securities authorised for investment by trustees (c) as it may determine, and on the money so invested, or on so much thereof as from time to time exceeds the amount of calls subsequently made on the shares in respect of which it has been retained, the company must pay the interest

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 41 (3). This is a new provision as to penalties. As to the penalties, see p. 98, *ante*.

(q) As to special resolutions, see *ibid.*, s. 69; and p. 259, *post*.

(r) *Ibid.*, s. 40 (1) [Companies Act, 1880 (43 Vict. c. 19), s. 3].

(s) *Re Piercy, Whitwham v. Piercy*, [1907] 1 Ch. 289, 293. The shareholders who pass the resolution might not be the same as those to whom the return is made. As between tenant for life and remainderman, the former is entitled to all payments out of profits unless validly capitalised by the company (*ibid.*, at p. 294; *Bouch v. Sproule* (1887), 12 App. Cas. 385; *Re Hopkins' Trusts* (1874), L. R. 18 Eq. 696).

(t) See p. 114, *post*.

(u) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 40 (2) [Companies Act, 1880 (43 Vict. c. 19), s. 4].

(w) *Ibid.*; see p. 103, *post*. This provision is new in terms; confirmation or inquiry by the court is not required.

(a) *Ibid.*, s. 40 (3).

received from time to time on the securities (*d*). The amount retained and invested is to be held to represent the future calls which may be made to replace the share capital so reduced on those shares, whether the amount obtained on sale of the whole, or such proportion thereof as represents the amount of any call when made, produces more or less than the amount of the call (*e*).

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Capital.

166. On such a reduction of paid-up share capital the powers vested in the directors of making calls on shareholders in respect of the amount unpaid on their shares extends to the amount of the unpaid share capital as augmented by the reduction (*f*).

Future call
where profits
returned.

167. After any such reduction the company must specify in the annual list of members required by the Act of 1908 (*g*) the amounts retained at the request of any of the shareholders, and must specify in the statements of account laid before any general meeting of the company the amount of the undivided profits so returned in reduction of paid-up share capital (*h*).

Returns to
registrar.

(iii.) *With Confirmation by the Court.*

(a) *In General.*

168. Subject to confirmation by the court, a company limited by shares, if so authorised by its articles (as originally framed or as altered by special resolution), may by special resolution reduce its share capital in any way (*i*). In particular, without prejudice to the generality of the foregoing power (*j*), it may (1) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or (2), either with or without extinguishing or reducing

Forms of
reduction.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 40 (3) [Companies Act, 1880 (43 Vict. c. 19), s. 5].

(*e*) *Ibid.*, s. 40 (4) [Companies Act, 1880 (43 Vict. c. 19), s. 5].

(*f*) *Ibid.*, s. 40 (5) [Companies Act, 1880 (43 Vict. c. 19), s. 3].

(*g*) See p. 264, *post*.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 40 (6) [Companies Act, 1880 (43 Vict. c. 19), s. 6]. No notice to the registrar, except such as is conveyed by the filing of the memorandum, is required.

(*i*) *Ibid.*, s. 46 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 9; Companies Act, 1877 (40 & 41 Vict. c. 26), s. 3].

(*j*) The Companies Act, 1867 (30 & 31 Vict. c. 131), s. 9, empowered a company limited by shares to "reduce its capital." JESSEL, M.R., decided that this did not enable a company to write off paid-up capital which had been lost (*Re Ebbw Vale Steel, Iron and Coal Co.* (1877), 4 Ch. D. 827, followed in *Re Kirkstall Brewery Co., Ltd. and Reduced* (1877), 5 Ch. D. 535). On the assumption that the decision was correct—which it was not (*British and American Trustee and Finance Corporation v. Couper*, [1894] A. C. 399, 412)—the Companies Act, 1877 (40 & 41 Vict. c. 26), was passed, s. 3 of which provided that "capital" in the Act of 1867 (30 & 31 Vict. 131) should include paid-up capital and that the power to reduce should "include" such reductions as are now specially mentioned in s. 46(1) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). The decision of BUCKLEY, J., that the section only applied to the reductions particularly mentioned in the Act of 1877 (*Re Anglo-French Exploration Co.*, [1902] 2 Ch. 845) was overruled in *Poole v. National Bank of China, Ltd.*, [1907] A. C. 229, 239, where it was held that the words of s. 3 of that Act gave statutory effect to previous decisions, and that the jurisdiction conferred by the Act was perfectly general, and arose whenever the company seeking reduction had passed a special resolution to that effect. The Act of 1908 makes this quite clear.

SECT. 7.
Capital.

liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or (3), either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the company's wants; and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly (*k*).

The special resolution to reduce is in the Act of 1908 called "a resolution for reducing share capital" (*l*).

**Guarantee
companies.**

169. A company limited by guarantee and registered on or after January 1, 1901 (*m*), may, if it has a share capital, and is so authorised by its articles, reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may do so (*n*).

**Reduction
when
company is
winding up.**

170. The power of a limited company to reduce continues even after it has gone into liquidation; but if the reduction is part of a scheme of arrangement (*o*), the requirements of the Act as regards reduction in other cases must be complied with (*p*).

**Surrender
and purchase
of shares.**

171. A surrender of part of an investment to improve the remainder of it is not a reduction requiring confirmation (*q*); but a surrender of shares, whether fully paid or not, unless made under circumstances which would justify a forfeiture of the shares, is a reduction requiring confirmation (*r*).

A purchase by a company of its own shares, or a cancellation of shares in consideration of a transfer of property of the company, is also a reduction requiring confirmation (*s*). A surrender of fully-paid shares is none the less a reduction of capital because new shares of the like nominal amount, purporting to be fully paid, are issued in exchange therefor (*t*).

**Reserve
capital.**

Capital which cannot be called up except in the event of and for the purpose of winding up may be cancelled with the confirmation of the court (*a*).

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 46 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 9].

(*l*) *Ibid.*, s. 46 (2).

(*m*) As to such companies registered before that date, see p. 76, *ante*.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 56 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 27 (1)].

(*o*) Under *ibid.*, s. 120; see p. 602, *post*.

(*p*) *Re Cooper, Cooper and Johnson, Ltd.* (1902), 51 W. R. 314; compare *Re Wallasey Brick and Land Co.*, [1894] W. N. 20.

(*q*) *Thomson v. Trustees, Executors and Securities Insurance Corporation*, [1895] 2 Ch. 454.

(*r*) *Bellerby v. Rowland and Marwood's Steamship Co., Ltd.*, [1902] 2 Ch. 14, C. A.; *Trevor v. Whitworth* (1887), 12 App. Cas. 409, 434; and see *Re Denver Hotel Co.*, [1893] 1 Ch. 495, C. A., and the observations thereon in *British and American Trustee and Finance Corporation v. Couper*, [1894] A. C. 399.

(*s*) *Trevor v. Whitworth*, *supra*; and see *British and American Trustee and Finance Corporation v. Couper*, *supra*; compare *Hope v. International Financial Society* (1876), 4 Ch. D. 327, C. A.; *Re St James's Bank, Colville's Case* (1879), 48 L. J. (CH.) 633; *Phosphate of Lime Co. v. Green* (1871), L. R. 7 C. P. 43.

(*t*) See the observations in *Bellerby v. Rowland and Marwood's Steamship Co., Ltd.*, *supra*, at p. 29, on *Eichbaum v. City of Chicago Grain Elevators, Ltd.*, [1891] 3 Ch. 459.

(*a*) *Re Midland Railway Carriage and Wagon Co.* (1907), 23 T. L. R. 661.

Capital issued by a company registered under the Companies Act, 1844 (b), on the terms that it shall be returned to the shareholders, and which has been so returned, may, where the company has been subsequently registered with limited liability, and has the power to reduce under its articles, be cancelled with the confirmation of the court (c).

SECT. 7.
Capital.

Capital
already
received.

172. Reduction of capital can only be effected in accordance with the Act of 1908 (d). Where the reduction does not involve the diminution of liability on any shares or the return of paid-up capital to any shareholder, the only questions for the court are (1) whether confirmation should be refused out of regard to the interest of those members of the public who may be induced to take shares; and (2) whether the proposed reduction is fair and equitable as between the different classes of shareholders (e).

Questions
for the court.

Speaking generally, a reduction of capital need not be spread equally or rateably over all the shares of the company (f). If there is nothing unfair or inequitable in the transaction, the shares of one or more shareholders may be extinguished without affecting other shares of the same or a different class (g), although a

(b) 7 & 8 Vict. c. 110; see p. 25, ante.

(c) *Re Midland Railway Carriage and Wagon Co.* (1907), 23 T. L. R. 661. For the mode in which members of companies registered under the Companies Act, 1844 (7 & 8 Vict. c. 110), could terminate their membership, see *Spackman v. Evans* (1868), L. R. 3 H. L. 171; *Evans v. Smallcombe* (1868), L. R. 3 H. L. 249; *Houldsworth v. Evans* (1868), L. R. 3 H. L. 263. Companies which under their deeds of settlement had power to reduce capital lost that power by registering as limited companies under the Companies Act, 1862 (25 & 26 Vict. c. 89) (*Droitwich Salt Co. v. Curzon* (1867), L. R. 3 Exch. 35).

(d) *Hope v. International Financial Society* (1876), 4 Ch. D. 327, C. A.; *Trevor v. Whitworth* (1887), 12 App. Cas. 409; *Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co.* (1875), 1 Ch. D. 682; and see *Bannatyne v. Direct Spanish Telegraph Co.* (1886), 34 Ch. D. 287, C. A. A company cannot therefore bind itself by contract not to exercise its statutory power to reduce its capital to the prejudice of any particular class of shareholders. Compare *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, C. A.; *Punt v. Symons & Co., Ltd.*, [1903] 2 Ch. 506; *Re Peveril Gold Mines, Ltd.*, [1898] 1 Ch. 122, C. A.

(e) *Poole v. National Bank of China, Ltd.*, [1907] A. C. 229, 239.

(f) *Re Quebrada Rail., Land and Copper Co.* (1889), 40 Ch. D. 363; *Re American Pastoral Co.*, [1890] W. N. 62; *Re Gatling Gun, Ltd.* (1890), 43 Ch. D. 628; *Re Agricultural Hotel Co.*, [1891] 1 Ch. 396; *Re Dido Pier Co.*, [1891] 2 Ch. 354; *Re Pinkney & Sons Steamship Co.*, [1892] 3 Ch. 125; *Re Newbery-Vautin (Patents) Gold Extraction Co.*, [1892] 3 Ch. 127, n.; *Re Floating Dock Co. of St. Thomas, Ltd.*, [1895] 1 Ch. 691; *Re London and New York Investment Corporation*, [1895] 2 Ch. 860 (founders' and preference shares); *Re Hyderabad (Deccan) Co., Ltd.* (1896), 75 L. T. 23. A rateable reduction may work injustice; see *Re Credit Assurance and Guarantee Corporation, Ltd.*, [1902] 2 Ch. 601, C. A.

(g) *British and American Trustee and Finance Corporation v. Couper*, [1894] A. C. 399, 406, 415, 417; *Re National Dwellings Society, Ltd.* (1898), 78 L. T. 144; *Bannatyne v. Direct Spanish Telegraph Co.* supra; *Re Direct Spanish Telegraph Co.* (1886), 34 Ch. D. 307; compare *Re Australian Estates and Mortgage Co., Ltd.*, [1910] 1 Ch. 414; *Re Hoare & Co., Ltd. and Reduced*, [1910] W. N. 87. The decision that the power to confirm a reduction of capital by affecting only some of the shares is legal (*Re Gatling Gun, Ltd.*, supra), has been approved by the House of Lords in *British and American Trustee and Finance Corporation v. Couper*, supra, where the reduction involved the cancellation of the shares of all the American shareholders, who were to take over the American investments of the company in consideration, the English shareholders, or rather the

**SECT. 7.
Capital.**

Reduction
where shares
of different
classes.

Proving loss
of capital.

reduction scheme which does not provide for uniform treatment of shareholders whose rights are similar is narrowly scrutinised (*h*).

In the case of a reduction of capital lost or unrepresented by available assets (*i*), the reduction should, *prima facie*, be effected as between preference shares having a priority as to return of capital in winding up, and shares deferred in this respect, at the expense of the latter (*k*). But a reduction is not necessarily made on this basis where as part of the scheme, the preference shareholders, under a power in the articles, consent to a modification of their rights as to capital (*l*). All round reductions are also confirmed where the preference shares only confer a priority as to dividends (*m*).

The fact that losses are, in case of winding up, to be borne by members in proportion to the amounts paid up on their shares does not require the court to apply the same principle on a reduction as between shares of the same class with different amounts paid up thereon (*n*).

It is not the fact that capital is lost or unrepresented by available assets which gives jurisdiction, and when the public is not concerned it is immaterial that the reduction is not exactly commensurate with the loss or deficiency of assets, any reduction beyond the loss by the company being within the general words of the Act (*o*).

company of which the English were the only shareholders, retaining the English assets. The case has been followed in numerous unreported decisions. In *Re Bowman, Thompson & Co.* (COZENS-HARDY, J., June 24, 1889), the shares of founders were cancelled in consideration of a purchase price far exceeding their nominal values, paid out of reserve profits. In *Re Knowles, Ltd.* (NEVILLE, J., 1908), a firm which had amalgamated with two companies on the terms that they should receive paid-up capital for the assets which they brought in on desiring to go out, were allowed to surrender their shares on the terms that the works and other assets which they had brought in should be given back to them. And in *Re Hamlyn Brothers, Ltd.* (WARRINGTON, J., December, 1908), a reduction by cancelling the paid-up shares of a director was confirmed on his being released from a debt to the company of a smaller amount.

(*h*) *Poole v. National Bank of China, Ltd.*, [1907] A. C. 229; and see the cases cited in the preceding note.

(*i*) Capital properly expended in preliminary expenses is not such capital (*Re Abstainers and General Insurance Co.*, [1891] 2 Ch. 124).

(*k*) *Re Floating Dock Co. of St. Thomas, Ltd.*, [1895] 1 Ch. 691; *Re Agricultural Hotel Co.*, [1891] 1 Ch. 396; *Re London and New York Investment Corporation*, [1895] 2 Ch. 860.

(*l*) *Re Welsbach Incandescent Gas Light Co., Ltd.*, [1904] 1 Ch. 87, C. A.

(*m*) *Bannatyne v. Direct Spanish Telegraph Co.* (1886), 34 Ch. D. 287, C. A.; *Re Barrow Haematite Steel Co.* (1888), 39 Ch. D. 582; and see *Re Quebrada Rail., Land and Copper Co.* (1889), 40 Ch. D. 363; *Re Union Plate Glass Co.* (1889), 42 Ch. D. 513.

(*n*) *Re Credit Assurance and Guarantee Corporation, Ltd.*, [1902] 2 Ch. 601, C. A.

(*o*) *Poole v. National Bank of China, Ltd.*, *supra*, with which compare, as to applying reserve funds in or towards wiping out losses of capital, *Re Hoare & Co., Ltd. and Reduced*, [1904] 2 Ch. 208, C. A.; *Re Rowland and Marwood's Steamship Co., Ltd. and Reduced* (1906), 51 Sol. Jo. 131; see also *Re Barrow Haematite Steel Co.*, [1901] 2 Ch. 746, C. A., observed upon in *Poole v. National Bank of China, Ltd.*, *supra*, at p. 238. As to reducing the nominal amount of shares issued as fully paid on a division of reserve fund, see *Re Eastern and Australian Steamship Co.*, [1893] W. N. 31. In practice the court requires proof of the loss. If the amount of capital to be written off as lost is more than the amount of proved loss, the court may, and probably will, direct an inquiry as to creditors. It has been held that it is unnecessary to prove that capital has

173. The court will not confirm a reduction by the surrender of paid-up deferred shares the holders of which are to receive a larger amount in paid-up ordinary shares, by which amount the capital is to be increased (*p*); or a reduction scheme to wipe out the deficiency caused by an illegal issue of shares at a discount (*q*); or a scheme for distributing assets amongst the shareholders (*r*). Nor, where shares are all partly paid-up to the same amount per share, will it confirm a scheme treating them as being fewer in number but all paid up, the aggregate of paid-up capital being the same as before; for this is not reduction, but re-allocation (*a*).

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Reductions which the court will not confirm.

174. A return of capital in excess of the wants of the company will be sanctioned, although a part of the portion returned is to be immediately borrowed by the company from the shareholders to whom it is returned on the security of debentures of the company (*b*), and although the return is made upon the footing that it may be called up again (*c*). The actual return of the excess capital should not be made until after the order confirming the reduction and approving the minute has been made (*d*). If the capital is not returned, the right of the shareholders to claim it will be barred after twenty years from the date of the notice of the order confirming the reduction (*e*). Payment to preference shareholders of the amount of their shares out of a sinking fund formed for the purpose out of income does not involve payment to them of any "paid-up capital" (*f*).

Return of capital.

175. The court will confirm a reduction, although the voting powers of the members or their priorities are affected thereby or the scheme involves the extinction of liability in respect of arrears of preference dividends (*g*).

Alteration of members' rights.

176. No reduction can take place unless authority to reduce is given by the articles, and an authority to do so which is given by

Power to reduce must be given by articles.

been lost, or is unrepresented by available assets (*Re Louisiana and Southern States Real Estate and Mortgage Co.*, [1909] 2 Ch. 552). But the real effect of *Poole v. National Bank of China, Ltd.*, [1907] A. C. 229, is probably that the courts need not be so strict as formerly in requiring evidence that the capital is lost or unrepresented by available assets.

(*p*) *Re Development Co. of Central and West Africa*, [1902] 1 Ch. 547.

(*q*) *Re New Chile Gold Mining Co.* (1888), 38 Ch. D. 475.

(*r*) *Re Wallasey Brick and Land Co.*, [1894] W. N. 20.

(*a*) *Re Walker Steam Trawl Fishing Co., Ltd.*, [1908] S. C. 123.

(*b*) *Re Nixon's Navigation Co.*, [1897] 1 Ch. 872; *Re Lamson Store Service Co.*, *ibid.*, 875, n.

(*c*) *Re Fore Street Warehouse Co.*, [1888] W. N. 155; *Re Watson, Walker & Quickfall, Ltd.*, [1898] W. N. 69.

(*d*) *Re Lees Brook Spinning Co.*, [1906] 2 Ch. 394; *Re Anglo-Italian Bank, Ltd. and Reduced*, [1906] W. N. 202; *General Industrials Development Syndicate, Ltd.*, [1907] W. N. 23, not following *Re Calgary and Edmonton Land Co.*, [1906] 1 Ch. 141.

(*e*) *Re Artisans' Land and Mortgage Corporation*, [1904] 1 Ch. 796; and see *Re Phoebe Gold Mining Co.*, [1900] W. N. 182.

(*f*) *Re Dido Pier Co.*, [1891] 2 Ch. 354.

(*g*) *Re Colmer (James), Ltd.*, [1897] 1 Ch. 524; *Re Allsopp & Sons, Ltd.* (1903), 51 W. R. 644, O. A.; *Re National Dwellings Society, Ltd.* (1898) 78 L. T. 144; *Re Oban and Aultmore-Glenlivet Distilleries, Ltd.* (1903), 5 F. (Ct. of Sess.) 1141; and see *Re Continental Union Gas Co.* (1891), 7 T. L. R. 476; *Re Hoare & Co., Ltd. and Reduced*, [1910] W. N. 87, where a scheme under Companies (Consolidation) Act, 1908 (8 Edw. 7 c. 69), s. 120, was at the same time approved.

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the memorandum of association is of no avail (*h*). The power may be given by the articles as originally framed or as altered by special resolution (*i*). If the company is governed by Table A, the provisions of that table authorise the company to reduce its capital (*k*). If the company has not power under its articles, whether by Table A or otherwise, to reduce its capital, a special resolution must be passed altering them by authorising reduction of capital, and subsequently another special resolution must be passed for reduction. The two resolutions cannot be passed and confirmed concurrently, but the company may pass the second special resolution at the general meeting at which the first special resolution is confirmed, confirmation being obtained subsequently (*l*).

Alteration
of company's
name.

177. Where the reduction involves either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, the company must, on and from the confirmation of the special resolution at the second meeting (*m*), add to its name, until such date as the court may fix, the words "and Reduced" as the last words in its name, and those words are until that date deemed part of the name of the company (*n*).

"And
Reduced."

Where, however, the reduction does not involve any such diminution of liability or any such payment, the words "and Reduced" are added to the company's name on the presentation of the petition for confirming the reduction; but the court may, if it thinks expedient, dispense altogether with the addition of the words (*o*).

(*b*) *Application to the Court.*

Procedure.

178. When a company has passed and confirmed a resolution for reducing share capital it may apply by petition to the court for an order confirming the reduction (*p*). Application must be made to the court having jurisdiction to wind up the company (*q*). In

(*h*) *Re Dexine Patent Packing and Rubber Co.* (1903), 88 L. T. 791.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285.

(*k*) *Ibid.*, Table A, clause 44.

(*l*) *Re Patent Invert Sugar Co.* (1885), 31 Ch. D. 166, C. A.; *Re West India and Pacific Steamship Co.* (1868), 9 Ch. App. 11, n.; *Re Crossley (John) & Sons*, [1892] W. N. 55; and compare *Taylor v. Pilsen Joel and General Electric Light Co.* (1884), 27 Ch. D. 268.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 69.

(*n*) *Ibid.*, s. 48 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 10]. In other cases the words need not be added until the petition is presented.

(*o*) *Ibid.*, s. 48 [Companies Act, 1877 (40 & 41 Vict. c. 26), s. 4]; see p. 115, *post*.

(*p*) *Ibid.*, s. 47 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 11]. Rules have been made governing the procedure on applications for confirmation by the court of the reduction of capital; see R. S. C., May 3rd, 1909, [1909] W. N., Part II., 183. The Rules of the Supreme Court for the time being in force and the general practice of that court, including procedure and practice in chambers, apply as regards all proceedings in relation to the confirmation of any reduction of capital by the court, so far as practicable, except if and so far as by the Act of 1908 or the Order of 1909 otherwise provided. In particular, if and when the court is for the time being a judge of the Chancery Division, R. S. C., Ord. 5, r. 9 (a), applies as to all such proceedings, as being business assigned within the meaning of that rule (R. S. C., 1909, r. 4). The rule referred to provides for assigning proceedings by rotation to a particular judge. As to the fees payable to solicitors, and fees of court in reduction cases, see *ibid.*, rr. 24, 25.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 12]; see p. 392, *post*. "The court" includes any judge of the High Court having jurisdiction for the time being to confirm the

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cases in the High Court of Justice, the jurisdiction may be exercised either by the judge to whom the winding-up jurisdiction of the High Court is from time to time assigned or by any other judge of the Chancery Division (r).

The petition and all notices, affidavits, and other proceedings under it must be intitled in the matter of the company, and in the matter of the Companies (Consolidation) Act, 1908 (s). Even if the petition is presented to the winding-up judge, it need not be intitled "Companies Winding Up" (t).

The petition must be supported by affidavits, and a copy of the memorandum and articles of association, and of the original minute book of the proceedings of the general meetings of the company, must be exhibited (a).

179. When the petition has been presented, an application must, in every case, be made *ex parte*, by summons in chambers to the judge (b), for directions as to the proceedings to be taken

Title of
proceedings.

Evidence.

Summons
for directions

reduction of the capital of companies (R. S. C., 1909, r. 3). Where, by reason of the paid-up capital being under £10,000, the jurisdiction is in a county court outside the district of the London Bankruptcy Court, the High Court will sometimes make the order confirming the reduction; but it does not follow that this will always be done; see *Re Portsmouth and District Vacuum Cleaner Co.*, [1908] W. N. 203.

(r) *Re Ocean Queen Steamship Co.*, [1893] 2 Ch. 666; *Re Islington and General Electric Supply, Ltd.*, [1892] W. N. 81; and see R. S. C., 1909, r. 16.

(s) R. S. C., 1909, r. 5. The name of the company must come first (*Re Woolley Coal Co.*, [1891] W. N. 19).

(t) *Re Aluminium Co.*, [1894] W. N. 6.

(a) *Re Omnium Investment Co.*, [1895] 2 Ch. 127. Minutes of the meetings duly signed are *prima facie* evidence (*Re Leicester Mortgage Co., Ltd.*, [1894] W. N. 108, 116). Where there was a liability to pay in cash for shares issued for some other consideration as fully paid, unless a contract had been filed under s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), and the company had issued paid-up shares for a consideration other than cash, the court required the petitioning company to prove that such shares were issued in accordance with a contract duly filed (*Re Omnium Investment Co.*, *supra*; *Re New Chile Gold Mining Co.* (1888), 38 Ch. D. 475). S. 33 of the Companies Act, 1900 (63 & 64 Vict. c. 48), repealed the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25, and enacted that no proceedings under that section should be commenced after December 31, 1900; but that does not make the shares fully paid, and a shareholder may wish to have the failure to file remedied, so as to be able, as a fully-paid shareholder, to claim a share of surplus assets, or exercise voting or other powers; see *Re Brutton and Burney, Ltd.*, *Re Burney's New Cross Brewery Co., Ltd.*, [1901] 1 Ch. 637, C. A. The Companies Act, 1898 (61 & 62 Vict. c. 26), which empowered the court to relieve where s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), had not been complied with, was repealed by s. 286 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and it seems clear that the Interpretation Act, 1889 (52 & 53 Vict. c. 63), has preserved the power to give relief under the Act of 1898; see *Re Herts and Essex Waterworks Co., Ltd.*, [1909] W. N. 48. Where, after that date, shares are allotted for a consideration other than cash, failure to file the written contract required by s. 88 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), or the Companies Act, 1900 (63 & 64 Vict. c. 48), s. 7 (1), does not prevent the shares from being paid up, and there is no reason why the court should require evidence that the statutory provisions have been complied with.

(b) "Judge" means any judge of the High Court having for the time being jurisdiction to confirm the reduction of the capital of companies, and includes any registrar, master, or other officer exercising the powers of any such judge (R. S. C., 1909, r. 3).

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preliminary to the hearing of the petition or otherwise with reference thereto (c). Upon the hearing of the summons, or upon any adjourned hearing or any subsequent application, the judge may make such order or orders and give such directions as he may think fit as to all the proceedings to be taken on and with reference to the petition, and more particularly with respect to the following matters, that is to say: (1) the publication of notice of the presentation of the petition; (2) the fixing of any date until which the company is to add to its name the words "and Reduced," or (in cases within the above provisions of the Act) the dispensing altogether with the use of those words; and (3), where creditors are inquired after, the proceedings below referred to (d).

Setting
down and
advertising
petition.

Where there is no diminution of liability of, or return to, shareholders, there is usually no inquiry as to creditors; but the petition is ordered to be set down as for an early date and advertised (e). *Primâ facie*, even in such cases the petition ought to be advertised (f); but the judge has a discretion to dispense with advertisement if he is satisfied that the interests of creditors cannot be affected by what is proposed (g).

Notice of the presentation of the petition must be published at such times and in such newspapers as the judge directs (h).

(c) *Consent of Creditors.*

Where
creditors
may object.

180. Where the proposed reduction involves diminution of liability on unpaid share capital or payment of any paid-up share capital to any shareholder (i), and in any other case if the court so directs, every creditor of the company who at the date fixed by the court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be

(c) R. S. C., 1909, r. 6 (1).

(d) *Ibid.*, r. 6 (2). On an application to dispense with "and Reduced" an affidavit is required (*Re Maxim Weston Electric Co., Ltd.* (1888), 59 L. T. 722). Leave to dispense with the words was given in *Re Langdale Chemical Manure Co.* (1878), 26 W. R. 434; *Re River Plate Fresh Meat Co.* (1885), 33 W. R. 319; *Re London and City Land and Building Co.*, [1885] W. N. 137; *Re New Quebrada Rail., Land and Copper Co.*, [1888] W. N. 233; *Re Pelsall Coal and Iron Co., Ltd.*, [1890] W. N. 222. It was refused in *Re Municipal Trusts Co.* (1886), 35 W. R. 120, and is now seldom granted except in the case of companies carrying on business in foreign countries, where the addition of the words "and Reduced" would not be understood, and would probably give rise to serious difficulties; see *Re Australian Estates and Mortgage Co., Ltd.*, [1910] 1 Ch. 414. If the special resolution for reduction is abandoned before confirmation, application should be made for leave to discontinue the use of the words (*Re Mordey, Carney & Co.* (1885), 53 L. T. 736, C. A.); see further, p. 114, *post*.

(e) *Re Dido Pier Co.*, [1891] 2 Ch. 354.

(f) *Re Consolidated Telephone Co.* (1885), 52 L. T. 575.

(g) *Re Plaskynaston Tube Co.* (1883), 23 Ch. D. 542; *Re Tambracherry Estates Co.* (1885), 29 Ch. D. 683, C. A.; *Re London and City Land and Building Co.*, *supra*, and other cases. Leave to dispense with the advertisement was refused in *Re People's Café Co.*, [1885] W. N. 226.

(h) R. S. C., 1909, r. 7; and see Form 2.

(i) *Re Dido Pier Co.*, *supra*. Cancelling paid-up shares on the terms of the amount of paid-up capital being paid out of a reserve consisting of profits is not payment of any paid-up share capital.

admissible in proof against the company is entitled to object to the reduction (j).

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181. If there are creditors entitled to object, the court must settle a list of them, and for that purpose must ascertain, as far as possible without requiring an application from any creditor, the names of the creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered, or are to be excluded from the right of objecting to the reduction (k). In such cases directions are given as to the proceedings to be taken for settling the list of creditors entitled to object, fixing the date with reference to which the list is to be made out, and as to all other necessary steps in the matter of the petition (l). The first insertion of the notice of presentation of the petition and fixing the date with reference to which the list of creditors is to be made out must be made, unless for special reasons, not less than one calendar month before the date so fixed (m).

Settling list
of creditors.

The company must then file in the Central Office an affidavit by some officer of the company verifying a list containing, so far as possible, the names and addresses of such creditors at the date fixed, and the amounts due to them respectively, or in the case of any debt payable on a contingency or any claim admissible to proof in a winding up, the value of such debt or claim, and must leave the list and an office copy of the affidavit at the judge's chambers (n).

Affidavit
verifying list.

(j) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 49 (1) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 13; Companies Act, 1877 (40 & 41 Vict. c. 26), s. 4]; see *Re Eastern and Australian Steamship Co., Ltd. and Reduced* (1893), 68 L. T. 321; as to creditors entitled to prove in winding up, see pp. 508 *et seq.*, *post*.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 49 (2) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 13; Companies Act, 1877 (40 & 41 Vict. c. 26), s. 4]. The list must be settled even if there is evidence that there are no creditors (*Re Lamson Store Service Co., Ltd., Re National Reversionary Investment Co., Ltd.*, [1895] 2 Ch. 726).

(l) Whether expressly mentioned in the Rules of 1909 or not (R. S. C., 1909, r. 6 (2) [Order of 1868, r. 4]).

(m) *Ibid.*, r. 6 (3) [Order of 1868, r. 5]. There is a prescribed form of first order on a summons for directions; see *ibid.*, Form 1. This and other forms may be used with such variations as circumstances require.

(n) *Ibid.*, r. 8 [Order of 1868, r. 6]. As to dispensing with names and addresses of the holders of bearer debentures, see *Re General Bank for the Promotion of Agricultural and Public Works* (1869), 17 W. R. 304; compare *Re Crédit Foncier of England* (1871), L. R. 11 Eq. 356; *Re Patent Ventilating Grinary Co.* (1879), 12 Ch. D. 254. As to the form of affidavit, see R. S. C., 1909, r. 9 [Order of 1868, r. 7], and Form 3. Any director, manager, or officer of the company wilfully concealing the name of any creditor entitled to object to the reduction, or wilfully misrepresenting the nature or amount of the debt or claim of any creditor, and any director or manager aiding or abetting in or being privy to any such concealment or misrepresentation as aforesaid, is guilty of a misdemeanour (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 54 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 19]). Copies of the list containing the names and addresses of the creditors, and the total amount due to them (including the value of any debts or claims so estimated), but omitting the amounts due to them respectively, or (as the judge thinks fit) complete copies of such list, must be kept at the registered office of the company and at the offices of their solicitors and London agents (if any), and any person desirous of inspecting the same may at any time during the ordinary hours of business

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Capital.

Notices to
creditors.

Publishing
notice of
lists of
creditors.

Affidavit
verifying list.

Notice to
creditor to
prove.

Dispensing
with
creditor's
consent.

182. The company must, within seven days after the filing of the affidavit, or such further or other time as the judge allows, send by post to each creditor in the list a notice stating the amount of the proposed reduction of capital, and the amount or estimated value of the debt for which he is entered in the list, and the time within which, if he claims to be a creditor for a larger amount, he must send in particulars of his claim, and the name and address of his solicitor (if any) to the solicitor of the company (o).

Notice of the list of creditors must be published as the judge directs, and must state the amount of the proposed reduction, the places where the list of creditors may be inspected, and the time within which creditors not entered on the list, and desirous of being entered therein, must send in particulars of their claims (p).

The company must, within such time as the judge directs, file in the Central Office an affidavit by the person to whom the particulars of claims are required to be sent, stating the result of the notices, and verifying a list of the persons (if any) who have sent in the particulars of their claims and the amounts of such claims, and some officer of the company must join in such affidavit, and must in the list distinguish which (if any) of the claims are wholly, or as to any and what part thereof, admitted or disputed by the company, and the list and an office copy of the affidavit must be left at the judge's chambers (q).

183. If any claim, the particulars of which are so sent in, is not admitted by the company at its full amount, then, unless the company is willing to appropriate in such manner as the judge directs the full amount of such claim, the company must, if so directed, send to the creditor a notice requiring him to come in and prove his claim, so far as not admitted, by a day, not less than four clear days after such notice (r).

Where a creditor entered on the list whose claim is not discharged or determined does not consent (s) to the reduction, the court may dispense with his consent, on the company securing payment of his claim by appropriating, (1) if the company admits the full amount of his claim, or though not admitting it is willing to

inspect and take extracts from the same on payment of one shilling (R. S. C., 1909, r. 10 [Order of March 2, 1869]).

(o) *Ibid.*, r. 11 [Order of 1868, r. 9]; see *ibid.*, Form 4.

(p) *Ibid.*, r. 12 [Order of 1868, r. 10]; see *ibid.*, Form 5.

(q) *Ibid.*, r. 13 [Order of 1868, s. 11]; see *ibid.*, Form 6.

(r) *Ibid.*, r. 14 [Order of 1868, r. 12]; see *ibid.*, Form 7, which states that in default of his complying with the directions, the creditor will be precluded from objecting to the proposed reduction, or, as the case may be, that he will, in all proceedings relative to the proposed reduction, be treated as a creditor for such amount only as is set against his name in the list. For the mode in which the notice is to be sent, see *supra*.

(s) The consent of any creditor, whether in respect of a debt due or presently due or a debt payable on a contingency or a claim admissible to proof in a winding up of the company, may be evidenced in any manner which the judge thinks reasonably sufficient having regard both to the amount of his debt or claim and all the circumstances of the case (*ibid.*, r. 17). R. 17 of the Order of 1868 required a signed consent. Some evidence of consent is necessary (*Re Patent Ventilating Granary Co.* (1871), 12 Ch. D. 254; *Re Crédit Foncier of England* (1871), L. R. 11 Eq. 356).

provide for it, the full amount; or (2) if the company does not admit or is not willing to provide for the full amount of the claim, or if the amount is contingent or not ascertained, an amount fixed by the court as if the company were being wound up (*t*).

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Such creditors as come in to prove their debts or claims in pursuance of a notice that a debt or claim is not fully admitted are allowed their costs of proof against the company, and are answerable for costs, in the same manner as in the case of persons coming in to prove debts under an administration judgment (*a*).

Costs of
creditors.

184. The result of the settlement of the list of creditors must be stated in a certificate by the master in the case of an application to the Chancery Division or by the registrar in the case of an application to the judge in companies winding up (*b*). The certificate must, amongst other things, show which of the creditors have consented to the proposed reduction, and the total amount of the debts due to them, and the total amount of the debts or claims the payment of which has been secured in the prescribed manner (*c*), and the persons to or by whom the same are due or claimed; but it is not necessary to show in such certificate the several amounts of the debts or claims of any persons who have consented to the proposed reduction or the payment of whose debts or claims has been secured (*d*).

Certificate as
to creditors.

185. In any case in which there is an inquiry as to creditors, the petition is not to be heard until the expiration of at least eight clear days from the filing of the certificate as to creditors (*e*).

Date of
hearing.

Before the hearing of the petition, notices stating the day on which the same is appointed to be heard must be published at such times and in such newspapers as the judge directs (*f*).

Advertising
hearing.

Any unsatisfied or unsecured creditor on the list who has not consented may, upon giving two days' notice to the solicitor of the company, appear to oppose the petition (*g*).

Notice of
opposition.

The court may give directions as to securing the payment of the claims of any creditors who do not consent, and the further hearing of the petition may be adjourned for the purpose of allowing any steps to be taken with reference to securing the payment of such claims (*h*).

Securing
creditors'
claims.

(*d*) *The Order confirming Reduction.*

186. The court may make an order confirming the reduction on such terms and conditions as it thinks fit, if it is satisfied in cases

Order
confirming
reduction.

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 49 (3) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 14]. The landlord of a company is entitled to security for future rent (*Re Telegraph Construction Co.* (1870), L. R. 10 Eq. 384).

(*a*) R. S. C., 1909, r. 15 [Order of 1868, r. 13].

(*b*) *Ibid.*, r. 16 [Order of 1868, r. 14].

(*c*) See *supra*.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 49 (3).

(*e*) R. S. C., 1909, r. 16 [Order of 1868, r. 14].

(*f*) *Ibid.*, r. 18 [Order of 1868, rr. 3, 15].

(*g*) *Ibid.*, r. 19 [Order of 1868, r. 16]; see *ibid.*, Form 8.

(*h*) *Ibid.*, r. 20 [Order of 1868, r. 17, amended]. As to the costs of opposing creditors, see *ibid.*, r. 21 [Order of 1868, r. 18].

SECT. 7.
Capital.

**Terms
imposed.**

where creditors are advertised for, with respect to every creditor entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged, determined, or secured (*i*); but in other cases, without regard to creditors, except so far as their objections at the hearing of the petition may be considered reasonable (*j*).

The court's power to confirm is discretionary, and any conditions may be imposed (*k*). Thus, it may require an alteration in the voting powers of different classes of shareholders to be made (*l*), or evidence to be produced that the company's financial position has not altered since the master's certificate was made (*m*), or that there are no fresh creditors (*n*), or money to be set aside to pay future rent (*o*). It may also require the company to publish as it directs the reasons for reduction, or such other information in regard thereto as may be thought expedient with a view to give proper information to the public, and, if thought fit, the causes which led to the reduction (*p*).

**Approval of
minute.**

187. The court must approve of a minute showing with respect to the share capital of the company, as altered by the order, the amount of such capital, the number of shares in which it is to be divided, the amount of each share, and the amount (if any) at the date of the registration of the minute deemed to be paid up on each share (*q*). Embodying the minute in the confirmatory order is a sufficient approval (*r*).

**Advertising
order.**

188. In every case in which the court confirms a reduction, the order must direct in what manner, and in what newspapers, and at what times, notice of the registration of the order and minute is to be published; and (unless the court has already dispensed altogether with the addition of the words "and Reduced" or at the hearing dispenses with any further use thereof) must fix the date until

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 50 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 11]; and see note (*l*), *infra*.

(*j*) R. S. C., 1909, r. 22 [Order of 1868, r. 19].

(*k*) *British and American Trustee and Finance Corporation v. Couper*, [1894] A. C. 399; *Re Fore-Street Warehouse Co.* (1888), 59 L. T. 214; *Re Watson, Walker, and Quickfall, Ltd.*, [1898] W. N. 69; and compare *Poole v. National Bank of China, Ltd.*, [1907] A. C. 229, 240.

(*l*) *Re Newbery-Vautin (Patents) Gold Extraction Co., Ltd.*, [1892] 3 Ch. 127, n.; *Re Pinkney & Sons Steamship Co.*, [1892] 3 Ch. 125.

(*m*) *Re Safety Oil Co.*, [1892] W. N. 133.

(*n*) *Ibid.*; *Re Watson, Walker and Quickfall, Ltd.*, *supra*.

(*o*) *Re Telegraph Construction Co.* (1870), L. R. 10 Eq. 384.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 55 [Companies Act, 1877 (40 & 41 Vict. c. 26), s. 4]; *Re Llynvi Tondy and Ogmores Coal and Iron Co.* (1877), 26 W. R. 55.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 51 (1) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 15]. The modern practice is also to require the minute to state the amounts from and to which the capital is reduced, and the arithmetical numbering of the shares remaining after the reduction; as to forms of minutes, see *Re West Cumberland Iron and Steel Co.*, [1888] W. N. 54; *Re Britannia Mills Co., Huddersfield*, [1888] W. N. 103; *Re International Conversion Trust, Ltd.*, [1892] W. N. 100; *Re Chelmsford Land Co., Ltd.*, [1904] W. N. 106; *Re Solway Steamship Co.* (1889), 61 L. T. 659.

(*r*) *Re Sharp, Stewart & Co.* (1867), L. R. 5 Eq. 155, 159. This is now the usual practice.

which the words "and Reduced" are to be deemed part of the name of the company (s).

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Capital.

The court, generally, requires the words "and Reduced" to be used for one month from the date of the confirmation order, and does not at once dispense with the use of the words (t). But any further use of the words after the confirmation is frequently dispensed with in the case of a company carrying on business abroad (a). A dispensation with the use of the words may be given on conditions (b).

Use of words
"and
Reduced."

189. The registrar, on production of the order confirming the reduction and delivery of a copy of the order and of the minute approved by the court, must register the order and minute (c). On the registration, and not before, the resolution for reduction as confirmed by the registered order takes effect (d).

Registration
of order
and minute.

The registrar's certificate of the registration of the order and minute is conclusive evidence that all statutory requirements with respect to the reduction have been complied with, and that the share capital is as stated in the minute (e).

Registrar's
certificate.

Even if the interval between the two meetings to pass and confirm the special resolution for reduction has been less than the fourteen clear days required by the Act, or the company has no power under its articles to reduce its capital, the defect is cured by the certificate (f).

190. The minute, when registered, is deemed to be substituted for the corresponding part of the memorandum of association, and is valid and alterable as if it had been originally contained therein (g).

Effect of
registered
minute.

(s) R. S. C., 1909, r. 23 [Order of 1868, r. 20]; and see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 51 (3). Publication of notice of registration cannot be dispensed with (*Re London Steam-Boat Co.*, [1883] W. N. 123; *Re Vivian (H. H.) & Co.*, [1886] W. N. 32); at any rate in the absence of special circumstances (*Re Canada North-Western Land Co.*, [1885] W. N. 61).

(t) *Re Walker and Lomax, Ltd.*, [1888] W. N. 26; *Re Pinkney & Sons Steamship Co.*, [1892] 3 Ch. 125. Three months was at one time considered the proper period (*Re Sharp, Stewart & Co.* (1867), L. R. 5 Eq. 155; *Re Estate Co., Ltd. and Reduced* (1870), 5 Ch. App. 407). Later on fourteen days were deemed sufficient (*Re Crédit Foncier of England* (1871), L. R. 11 Eq. 357; *Re Patent Ventilating Granary Co.* (1879), 12 Ch. D. 254).

(a) *Re Sumatra Tobacco Plantations Co.*, [1898] W. N. 80; *Re Australian Estates and Mortgage Co., Ltd.*, [1910] 1 Ch. 414. In one case BUCKLEY, J., only shortened the time (*Re Monmouthshire Steel and Tinplate Co., Ltd.*, [1906] W. N. 128).

(b) *Re Lawrence and Bullen, Ltd.*, [1901] W. N. 158.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 51 (1) [Companies Act, 1867 (30 & 31 Vict. c. 181), ss. 9, 15; Companies Act, 1877 (40 & 41 Vict. c. 26), s. 4]. Notice of the registration must be published in such manner as the court has directed (*ibid.*, s. 51 (3)).

(d) *Ibid.*, s. 51 (2) [Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 9, 15; Companies Act, 1877 (40 & 41 Vict. c. 26), s. 4].

(e) *Ibid.*, s. 51 (4) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 15].

(f) *Ladies' Dress Association v. Pulbrook*, [1900] 2 Q. B. 376, C. A.; *Re Walker and Smith, Ltd.* (1903), 72 L. J. (CH.) 572. The conclusiveness of the minute renders it unnecessary to produce evidence, on future reductions, as to the history of the company's capital before the previous reduction.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 52 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 16].

SECT. 7.
Capital.

It must be embodied in every copy of the memorandum issued after its registration under a penalty imposed in default on the company and on every director and manager knowing and wilfully authorising or permitting the default (*h*).

Liability of
members
after
reduction of
capital.

191. When there has been a reduction of capital a member of the company, past or present, is not liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid, or (as the case may be) the reduced amount (if any) which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute (*i*). Where, however, any creditor, entitled in respect of any debt or claim to object to the reduction, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the statutory provisions with respect to winding up by the court (*j*), to pay the amount of his debt or claim, then (1) every person who was a member of the company at the date of the registration of the order for reduction and minute is liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration; and (2) if the company is wound up, the court, on the application of any such creditor, and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up (*k*). But the above provisions do not affect the rights of the contributories among themselves (*l*).

SUB-SECT. 8.—Reorganisation of Capital.

Reorganisa-
tion of
capital.

192. A company limited by shares may, by special resolution, confirmed by an order of the court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes (*a*). No preference or

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 53 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 16]. The penalty is a fine not exceeding £1 for each copy in respect of which default is made (*ibid.*).

(*i*) *Ibid.*, s. 53 [Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 16, 17; Companies Act, 1907 (7 Edw. 7, c. 50), s. 50, Sched. III.].

(*j*) See p. 396, *post*.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 53 [Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 16, 17; Companies Act, 1907 (7 Edw. 7, c. 50), s. 50, Sched. III.]. As to the effect of a statutory company obtaining a transfer of partly-paid shares, see *Re Sovereign Life Assurance Co.*, [1892] 3 Ch. 279, C. A.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 53 [Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 16, 17; Companies Act, 1907 (7 Edw. 7, c. 50), s. 50, Sched. III.].

(*a*) *Ibid.*, s. 45 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 39]. Before 1907 a company limited by shares could, if authorised so to do by its articles, consolidate its shares and divide them into shares of larger amount, or

special privilege attached to or belonging to any class of shares is, however, to be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed; and every resolution so passed is to bind all shareholders of the class (b).

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Capital.

An office copy of the order of the court confirming the resolution must be filed with the registrar within seven days after the making of the order, or within such further time as the court may allow, and the resolution will not take effect until such a copy has been so filed (c). Filing order.

SUB-SECT. 9.—*Application of Capital.*

193. A company, if authorised by its articles, may accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any of his shares, although no part of that amount has been called up (d). In such a case the articles may provide that the company may on money so advanced, until the same would, but for such advance, become presently payable, pay interest as agreed upon (e). The interest may be paid out of capital (at any rate if so authorised by the articles), provided that the directors make the payment in good faith and in the honest exercise of their discretion (f).

Interest on
advances.

194. Interest on share capital may, subject to certain restrictions, be paid on and out of capital during the construction of works (g).

Interest on
capital.

sub-divide its shares into shares of smaller amount, although the nominal amount of each share was, as required by statute, stated in the memorandum of association. The Act of 1908, by s. 45, provides for (1) a different consolidation, namely, that of shares of different classes, such as, for instance, preference shares, with a cumulative preferential dividend of 5 per cent., and ordinary shares taking the balance of the dividends, so as to put the holders of them on an equal footing as to dividends and otherwise, if both classes pass special resolutions agreeing to the consolidation on equal terms; and (2) a division of the company's shares into shares of different classes. The term "different classes" may imply that there is already a division of the shares into classes, which may be changed; on the other hand, the words "its shares" may refer to the case where the memorandum has, but for *ibid.*, s. 45, irrevocably fixed all the share capital as of one class. The section means that where the rights of shareholders, or different classes of them, are stated in the memorandum of association, they are not to be unalterable as formerly, but may be altered on the conditions of the section being complied with (*Re Australian Estates and Mortgage Co.*, [1910] 1 Ch. 414).

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 45 (1).

(c) *Ibid.*

(d) *Ibid.*, s. 39 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 24]; see p. 162, post.

(e) See *ibid.*, Sched. I., Table A, clause 17.

(f) *Lock v. Queensland Investment and Land Mortgage Co.*, [1896] A. C. 461. The interest is due to the shareholder in the character of a creditor (*ibid.*, at p. 468); see *Dale v. Martin* (1883), 11 L. R. Ir. 371, O. A.; and compare *Re Wood's (A. M.) Ships' Woodite Protection Co., Ltd.* (1890), 62 L. T. 760.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 91 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 9]. As to paying interest out of capital raised by shares during construction, see *Re Alexandra Palace Co.* (1882), 21 Ch. D. 149. Where a company borrowed, on debenture stock, money to construct

SECT. 7.
Capital.

Paying
interest on
capital
during
construction
of works.

Where any shares of a company are issued to raise money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may, if so authorised by its articles or by special resolution, pay interest on so much of that share capital as is for the time being paid up, and may charge the same to capital as part of the cost of such construction, or provision of plant (*h*). But no such payment must be made without the previous sanction of the Board of Trade; and, before sanctioning any such payment, the Board may, at the expense of the company, appoint a person to inquire and report to the Board as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry (*i*). The payment of interest is to be made only for such period as the Board determines (in no case extending beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided); and the rate of interest is in no case to exceed 4 per cent. per annum or such lower rate as may for the time being be prescribed by Order in Council (*k*). The payment of interest does not operate as a reduction of the amount paid up on the shares in respect of which it is paid (*l*). The accounts of the company must show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate (*m*). This provision does not affect any company to which the Indian Railways Act, 1894, as amended by any subsequent enactment, applies (*n*).

Dividends
out of capital.

195. Dividends cannot be paid to shareholders out of capital (*o*) except by way of a return to shareholders which is confirmed by the court as a reduction of capital (*p*), or to the extent of sums, payment of which could have been charged to capital but has been

works it could, even before the Act of 1907, treat the interest on the stock as part of the cost of construction and charge it to capital account during construction (*Hinds v. Buenos Ayres Grand National Tramways Co.*, [1906] 2 Ch. 654); and see *Bardwell v. Sheffield Waterworks Co.* (1872), L. R. 14 Eq. 517. As to payment of interest out of capital on the amount paid up on shares in advance of calls, see p. 117, *ante*.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 91 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 9].

(*i*) *Ibid.*

(*k*) *Ibid.*

(*l*) *Ibid.*

(*m*) *Ibid.*

(*n*) *Ibid.* The expression "Indian railway company" means a company registered under the Companies Acts, 1862 to 1890, or any of them, or under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and formed for the purpose of making and working, or making or working, a railway in India, whether alone or in conjunction with other purposes (Indian Railways Act, 1894 (57 & 58 Vict. c. 12), s. 2; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (1)). The Act of 1894 gave powers to Indian railway companies very similar to those given by s. 91 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

(*o*) See p. 272, *post*.

(*p*) See p. 104, *ante*.

made in the first place out of profits (*q*). Where depreciation in investments has been debited to revenue on the investment rising in value, the appreciation may be credited to revenue (*r*). But earnings by a limited company after the commencement of its liquidation are capital and not income (*s*).

SECT. 7.
Capital.

196. There is no hard-and-fast rule as to what losses can be properly charged to capital and what to income, but it is a matter for business men to determine (*a*). The balance to the credit of profit and loss does not, as between the company and its shareholders, automatically become part of the capital assets because the actual value of those assets has depreciated to an amount equal to or exceeding that balance (*b*).

Losses and gains attributable to capital.

197. A company incorporated under the Act of 1908, or the Acts which it replaces, has not, as many chartered companies have, the power to do with its property all such acts as an ordinary person can do (*c*). Apart from any specific statutory power, therefore, a company cannot employ its funds or assets (whether representing money subscribed in respect of its shares or borrowed money, or what has been purchased with such subscribed or borrowed money) for the purpose of any transactions which do not come within the objects specified in its memorandum of association; and it cannot by its articles of association extend its powers in this respect (*d*), or obtain the power from the unanimous authority of the whole body of its shareholders (*e*). Thus, directors cannot pay themselves or each other for their services, or make presents to themselves out of the company's assets, unless authorised to do so by the instrument regulating the company or by the shareholders at a properly convened meeting; and even at such a meeting such payments can only be authorised out of assets properly divisible amongst the shareholders themselves (*f*). When the company is in winding up a meeting of shareholders cannot authorise the payment of gratuities to officers of the company (*g*). Even before winding up they cannot authorise the application of the company's funds in subscriptions for public objects (*h*). Payments, however, may be made out of the company's funds for matters which are reasonably incidental to or consequential on the

Limits on company's power to deal with its assets.

Mills v. Northern Railway of Buenos Ayres Co. (1870), 5 Ch. App. 621.

Bishop v. Smyrna and Cassaba Rail. Co. (No. 2), [1895] 2 Ch. 596.

Ibid.

Dovey v. Cory, [1901] A. C. 477, 486; see p. 272, *post*.

Bond v. Barrow Hæmatite Steel Co., [1902] 1 Ch. 353, 365.

Wenlock (Baroness) v. River Dee Co. (1883), 36 Ch. D. 675, n., 685, n., C. A.; see p. 68, *ante*.

(*d*) *Trevor v. Whitworth* (1887), 12 App. Cas. 409; *Re Alexandra Palace Co.* (1882), 21 Ch. D. 149; see p. 283, *post*.

(*e*) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653.

(*f*) *Re Newman (George) & Co.*, [1895] 1 Ch. 674, 686, C. A. Where directors' remuneration is payable under the articles it may be paid out of capital if there are no profits (*Re Lundy Granite Co. (Harvey Lewis's Case)* (1872), 26 L. T. 673, C. A.).

(*g*) *Hutton v. West Cork Rail. Co.* (1883), 23 Ch. D. 654, C. A.; *Stroud v. Royal Aquarium and Summer and Winter Garden Society* (1903), 89 L. T. 243.

(*h*) *Tomkinson v. South Eastern Railway* (1887), 35 Ch. D. 675.

SECT. 7.
Capital.
—

business authorised by the company's instrument of constitution, such as the expenses of stamping and posting proxy papers (*i*), or of its incorporation (*k*) or liquidation (*l*), or the interest during construction of works on money borrowed to pay for such construction (*m*). It does not follow that because certain payments are not allowed to be deducted from income for taxation purposes they are capital sums as between the company and its shareholders (*n*).

Profit on sale
of a capital
asset.

198. When a company sells a capital asset for a sum larger than the total amount of its paid-up capital, the difference between the two amounts is, as between the company and its shareholders, not capital, but profit on capital which may be divided amongst the shareholders (*o*). As between the person entitled for life to the income of shares, however, and the persons entitled to the *corpus* on his death, accretions to capital out of profits which are distributed among the shareholders in the form of new shares credited as paid up are capital (*p*).

SECT. 8.—Prospectus.

SUB-SECT. 1.—Definition and Contents.

Definition.

199. In the Act of 1908 the expression "prospectus" means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures or debenture stock of any company (*q*) formed and registered under that Act, or under the Companies Act, 1862, or under any one or more of the Joint Stock Companies Acts (*r*).

Some provisions of the Act of 1908 indicate that the Act applies only to prospectuses issued after the incorporation of the company (*s*),

(*i*) *Peel v. London and North Western Railway*, [1907] 1 Ch. 5, C. A., overruling on this point *Studdert v. Grosvenor* (1886), 33 Ch. D. 528.

(*k*) As, for instance, preliminary expenses; see *Re Englefield Colliery Co.* (1878), 8 Ch. D. 388, C. A.; *Re Abstainers and General Insurance Co.*, [1891] 2 Ch. 124.

(*l*) These are properly payable out of capital (*Bishop v. Smyrna and Cassaba Rail. Co.*, [1895] 2 Ch. 265).

(*m*) *Hinds v. Buenos Ayres Grand National Tramways Co., Ltd.*, [1906] 2 Ch. 654.

(*n*) *Alianza Co. v. Bell*, [1906] A. C. 18; *Strong & Co., Ltd. v. Woodifield*, [1906] A. C. 448; *Granite Supply Association, Ltd. v. Inland Revenue* (1905), 8 F. (Ct. of Sess.) 55; *Southwell v. Savill Brothers, Ltd.*, [1901] 2 K. B. 349; *Brickwood & Co. v. Reynolds*, [1898] 1 Q. B. 95, C. A.; and see title **INCOME TAX**.

(*o*) *Lubbock v. British Bank of South America*, [1892] 2 Ch. 198.

(*p*) *Bouch v. Sproule* (1887), 12 App. Cas. 385.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 30]. A private company (as to which see p. 73, *ante*) must by its articles prohibit any invitation to the public to subscribe for its shares or debentures (*ibid.*, s. 121). The Companies Act, 1862 (25 & 26 Vict. c. 89), did not mention the word "prospectus"; but the courts were not unfamiliar with such documents before the passing of the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38 of which contains the first reference in the Companies Acts to prospectuses.

(*r*) See p. 37, *ante*.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 31 (*e*); but see *ibid.*, ss. 80 (1), 81 (7).

but a person who has subscribed for shares on the faith of a prospectus issued before the company's incorporation may be entitled to relief apart from the Act by way of rescission (a). SECT. 8.
Prospectus.

A circular or notice inviting existing members or debenture-holders to subscribe for shares or debentures is not an invitation to the public (b).

200. Every prospectus issued (c) on or with reference to the formation of a company or subsequently (d) by or on behalf of a company, or by or on behalf of any person (e) who is or has been engaged or interested in the formation of the company (f), not being a circular or notice inviting existing members or debenture-holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons (g), must state as follows (h):— Contents.

(1) The contents of the memorandum of association (i), with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively (except where the prospectus is published as a newspaper advertisement (k), or is issued more than a year after the date at which the company is entitled to commence business (l)), and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company;

(2) The number of shares (if any) fixed by the articles as the qualification of a director (m), and any provision in the articles as Number of shares

(a) *Karberg's Case*, [1892] 3 Ch. 1, C. A.; *Re Canadian (Direct) Meat Co., Champion's Case*, [1892] W. N. 94; *Re Canadian (Direct) Meat Co.*, [1892] W. N. 146, C. A.; and see *Lynde v. Anglo-Italian Hemp Spinning Co.*, [1896] 1 Ch. 178; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, 428, C. A.

(b) *Burrows v. Matabele Gold Reefs and Estates Co., Ltd.*, [1901] 2 Ch. 23, C. A.; and see *Sherwell v. Combined Incandescent Mantles Syndicate, Ltd.* (1907), 23 T. L. R. 482.

(c) A distribution before incorporation by future directors among their business acquaintances of a few copies of a document, stating that the company does not invite public subscriptions, is not the issue of a prospectus, although it is intended that the documents shall be shown to friends (*Sleigh v. Glasgow and Transvaal Options, Ltd.* (1904), 6 F. (Ct. of Sess.) 420); nor is the showing of proofs of a prospectus to friends and speculators (*Baty v. Keswick* (1901), 85 L. T. 18; *Sherwell v. Combined Incandescent Mantles Syndicate, Ltd.*, *supra*).

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (7) [Companies Act, 1900 (62 & 63 Vict. c. 48), s. 10 (4)].

(e) "Person" includes a body of persons whether corporate or unincorporate (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 19).

(f) See p. 47, *ante*.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (7) [Companies Act, 1900 (62 & 63 Vict. c. 48), s. 10 (4), amended].

(h) *Ibid.*, s. 81 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 2, replacing, with amendments, Companies Act, 1900 (62 & 63 Vict. c. 48), s. 10 (1)].

(i) Apart from statute a variance between the objects of a company, as stated in a prospectus issued before incorporation, and the objects subsequently stated in the memorandum, was ground for relief; see *supra*.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (5) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10 (6)].

(l) *Ibid.*, s. 81 (8) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10 (4)].

(m) As to the meaning of "director," see *ibid.*, s. 285. The name of a

SECT. 8 Prospectus.	to the remuneration of the directors (<i>n</i>) (except where the prospectus is issued more than one year after the date at which the company is entitled to commence business (<i>o</i>));
Directors.	(3) The names, descriptions, and addresses of the directors or proposed directors (<i>p</i>), subject to the same exception (<i>o</i>);
Minimum subscription.	(4) The minimum subscription (<i>q</i>) on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount, if any, paid on the shares so allotted (<i>r</i>);
Share and debenture issues.	(5) The number and amount of shares and debentures or debenture stock which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which they have been issued or are proposed or intended to be issued;
Particulars of vendor.	(6) The name and address of every vendor (<i>s</i>) of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of

director or proposed director of a company registered after December 31, 1900, must not be inserted in a prospectus issued by or on behalf of the company within a year after it is entitled to commence business unless, before publication, s. 72 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), has been complied with; see p. 209, *post*.

(*n*) *Ibid.*, s. 81 (1) (b) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10 (1) (b)].

(*o*) *Ibid.*, s. 81 (8) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10 (4)].

(*p*) *Ibid.*, s. 81 (1) (c) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10 (1) (c)].

(*q*) This is the minimum subscription referred to in *ibid.*, s. 85 (1) (d), which only applies to the first allotment of shares offered to the public for "subscription"; see p. 177, *post*. The Act does not apparently require any minimum subscription to be stated in the case of debenture or debenture stock even in the case of a first issue; see *Burton v. Bevan*, [1908] 2 Ch. 240. The statement of the minimum subscription must be an express statement, and not one which can be merely implied from other statements in the prospectus (*Roussell v. Burnham*, [1909] 1 Ch. 127). But a statement that the minimum subscription is fixed by the articles at a certain rate per cent. of the shares offered is sufficient if it accords with the articles (*Re West Yorkshire Darracq Agency, Ltd.*, [1908] W. N. 236; see p. 177, *post*). As to commencing business or borrowing before the allotment of shares not less than the amount of the minimum subscription, see p. 262, *post*.

(*r*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 85; and p. 177, *post*.

(*s*) Including in the term "vendor" every person who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where (1) the purchase-money is not fully paid at the date of issue of the prospectus; or (2) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or (3) the contract depends for its validity or fulfilment on the result of that issue, and including, where any of the property to be acquired by the company is to be taken on lease, the lessor, the expression "purchase-money" being in that case deemed to include the consideration for the lease, and the expression "sub-purchaser" being deemed to include a sub-lessee (*ibid.*, s. 81 (2), (3) [Companies Act, 1900 (63 & 64 Vict. 48), s. 10 (2), (3)]).

the proceeds of the issue offered for subscription by the proprietors, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures, or debenture stock, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount payable to each vendor: provided that where the vendors or any of them are a firm the members of the firm are not to be treated as separate vendors (*t*);

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(7) The amount (if any) paid or payable as purchase-money in cash, shares, or debentures, or debenture stock, for any such property, specifying the amount (if any) payable for goodwill;

Purchase-money.

(8) The amount (if any) paid within the two preceding years, or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures or debenture stock of, the company, or the rate of any such commission (not including commission payable to sub-underwriters) (*a*);

Commission.

(9) The amount or estimated amount of preliminary expenses (*b*) (except where the prospectus is issued more than one year after the date at which the company is entitled to commence business) (*c*);

Preliminary expenses.

(10) The amount paid within the two preceding years or intended to be paid to any promoter (*d*) and the consideration for any such payment;

Payments to promoters.

(11) The dates of and parties to every material contract (*e*), not including any contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or any contract entered into more than two years before the date of issue of the prospectus; and a reasonable time and place at which any material contract or a copy thereof may be inspected (*f*);

Contracts.

(*t*) The company is not a sub-purchaser, so as to be required to state the consideration paid or to be paid to each vendor, unless it has to pay purchase-money to someone other than its own immediate vendor; and if he is absolute owner, and has paid the vendor to him, even out of borrowed money, the amount of the last-named payment need not be stated (*Brookes v. Hansen*, [1906] 2 Ch. 129). The terms of any contract referred to in the prospectus cannot be varied before the statutory meeting except subject to the approval of that meeting (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 83 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 11]).

(*a*) See *ibid.*, s. 89 (1); and p. 92, *ante*.

(*b*) See p. 56, *ante*.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (8) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10 (4)].

(*d*) As to promoters, see p. 47, *ante*.

(*e*) A company cannot, previously to the statutory meeting, vary the terms of a contract referred to in the prospectus, except subject to the approval of the statutory meeting (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 83 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 11]).

(*f*) This part of *ibid.*, s. 81, is a re-enactment, with an amendment, of part of s. 2 of the Companies Act, 1907 (7 Edw. 7, c. 50) (which amended s. 10 (1) of the Companies Act, 1900 (63 & 64 Vict. c. 48)), and may be interpreted to some extent by the decisions on s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131) (repealed by s. 33 of the Companies Act, 1900 (63 & 64 Vict. c. 48)), which provided that a prospectus inviting persons to subscribe for shares should, unless it specified "the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof" before its issue,

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Prospectus,
Directors' interests.

(12) The names and addresses of the auditors (if any) (g) of the company (h);

(13) Full particulars of the nature and extent of interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or where the interest of such a director consists in being a partner in a firm, the nature and extent

"whether subject to adoption by the directors or the company, or otherwise," was to be "deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract." There is a wide difference between the wording of that section and that of s. 81 of the Act of 1908. The only persons who could be sued under the old sections were the promoters and officers who issued the prospectus. The contracts to be stated were those entered into by the company, or the person mentioned in the section, whereas the Act of 1908 requires every "material contract" to be noticed. The later words of s. 81 (1) (k) of that Act point to the conclusion that its meaning is not confined to contracts with the company itself. As to this point, the decisions on the old section in *Gover's Case* (1875), 1 Ch. D. 182, C. A.; *Sullivan v. Mitcalfe* (1880), 5 C. P. D. 455, C. A.; *Twycross v. Grant* (1877), 2 C. P. D. 469, C. A.; *Watts v. Bucknall*, [1903] 1 Ch. 766, C. A.; *Coats (J. and P.), Ltd. v. Crossland* (1904), 20 T. L. R. 800; and *Cuckett v. Keswick*, [1902] 2 Ch. 456, C. A., may be in point. The expression "material contract" does not occur in the old section, but that section was construed as referring only to contracts which were material in the sense of being calculated to induce a person to subscribe or refrain from subscribing for shares (*Gover's Case*, *supra*; *Sullivan v. Mitcalfe*, *supra*; *Jury v. Stoker* (1882), 9 L. R. Ir. 385; *Broome v. Speak*, [1903] 1 Ch. 586, C. A.; affirmed *sub nom. Shephard v. Broome*, [1904] A. C. 342). A contract under either section may be material, although it has been rescinded and another contract has been substituted for it (*Shephard v. Broome*, *supra*). S. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), was enacted only for the benefit of shareholders (*Cornell v. Hay* (1873), L. R. 8 C. P. 328), and in order to obtain relief a shareholder had to prove not only that he had subscribed on the faith that there was no such contract as that which had been omitted from the prospectus, or possibly that he might not have subscribed if the contract had been stated, but also that the contract was material, and that he had suffered damage by the omission of the contract (*Baty v. Keswick* (1901), 85 L. T. 18; *Nash v. Calthorpe*, [1905] 2 Ch. 237, C. A.; *Calthorpe v. Trechmann* (1905), 22 T. L. R. 149, H. L.; *Marshall v. Morrison*, [1907] W. N. 29). As to the meaning of "knowingly issued," see p. 125, *post*. As to the measure of damages in a case under s. 38 of the Act of 1867, see *McConnel v. Wright*, [1903] 1 Ch. 546, C. A. Merely giving dates and names of parties does not amount to giving notice, where it is material, of the contents of contracts, or of circumstances which, apart from statutory provisions, are material, and the omission of which makes any of the statements untrue, or calculated to give an erroneous impression (*Aaron's Reefs v. Twiss*, [1896] A. C. 273, 280; *Venezuela Central Rail. Co. (Directors etc.) v. Kisch* (1867), L. R. 2 H. L. 99). In view of the provision for inspection and as to copies of material contracts, the section seems to apply only to contracts in writing, and not to parol contracts, as did the Act of 1867 (*Jury v. Stoker*, *supra*; *Capel & Co. v. Sim's Ships Compositions Co.* (1888), 57 L. J. (CH.) 713). As to the effect of waiver clauses in respect of s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), see p. 125, *post*. As to the effect of s. 38 of the Act of 1867, see, further, *Craig v. Phillips* (1876), 3 Ch. D. 722; *Arkwright v. Newbold* (1881), 17 Ch. D. 301, C. A.

(g) A company need not appoint an auditor before its first annual general meeting, but the directors may before the statutory meeting appoint an auditor to hold office until the first annual general meeting (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 112 (5)).

(h) *Ibid.*, s. 81 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 2 (1), substituted for Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10 (1)]; see p. 267, *post*.

of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person, either to induce him to become, or to qualify himself as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company (i);

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(14) Where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively (j).

Voting rights,

201. Any condition requiring or binding any applicant for shares or debentures to waive compliance with any of the above-mentioned requirements, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, is void (k).

Invalidity
of waiver
clauses.

202. In the event of non-compliance with any of the above-mentioned statutory requirements, a director or other person responsible for the prospectus does not incur any liability by reason of the non-compliance (l), if he proves (1) that as regards any matter not disclosed he was not cognisant thereof (m), or (2) that the non-compliance arose from an honest mistake of fact on his part; and for non-compliance with the requirement numbered (13) above, no director or other person incurs any liability unless it is proved that he had knowledge of the matters not disclosed (n). These provisions do not limit or diminish any liability which any person may incur under the general law or under the rest of the

Penalties for
non-compliance.

(i) See p. 52, *ante*.

(j) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 2 (1)].

(k) *Ibid.*, s. 81 (4) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10 (5)]. As to the effect of clauses waiving compliance with s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), see *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A.; *Watts v. Bucknall*, [1902] 2 Ch. 628; [1903] 1 Ch. 776, C. A.; *Calthorpe v. Trechmann* (1905), 22 T. L. R. 149, n. H. L.; *Crockett v. Keswick*, [1902] 2 Ch. 456, C. A.; *Batey v. Keswick*, [1901] W. N. 167. There is nothing in this statutory provision which invalidates a waiver clause applied to matters which are not required to be stated in accordance with the statutory provision.

(l) That is to say, any liability under the statute as distinguished from liability under the general law; see p. 126, *post*.

(m) The decisions as to the meaning of "knowingly issued" in s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), may have some bearing as to the meaning of "cognisant"; see *Twyndross v. Grant* (1877), 2 C. P. D. 469; *Watts v. Bucknall*, *supra*; *Hoole v. Speak*, [1904] 2 Ch. 732; *Tait v. Macleay*, [1906] A. C. 21; *Batey v. Keswick*, *supra*.

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (6) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10 (7)]. This provision and *ibid.*, s. 81 (9), clearly point to a liability under the Act, apart from liability under the general law. A director or other person responsible for a prospectus will, in the event of non-compliance with any of the statutory requirements, incur some liability, but the Act gives no indication of the nature of that liability, or by whom or how it is to be enforced. It has been suggested, however, that non-compliance renders a person responsible liable to indictment for misdemeanour (*R. v. Hall*, [1891] 1 Q. B. 747), and is also a breach of statutory duty, which is a cause of action for damages at the instance of any person who can prove that, having applied for shares or debentures on the faith of the prospectus, he has sustained material loss or damage by reason of the breach of duty; see *Thomson v. Clanmorris* (Lord), [1900] 1 Ch. 718, 726, 727, C. A. As to the liability in

SECT. 8. Act of 1908 (o). Nor does the omission of any of the required particulars, *per se*, entitle a shareholder to rescission of his contract to take shares (p).

SUB-SECT. 2.—Filing.

**Filing
prospectus.**

203. The prospectus, if issued by or on behalf of a company, or in relation to any intended company, must be dated and state on the face of it that a copy has been filed for registration, and its date, unless the contrary is proved, is taken as the date of publication of the prospectus. A copy of it signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, must be filed for registration with the registrar on or before the date of its publication. No such prospectus is to be issued until a copy has been so filed for registration, and the registrar is not to register any prospectus unless it is dated and the copy is so signed (q).

If a prospectus is issued without a copy thereof being so filed, the company, and every person knowingly a party to the issue, is liable to a fine not exceeding £5 for every day from the date of issue until a copy thereof is so filed (r).

SUB-SECT. 3.—Misrepresentations in Prospectus.

(i.) *In General.*

**Misrepresentation in
prospectus.**

204. The provisions of the Act of 1908 (s) as to what is to be stated in a prospectus do not limit or diminish any liability which any person may incur under the general law or under the Act

damages for breach of a statutory requirement, see *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, C. A.; *Pickering v. James* (1873), 11 R. 8 C. P. 489; *Cowley v. Newmarket Local Board*, [1892] A. C. 345; *Pictou (Municipality) v. Geldert*, [1893] A. C. 524, P. C.; *Oliver v. Horsham Local Board*, [1894] 1 Q. B. 332, C. A.; *Sydney Municipal Council v. Bourke*, [1895] A. C. 433, P. C.; *Groves v. Wimborne (Lord)*, [1898] 2 Q. B. 402, C. A.; *Saunders v. Holborn District Board of Works*, [1895] 1 Q. B. 64, 68; *Johnston and Toronto Type Foundry Co. v. Consumers' Gas Co. of Toronto*, [1898] A. C. 447, 454–456, P. C. There may be a common law remedy against a company by indictment for non-compliance with the statutory requirements (*R. v. Tyler and International Commercial Co.*, [1891] 2 Q. B. 588, 594, 597, C. A.). As to breach of statutory requirements generally, see title STATUTES.

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (9) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10 (8), amended]. The words, as to the rest of the Act, are new, and refer apparently to the provisions of s. 84 of the Act of 1908. See p. 136, 1.

(p) *Re Wimbledon Olympia, Ltd.*, [1910] 1 Ch. 630.

(q) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 80 (1)–(4) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 9].

(r) *Ibid.*, s. 80 (5) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 3]. Prior to the Act of 1907 there was no express statutory penalty. When a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it, only that remedy can be followed, at any rate by a private person (*Wolverhampton New Waterworks Co. v. Hawkesford* (1859), 6 C. B. (N. S.) 336, 356; *Devonport Corporation v. Tozer*, [1903] 1 Ch. 759, C. A.); and see *A.-G. v. Ashbourne Recreation Ground Co.*, [1903] 1 Ch. 101; and title STATUTES.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81; see p. 121, *ante*. As to the effect of non-compliance with the section, see p. 125, *ante*.

apart from such provisions (t). In respect of the liability so incurred, the remedies open to a shareholder, but not necessarily to a transferee of his shares (u), are :—

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—

- (1) Defence of misrepresentation to an action for calls ;
- (2) Rectification of the register of members and consequent relief ;
- (3) Rescission of the contract ;
- (4) Damages in an action of deceit ;
- (5) Damages under the statutory provisions replacing the Directors Liability Act, 1890 ;
- (6) Criminal proceedings ;

The shareholder cannot retain his shares and bring an action for damages against the company (a).

(ii.) *Defence to Action.*

205. To an action for calls on shares registered in his name the holder may set up as a good defence that he was induced to subscribe for them by misrepresentations in the prospectus, if he can also show that he has repudiated the shares, and has not so acted after discovering the misrepresentation as to have claimed or recognised any rights or liabilities as a shareholder (b). To an action for specific performance of an agreement to take shares or debentures or debenture stock, the usual defences in such an action are available (c).

Misrepresentation as a defence to action for calls.

(iii.) *Rectification of the Register and consequent Relief.*

206. A person who has been induced to take shares by misrepresentation in a prospectus may, if he can show repudiation, and that there is not any such claim or recognition as above stated, obtain relief on an application to rectify the register of members by removing his name therefrom and for the return to him of what he has paid with interest thereon (d).

Rectifying register of members on ground of misrepresentation.

(iv.) *Action for Rescission.*

207. If a subscription for shares, not being those which are subscribed for by a signatory to the memorandum of association (e),

Action for rescission.

(t) Companies (Consolidation) Act, 1908 (8 Edw 7, c. 69), s. 81(9).

(u) *Hyslop v. Morrel Brothers, Cobbet & Son, Ltd.*, [1891] W. N. 19; *Andrews v. Mockford*, [1896] 1 Q. B. 372, C. A.

(a) *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317; see *Re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191, C. A.

(b) *Bulch-y-Plwm Lead Mining Co. v. Baynes* (1867), L. R. 2 Exch. 324; *Bentley & Co. v. Black* (1893), 9 T. L. R. 580, C. A.; *Deposit Life Assurance v. Ayscough* (1856), 6 E. & B. 761; and see *Aaron's Reefs v. Twiss*, [1896] A. C. 273.

(c) See *Odessa Tramways Co. v. Mendel* (1878), 8 Ch. D. 235, C. A.; and p. 353, *post*. As to specific performance generally, see title SPECIFIC PERFORMANCE.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 32 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35]; *Stewart's Case* (1866), 1 Ch. App. 574; *Wilkinson's Case* (1867), 2 Ch. App. 536; *Peel's Case* (1867), 2 Ch. App. 674; *Anderson's Case* (1881), 17 Ch. D. 373; *Re London and Staffordshire Fire Insurance Co.* (1883), 24 Ch. D. 149; and see p. 153, *post*.

(e) *Lurgan's (Lord) Case*, [1902] 1 Ch. 707.

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or debentures or debenture stock, is obtained by a material misrepresentation of facts (*f*), the contract is voidable at the election of the person deceived (*g*), and the court will in an action by the subscriber rescind the contract to take the shares or securities and order restitution of the moneys paid under the contract with interest (*h*). The contract may be rescinded on the ground of misrepresentation by the company's directors or other general agents, or special agents acting within the scope of their authority (*i*), but not by unauthorised persons making promises purporting to be made on its behalf (*k*). The company may be liable where the prospectus, on the faith of which (*l*) subscriptions have been made, was issued by promoters before the incorporation of the company (*m*).

In a prospectus no misstatement, or concealment of any material facts or circumstances, is permitted. The public, invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything materially bearing on its true character as the promoters themselves possess; and the utmost honesty and candour ought to characterise the statements in the prospectus (*p*).

(*f*) As to proof of misrepresentation see *Meux's Executors' Case* (1852), 2 De G. M. & G. 522; *Re Devala Provident Gold Mining Co.* (1883), 22 Ch. D. 593; *Re British Burmah Lead Co., Ex parte Vickers* (1887), 56 L. T. 815. As to the effect of an omission to state the particulars required by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81, see p. 126, *ante*.

(*g*) *Western Bank of Scotland v. Addie* (1867), L. R. 1 Sc. & Div. 145.

(*h*) *Venezuela Central Rail. Co. (Directors etc.) v. Kisch* (1867), L. R. 2 H. L. 99; *Gover's Case* (1875), 1 Ch. D. 182, 198, 199, C. A. As to indemnity, see *Adam v. Neubigging* (1888), 13 App. Cas. 308.

(*i*) *Ibid.*; *New Brunswick and Canada Rail. etc. Co. v. Conybeare* (1862), 9 H. L. Cas. 711; *Lynde v. Anglo-Italian Hemp Spinning Co.*, [1896] 1 Ch. 178; and see *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, C. A.; *Re Royal British Bank etc., Nicol's Case* (1859), 3 De G. & J. 387, 430; *Re Royal British Bank, Mixer's Case* (1859), 4 De G. & J. 575, C. A.; *Henderson v. Lacon* (1867), L. R. 5 Eq. 249, 261.

(*k*) *Re United Kingdom Shipowners' Co., Felgate's Case* (1865), 11 L. T. 613, C. A. The company's secretary has no general authority to make representations (*Newlands v. National Employers' Accident Association* (1885), 54 L. J. (Q. B.) 428, C. A.; *Barnett v. South London Tramways Co.* (1887), 18 Q. B. D. 815, 817, C. A.).

(*l*) As to the meaning of this expression, see *Arnison v. Smith* (1889), 41 Ch. D. 348, C. A., *per* Lord HALSBURY, L.C., at p. 369; *Drincqbier v. Wood*, [1899] 1 Ch. 393, 404.

(*m*) *Stewart's Case* (1866), 1 Ch. App. 574; *Downes v. Ship* (1868), L. R. 3 H. L. 343; *Karberg's Case*, [1892] 3 Ch. 1, C. A.; *Re Canadian (Direct) Meat Co., Champion's Case*, [1892] W. N. 94; *Re Canadian (Direct) Meat Co., Tamplin's Case*, [1892] W. N. 146, C. A.; *Lurgan's (Lord) Case*, [1902] 1 Ch. 707, where a subscriber to the memorandum was refused relief. As to relief on the ground that the objects of the company as stated in the prospectus differed from those stated in the memorandum of association when registered, see *Downes v. Ship*, *supra*; *Stewart's Case*, *supra*; *Webster's Case* (1866), L. R. 2 Eq. 741; *Langham v. East Wheel Rose Consolidated Silver Lead Mining Co.* (1868), 37 L. J. (CH.) 253; and as to the shareholder's duty to ascertain in a reasonable time the contents of the memorandum, see *Re Overend, Gurney & Co., Oakes v. Turquand and Harding* (1867), L. R. 2 H. L. 325; *Wilkinson's Case* (1867), 2 Ch. App. 536; *Lawrence's Case* (1867), 2 Ch. App. 412; *Peel's Case* (1867), 2 Ch. App. 674; *Hallow v. Fernie* (1868), 3 Ch. App. 467, 477.

(*n*) *Venezuela Central Rail. Co. (Directors etc.) v. Kisch*, *supra*, at p. 113; *New Brunswick and Canada Rail. etc. Co. v. Muggeridge* (1860), 1 Drew.

208. To afford ground for relief the misrepresentation must be one of fact and not of law (o), although a statement of facts which involves a conclusion of law is a statement of fact (p). A representation as to the state of a man's mind, as, for instance, as to his belief, although difficult of proof, is a statement of fact (q), and language expressed in the form of hope and expectation may be a representation of fact (r), although statements as to what will occur in the future are not *ex necessitate* statements of fact (s). Although a statement may be true when made, if it becomes untrue before it is acted on, the action will be sustainable if the statement was intended to be then acted on (a).

209. To obtain rescission the untrue statement need not be fraudulent or made with intent to deceive (b).

210. Any statement will be construed in the natural and reasonable sense in which other persons are likely to read it (c). The untrue statement must be material (d), that is to say, of

SECT. 8.
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Misrepresentation must be of fact.

Proof of fraud unnecessary.
Materiality of statements

& Sm. 363; *Henderson v. Lacon* (1867), L. R. 5 Eq. 249; *Denton v. Macneil* (1866), L. R. 2 Eq. 352; and see *Aaron's Reefs v. Twiss*, [1896] A. C. 273.

(o) *Beattie v. Ebury* (Lord) (1874), L. R. 7 H. L. 102.

(p) *Eaglesfield v. Londonderry (Marquis)* (1876), 4 Ch. D. 693, 703, C. A.; *New Brunswick and Canada Rail. etc. Co. v. Conybeare* (1862), 9 H. L. Cas. 711; *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A.; *Derry v. Peek* (1889), 14 App. Cas. 337.

(q) *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459, 483, C. A.

(r) *Aaron's Reefs v. Twiss*, [1896] A. C. 273; compare *Jorden v. Money* (1854), 5 H. L. Cas. 185; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873), L. R. 6 H. L. 352; *Maddison v. Alderson* (1883), 8 App. Cas. 467.

(s) *Hallows v. Fernie* (1868), 3 Ch. App. 467; *Beattie v. Ebury* (Lord), *supra*; *Bellairs v. Tucker* (1884), 13 Q. B. D. 562; *Maddison v. Alderson*, *supra*; *Knock v. Hayman* (1892), 67 L. T. 137, C. A.; *Bentley & Co. v. Black* (1893), 9 T. L. R. 580, C. A.; compare *Jorden v. Money*, *supra*; *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, *supra*.

(a) *Anderson's Case* (1881), 17 Ch. D. 373; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, C. A.; compare *Hallows v. Fernie*, *supra*.

(b) *Smith's Case* (1867), 2 Ch. App. 604; *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64, 79; *Re London and Staffordshire Fire Insurance Co.* (1883), 24 Ch. D. 149; *Mathias v. Yetts* (1882), 46 L. T. 497, 506, C. A.; compare *Jackson v. Turquand* (1869), L. R. 4 H. L. 305.

(c) *Arkwright v. Newbold* (1881), 17 Ch. D. 301, C. A.; *Arnison v. Smith* (1889), 41 Ch. D. 348, C. A.; *Smith v. Chadwick* (1884), 9 App. Cas. 187.

(d) *Gover's Case* (1875), 1 Ch. D. 182, C. A., and see the cases cited below. The following cases are referred to as showing what are material statements: As to shares alleged to be subscribed, *Ross v. Estates Investment Co.* (1868), 3 Ch. App. 682; *Henderson v. Lacon*, *supra*; *Croydon v. Prudential Loan and Discount Co.* (1886), 2 T. L. R. 535, C. A.; *Arnison v. Smith*, *supra*; as to contracts to purchase property, *Ross v. Estates Investment Co.*, *supra*; *Venezuela Central Rail. Co. (Directors etc.) v. Kisch* (1867), L. R. 2 H. L. 99; as to property really non-existent, *Scott v. Snyder Dynamite Projectile Co.* (1892), 67 L. T. 104, C. A.; as to the amount of purchase-money paid, *Capel & Co. v. Sim's Ships Compositions Co.* (1888), 67 L. J. (OH.) 713; as to the value of property, *Reese River Silver Mining Co. v. Smith*, *supra*; *Re British Burmah Land Co.* (1888), 4 T. L. R. 631; as to the persons by whom valuers of property have been employed, *Angus v. Clifford* (1890), 7 T. L. R. 123; as to the object of issuing debentures offered for subscription, *Edgington v. Fitzmaurice*, *supra*; as to the amount of net profits of a business, *Glasier v. Rolfs* (1889), 42 Ch. D. 436, C. A.; as to the existence of parliamentary powers, *Peek v. Derry* (1887), 37 Ch. D. 541, C. A., reversed without reference to this point *sub nom. Derry v. Peek*, *supra*; as to the non-payment of promotion money, *Lodwick v. Perth (Earl)* (1884), 1 T. L. R. 76; as regards the names of directors and others connected or

SECT. 8. some importance (e), and the subscriber must be materially influenced by it, although it need not be the only inducement to subscribe (f).

Prospectus.

Omission of material facts.

How right to rescind is lost.

If a person is induced to subscribe by a material misstatement, it is no defence to an action for rescission that he had the means of discovering and might with reasonable diligence have discovered that the statement was untrue (g).

The omission of material facts is not a ground for rescission unless it is of such a nature as to make what is actually stated misleading (h).

211. The right of a shareholder to rescission is lost by his doing, after notice (i) of the misrepresentation, anything inconsistent with the right to repudiate, such as attempting to sell the shares (k), receiving dividends on them (l), or making further payments in respect of them (m). Any such acts done before knowledge or notice of the misrepresentation will not affect his right to rescind (n); and the right is not affected by his attending a meeting of the company or opposing a winding-up petition as a shareholder after he has taken proceedings for rectification (o). A person who

to be connected with the company, *Re Metropolitan Coal Consumers' Association, Wainwright's Case* (1890), 63 L. T. 429, C. A.; *Karberg's Case*, [1892] 3 Ch. 1, C. A. Statements as to certain persons being directors may or may not be material (*Re Life Association of England, Blake's Case* (1865), 34 Beav. 639; *Re Land Credit Co. of Ireland, Munster's Case* (1866), 14 W. R. 957; *Hallows v. Fernie* (1868), 3 Ch. App. 467; *Anderson's Case* (1881), 17 Ch. D. 373; *Smith v. Chadwick* (1882), 20 Ch. D. 27, C. A.; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, C. A.; *Re Kent County Gas Light and Coke Co., Ex parte Brown* (1906), 95 L. T. 756). As to the company having obtained contracts or orders, see *Snook v. Self-Acting Sewing Machine Co.* (1887), 3 T. L. R. 612; *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A.; and as to the guarantee of dividends, see *Kent v. Freehold Land and Brickmaking Co.* (1867), L. R. 4 Eq. 588; *Knox v. Hayman* (1892), 67 L. T. 137, C. A.

(e) *Smith v. Chadwick* (1882), 20 Ch. D. 27, C. A.

(f) *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459, C. A.; *Re London and Leeds Bank, Ex parte Carling, Carling v. London and Leeds Bank* (1887), 56 L. J. (CH.) 321; *Robson v. Devon (Earl)* (1857), 4 Jur. (N. S.) 245, C. A. As to disclosure, subsequent to the issue of a prospectus, of misrepresentations therein, see *Arnison v. Smith* (1889), 41 Ch. D. 348, C. A.; *Re London and Staffordshire Fire Insurance Co.* (1883), 24 Ch. D. 149.

(g) *Redgrave v. Hurd* (1881), 20 Ch. D. 1, C. A.; and compare *Aaron's Reefs v. Twiss*, [1896] A. C. 273.

(h) *McKeown v. Boudard-Peveril Gear Co.* (1896), 65 L. J. (CH.) 735, C. A.; *Aaron's Reefs v. Twiss*, *supra*; *Components Tube Co. v. Naylor*, [1900] 2 I. R. 1; *New Brunswick and Canada Rail. etc. Co. v. Conybeare* (1862), 9 H. L. Cas. 711; compare p. 126, *ante*.

(i) As to what is notice, see *Re London and Staffordshire Fire Insurance Co.*, *supra*. As to the rights of persons taking transfers before notice, see *Edinburgh United Breweries v. Molleson*, [1894] A. C. 96.

(k) *Ex parte Briggs* (1866), L. R. 1 Eq. 483. As to a sale of shares in another company included in the same contract, see *Maturin v. Tredinnick* (1864), 4 New Rep. 15.

(l) *Scholey v. Venezuela Central Rail. Co.* (1868), L. R. 9 Eq. 266, n.

(m) *Re Dunlop-Truffault Cycle etc. Manufacturing Co., Ex parte Shearman* (1896), 66 L. J. (CH.) 25.

(n) *Re Mount-Morgan (West) Gold Mine, Ltd., Ex parte West* (1887), 56 L. T. 622.

(o) *Re Metropolitan Coal Consumers' Association, Ex parte Edwards* (1891), 64 L. T. 561; *Foulkes v. Quartz Hill Consolidated Gold Mining Co.* (1883), Cab. & El. 156; *Tomlin's Case*, [1898] 1 Ch. 104.

SECT. 8.
Prospectus.

has been misled by misrepresentations, and whose shares have been forfeited for non-payment of calls, ceases thereupon to be a shareholder, and, as a debtor to the company, stands on a different footing, as he is not prejudiced by matters which would affect him as a shareholder (*p*).

The right to rescind is also lost by the commencement of the winding up of the company (*q*), or by the company becoming insolvent and stopping payment (*r*), unless in either case the shareholder has previously repudiated the shares, and proceedings for rescission have been commenced by him or some other person, and he has, in the latter case, agreed with the company to be bound by such proceedings (*s*), or has previously repudiated and filed an affidavit setting up the misrepresentation in resisting a summary application for judgment in an action for calls (*t*).

The right is also lost by the shareholder not repudiating his shares within a reasonable time (what is a reasonable time being a question of fact) after he discovers the misrepresentation (*a*); but delay in repudiating which is caused by reasonable negotiations with the company is excusable (*b*). If there are two misrepresentations, the fact that the shareholder is precluded by delay as regards one is not a ground for refusing relief on the other, when that has been subsequently discovered and there has been no delay in coming for relief as to it (*c*).

(*p*) *Aaron's Reefs v. Twiss*, [1896] A. C. 273. As to restraining forfeiture after proceedings for rescission, see *Lamb v. Sambas Rubber and Gutta Percha Co., Ltd.*, [1908] 1 Ch. 845; and p. 201, *post*.

(*q*) *Re Overend, Gurney & Co., Oakes v. Turquand and Harding* (1867), L. R. 2 H. L. 325; *Kent v. Freehold Land and Brickmaking Co.* (1868), 3 Ch. App. 493; *Burgess's Case* (1880), 15 Ch. D. 507; *Re Lennox Publishing Co., Ex parte Storey* (1890), 6 T. L. R. 357; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, 436, C. A.; *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64 (whether the winding up is voluntary or otherwise); *Stone v. City and County Bank* (1877), 3 O. P. D. 282, 295, C. A. As to amending the statement of claim after the winding up has commenced, see *Cocksedge v. Metropolitan Coal Consumers' Association*, [1891] W. N. 132, 148, C. A.

(*r*) *Tennent v. City of Glasgow Bank* (1879), 4 App. Cas. 615, where notice was given a day before the winding up commenced; compare *Re London and Leeds Bank, Ex parte Carling, Carling v. London and Leeds Bank* (1887), 56 L. J. (CH.) 321.

(*s*) *Paule's Case* (1869), 4 Ch. App. 497; *Re Scottish Petroleum Co., supra*; and see *Ashley's Case* (1870), L. R. 9 Eq. 263; *McNeill's Case* (1870), L. R. 10 Eq. 503.

(*t*) *Whiteley's Case*, [1900] 1 Ch. 365, C. A.; compare *Re Cleveland Iron Co., Ex parte Stevenson* (1867), 16 W. R. 95; *Re Etna Insurance Co., Ltd.* (1871), 6 I. R. Eq. 298, C. A.

(*a*) *Bwlch-y-Plwm Lead Mining Co. v. Baynes* (1867), L. R. 2 Exch. 324; *Pentelouw's Case* (1869), 4 Ch. App. 178; *Taite's Case* (1867), L. R. 3 Eq. 795; *Whitehouse's Case* (1867), L. R. 3 Eq. 790; *Lawrence's Case* (1867), 2 Ch. App. 412; *Heymann v. European Central Rail. Co.* (1868), L. R. 7 Eq. 154; *Scholey v. Venezuela Central Rail. Co.* (1868), L. R. 9 Eq. 266, n.; *Paule's Case* (1869), 4 Ch. App. 497; *Ashley's Case, supra*; *Sharpley v. Louth and East Coast Rail. Co.* (1876), 2 Ch. D. 663, C. A.; *Cargill v. Bower* (1878), 10 Ch. D. 502; *Re London and Staffordshire Fire Insurance Co.* (1883), 24 Ch. D. 149; *Re London and Provincial Electric Lighting etc. Co., Ex parte Hale* (1886), 55 L. T. 670; *Venezuela Central Rail. Co. (Directors etc.) v. Kisch* (1867), L. R. 2 H. L. 99, 125.

(*b*) *Neill's Case* (1867), 15 W. R. 894; *Heymann v. European Central Rail. Co., supra*, at p. 168; *Ogilvie v. Currie* (1868), 37 L. J. (CH.) 541.

(*c*) *Re London and Provincial Electric Lighting etc. Co., Ex parte Hale, supra*; compare *Whitehouse's Case* (1867), L. R. 3 Eq. 790.

SECT. 3. The above-mentioned conditions are applicable in the case of a **Prospectus.** voidable contract, and need not be complied with where the contract to take shares is not merely voidable but void (*d*).

If on the facts it appears that a shareholder has a right, of which he was ignorant, to claim rescission, the cancellation of an allotment to him, though on invalid grounds, will stand (*e*).

Compromise
by surrender
of shares.

212. A surrender of shares, as a compromise of proceedings *bonâ fide* commenced for rescission on the ground of misrepresentation, is valid (*f*).

Restraining
forfeiture
of shares.

213. After proceedings for rescission have been commenced, forfeiture of the shares for non-payment of calls will be restrained until the trial on the plaintiff giving an undertaking as to damages and paying the amount of the calls with interest thereon into court (*g*).

Joinder of
other causes
of action.

214. A person who has been induced to subscribe by misrepresentation may combine in the same action his claims for rescission against the company and for damages for deceit or compensation under the statute against the directors or others (*h*).

(v.) *Action of Deceit.*

Misrepresentation
in prospectus.

215. Although a company is liable to an action of deceit in respect of an act of its agent which is within the scope of his authority (*i*), even where the proceeds of the fraud are appropriated by the agent (*k*), actions of deceit in respect of misrepresentations in a prospectus are generally brought against some one or more of the persons, generally directors, responsible for the prospectus, to recover damages for the loss sustained; for the liability of the

(*d*) *Alabaster's Case* (1868), L. R. 7 Eq. 273; *Dougan's Case* (1873), 8 Ch. App. 540; *Wynne's Case* (1873), 8 Ch. App. 1002, 1016; *Gorrissen's Case* (1873), 8 Ch. App. 507, 519; *Beck's Case* (1874), 9 Ch. App. 392; *Baillie's Case*, [1898] 1 Ch. 110; *Re United Ports and General Insurance Co.*, *Nelson's Case*, [1874] W. N. 197.

(*e*) *Wright's Case* (1871), 7 Ch. App. 55.

(*f*) *Re Life Association of England*, *Blake's Case* (1865), 34 Beav. 639; *Fox's Case* (1868), L. R. 5 Eq. 118; *Wright's Case*, *supra*; *Anderson's Case* (1881), 17 Ch. D. 373; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, O. A.

(*g*) *Lamb v. Sambas Rubber and Gutta Percha Co., Ltd.*, [1908] 1 Ch. 845; compare *Ripley v. Paper Bottle Co.* (1887), 57 L. J. (CH.) 327. As to the position where the forfeiture has been carried out, see *Aaron's Reefs v. Twiss*, [1896] A. C. 273.

(*h*) *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, O. A.; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84 [Directors Liability Act, 1890 (53 & 54 Vict. c. 64)]; see p. 136, *post*; and compare *Greenwood v. Humber & Co. (Portugal)* (1899), 6 Mans. 42. One subscriber cannot maintain the action on behalf of himself and the others who have been misled; see *Hallows v. Fernie* (1868), 3 Ch. App. 467; *Croskey v. Bank of Wales* (1863), 4 Giff. 314; *Clements v. Bowes* (1853), 1 Drew. 684.

(*i*) *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch.; *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. O. 394, approved in *Swire v. Francis* (1877), 3 App. Cas. 106, P. O. But the company is not liable for the unauthorised and fraudulent act of its agent, if committed for his own benefit (*British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, O. A.); see, generally, title AGENCY, Vol. I., pp. 211, 212.

(*k*) *Swire v. Francis*, *supra*; compare *dicta* in *Western Bank of Scotland v. Addie* (1867), L. R. 1 Sc. & Div. 145, 158, 167, disapproved in *Mackay v. Commercial Bank of New Brunswick*, *supra*

director remains although the right to rescission or damages as against the company (l) may be barred by the fact that the company has gone into liquidation or otherwise (m). SECT. 8.
Prospectus.

The shareholder can combine in the same action a claim for damages against directors for deceit in respect of statements in a prospectus with a claim against them, and the executors of a deceased director, for the statutory relief (n) and a claim against the company for rescission (o); and any number of shareholders may sue directors in one action of deceit (p).

216. Where a prospectus contains a false representation (q) as to a matter of fact, made in order to induce a person to act thereon, and he acts thereon relying on such representation and thereby sustains damage, such damage may be recovered from directors or promoters who authorised the issue of the prospectus (r). Grounds for
action of
deceit.

The false statement must be as to a matter of fact, not of law (s), and the matter of fact must be ascertained at the time when the statement is made, in the sense that a statement as to something expected to happen in the future is generally only a matter of opinion (t).

The statement complained of must be a material false representation (a), and if it is not obviously material the onus of showing materiality is on the plaintiff (b). The plaintiff must also prove that the defendant was responsible for the prospectus (c).

(l) *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317; *Re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191, C. A., overruling *Re Government Security Fire Insurance Co., Mudford's Claim* (1880), 14 Ch. D. 634, and *Great Australian Gold Mining Co., Ex parte Appleyard* (1881), 18 Ch. D. 587.

(m) See p. 130, *ante*.

(n) Under s. 84 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); see p. 136, *post*.

(o) *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, C. A.; and see *Kent Coal Exploration Co. v. Martin* (1900), 16 T. L. R. 486, C. A. As to ordering an unsuccessful defendant to pay the costs of a successful defendant, see *Sanderson v. Blyth Theatre Co.*, [1903] 2 K. B. 533, C. A.; *Rudow v. Great Britain Mutual Life Assurance Society* (1881), 17 Ch. D. 600, C. A.

(p) *Arnison v. Smith* (1889), 41 Ch. D. 98, C. A.

(q) As to what is a false representation, see *Bellairs v. Tucker* (1884), 13 Q. B. D. 562; *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459, C. A.

(r) *Gerhard v. Bates* (1853), 2 E. & B. 476; *Scott v. Dixon* (1859) 29 L. J. (EX.) 62, n.; *Burnes v. Pennell* (1849), 2 H. L. Cas. 497; *Richardson v. Silvester* (1873), L. R. 9 Q. B. 34; *Cullen v. Thomson's Trustees and Kerr* (1862), 4 Macq. 424, H. L.; *Urquhart v. Macpherson* (1878), 3 App. Cas. 831, 838, P. C.; *Peck v. Gurney* (1873), L. R. 6 H. L. 377; and see *Denton v. Great Northern Rail. Co.* (1856), 5 E. & B. 860; *Williams v. Swansea Harbour Trustees* (1863), 14 C. B. (N. S.) 845; *Arnison v. Smith*, *supra*; *Edgington v. Fitzmaurice*, *supra*.

(s) *Eaglesfield v. Londonderry (Marquis)* (1876), 4 Ch. D. 693.

(t) *Beattie v. Ebury (Lord)* (1872), 7 Ch. App. 777, 804; *Hallows v. Fernie* (1868), 3 Ch. App. 467; *Denton v. Macneil* (1866), L. R. 2 Eq. 352; *Bellairs v. Tucker*, *supra*; and see the cases cited in note (s), p. 129.

(a) *Smith v. Chadwick* (1884), 9 App. Cas. 187. As to materiality, see p. 129, *ante*.

(b) *Smith v. Chadwick* (1882), 20 Ch. D. 27, 45, C. A., affirmed, *supra*; *Capel & Co. v. Sim's Ships Composition Co.* (1888), 58 L. T. 807, 808.

(c) *Henderson v. Lacon* (1867), L. R. 5 Eq. 249; *Ship v. Crosskill* (1870), L. R. 10 Eq. 73, 82; *Watts v. Atkinson* (1892), 8 T. L. R. 235, C. A.

SECT. 8.

Prospectus.

Fraud must
be proved.

217. The plaintiff must further prove that the false representation contained in the prospectus was an actual fraud, and the fraud is so proved when it is shown that the false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false. Where it is made merely through carelessness, and without reasonable ground for believing it to be true, it may be, but is not necessarily, evidence of fraud. If the false statement is made in the honest belief that it is true, it is not fraudulent, and does not give ground for an action of deceit (*d*). Even where the statement is shown to be untrue and to have been made without any reasonable ground for believing it to be true, or even with gross carelessness, the plaintiff cannot succeed unless the statement was made dishonestly, and the onus is on him to prove the dishonesty (*e*). Where a statement is ambiguous and capable of more than one meaning, the onus is on the plaintiff to show that he has interpreted the words in the sense in which they were false, and has been deceived by them as so interpreted (*f*). A partial and fragmentary statement of fact may, by the withholding of material facts, be itself absolutely false (*g*).

Inducement
to subscribe.

218. A false statement need not be proved to be the only inducement to subscribe; it is sufficient to show that it materially tended to induce subscription (*h*). But a plaintiff cannot succeed unless he was directly induced to subscribe by the false statement, although it was made with the intention that it should be acted on (*i*).

Transferees.

The function of the prospectus is, as a rule, exhausted when the shares are issued; but if it contains a material false statement, and is intended to be acted on by a person other than the person or persons to whom it is addressed, that person, if deceived and injured, can maintain an action of deceit (*k*).

(*d*) *Derry v. Peek* (1889), 14 App. Cas. 337; and see *Arkwright v. Newbold* (1881), 17 Ch. D. 301, C. A. It would seem that the principle laid down in *Derry v. Peek*, *supra*, will not protect directors in an action by the company if they issued the prospectus without proper care, and if loss resulted, as the directors owe duties to the company (*Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, C. A., *per* LINDLEY, M.R., at p. 436).

(*e*) *Glazier v. Rolfe* (1889), 42 Ch. D. 436, C. A.; *Angus v. Clifford*, [1891] 2 Ch. 449, C. A.; *Jackson v. Turquand* (1869), L. R. 4 H. L. 305; *Watts v. Atkinson* (1892), 8 T. L. R. 235, C. A.

(*f*) *Smith v. Chadwick* (1884), 9 App. Cas. 187.

(*g*) *Peek v. Gurney* (1873), L. R. 6 H. L. 377; *Gluckstein v. Barnes*, [1900] A. C. 240; and compare the cases in note (*d*), p. 129, *ante*.

(*h*) *Peek v. Derry* (1887), 37 Ch. D. 541, C. A., reversed without affecting the point *sub nom.* *Derry v. Peek*, *supra*; *Western Bank of Scotland v. Addie* (1867), L. R. 1 Sc. & Div. 145; *Re Royal British Bank etc., Nicol's Case* (1859), 3 De G. & J. 387, C. A.; *Cleveland Iron Co. v. Stephenson* (1865), 4 F. & F. 428; *Clarke v. Dickson* (1859), 6 C. B. (N. S.) 453; *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459, C. A.; *Moore v. Burke* (1865), 4 F. & F. 258; *Arnison v. Smith* (1889), 41 Ch. D. 348, 369, C. A.; compare *Re London and Leeds Bank, Ex parte Carling* (1887), 56 L. T. 115.

(*i*) *Peek v. Gurney*, *supra*.

(*k*) *Ibid.*, at pp. 412, 413, overruling *Bagshaw v. Seymour* (1856), 18 C. B. 903, and *Bedford v. Bagshaw* (1859), 4 H. & N. 538; *Barry v. Croskey* (1861), 2 John. & H. 1, 23; *Barrett's Case* (1865), 3 De G. J. & Sm. 30. Where the prospectus is part of a scheme of fraud, continued, after the issue, by other devices, intended to induce persons, who receive but do not act on the prospectus, by subscribing, to purchase the shares in the market, there may be a good cause of action

219. The fact that a director has joined in an authority to brokers to obtain subscriptions does not apparently render him liable for misstatements of facts in a prospectus issued by the brokers, not known of or authorised by him (*l*). Nor is he liable in respect of false representations in a prospectus issued by his co-director or by any other agent of the company unless he has expressly authorised or tacitly permitted its issue (*m*).

SECT. 8.
Prospectus.
Liability of directors or promoters.

A promoter is liable if the misrepresentation is made with his consent or by his agent (*n*).

220. Mere delay in instituting an action of deceit does not, as it does in an action for rescission, debar the plaintiff from relief; but, except in cases of concealed fraud (*o*), the claim is barred by statute after six years from the date of the fraudulent statement (*p*).

Delay in proceedings.

The plaintiff must prove actual damage to himself (*q*), and the measure of damages in an action brought by a shareholder is the difference between what he paid for his shares and what they were worth when they were allotted to him (*r*).

Damages.

On the death of a person entitled to maintain an action of deceit, his right of action survives (*s*) to his personal representatives (*t*). The personal representatives of a deceased person, responsible for a fraudulent misrepresentation in a prospectus, cannot be sued for damages unless the estate of the deceased has derived benefit from the fraud, and then only to the extent of the benefit (*a*). The same rule applies when death occurs after the commencement of proceedings (*b*).

Death of parties.

(*Andrews v. Mockford*, [1896] 1 Q. B. 372, 381, C. A.; *Peek v. Gurney* (1873), L. R. 6 H. L. 377; *Barry v. Croskey*, *supra*; *Levy v. Langridge* (1838), 4 M. & W. 337, Ex. Ch.; *Cullen v. Thomson's Trustees and Kerr* (1862), 4 Macq. 441, H. L.; *Stainbank v. Fernley* (1839), 9 Sim. 556).

(*l*) *Weir v. Bell* (1878), 3 Ex. D. 238, C. A. As to ratification, see note (*m*), *infra*.

(*m*) *Cargill v. Bower* (1878), 10 Ch. D. 502; and see *Re Denham & Co.* (1883), 25 Ch. D. 752, 765; *Peek v. Gurney*, *supra*, at p. 392; *Glasier v. Rolls* (1889), 42 Ch. D. 436, C. A.; *Marnham v. Weaver* (1899), 80 L. T. 412, 413. The decision in *Hoole v. Speak*, [1904] 2 Ch. 732, that a principal cannot ratify a tort committed by his agent is contrary to authority (*Hull v. Pickersgill* (1819), 1 Brod. & Bing. 282, 286; *Wilson v. Barker* (1833), 4 B. & Ad. 614; *Wilson v. Tumman* (1843), 6 Man. & G. 236, 242; *Keighley, Maxsted & Co. v. Durant*, [1901] A. C. 240, 246, 247; *Carter v. St. Mary Abbott's Vestry* (1900), 64 J. P. 548, C. A.).

(*n*) *Glasier v. Rolls*, *supra*, at p. 441; *Dunnett v. Mitchell* (1885), 12 R. (Ct. of Sess.) 40; *Arnison v. Smith* (1889), 41 Ch. D. 348, C. A.

(*o*) *Gibbs v. Guild* (1882), 9 Q. B. D. 59, C. A.; *Peek v. Gurney* (1873), L. R. 6 H. L. 377, 384, 402.

(*p*) *Bull's Coal Mining Co. v. Osborne*, [1899] A. C. 351, 363, P. C.; and see *Re McCallum*, *McCallum v. McCallum*, [1901] 1 Ch. 143, C. A.

(*q*) *Hyde v. Bulmer* (1868), 18 L. T. 293.

(*r*) *Arkwright v. Newbold* (1881), 17 Ch. D. 301, 312, C. A.; *Peek v. Derry* (1887), 37 Ch. D. 541, 593, 594, C. A.; reversed without affecting this point *sub nom. Derry v. Peek* (1889) 14 App. Cas. 337; *Arnison v. Smith*, *supra*, at pp. 363, 364; and compare *Twycross v. Grant* (1877), 2 C. P. D. 469, C. A.; *Cackett v. Keswick*, [1902] 2 Ch. 456, C. A.

(*s*) Stat. 4 Edw. 3, c. 7 (1330); see title EXECUTORS AND ADMINISTRATORS.

(*t*) *Twycross v. Grant* (1878), 4 C. P. D. 40, 46, 47, C. A. As to order of revivor, see *Arnison v. Smith*, *supra*.

(*a*) *Peek v. Gurney*, *supra*, at pp. 377, 392—395; *Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, C. A.; compare *Re Duncan, Terry v. Sweeting*, [1899] 1 Ch. 387; and see *Davoren v. Wootton*, [1900] 1 L. R. 273.

(*b*) *Phillips v. Homfray* (1883), 24 Ch. D. 439, C. A.; affirmed *sub nom. Phillips v. Fothergill* (1886), 11 App. Cas. 466.

SECT. 8.**Prospectus.****Effect of
bankruptcy.**

An action of deceit is not barred by an order of discharge in bankruptcy, as, unless judgment has been signed before adjudication, the claim is not provable in bankruptcy (c); if judgment has been signed, the judgment debt may be proved for in the bankruptcy (d).

(vi.) Statutory Remedy for Untrue Statements.**Statutory
remedy for
untrue state-
ments**

221. Where a prospectus (e) invites persons to subscribe for shares in or debentures (f) of a company (g), every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorised his being named, and who is named, in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company (h), and every person (i) who has authorised the issue of the prospectus, is liable to pay compensation (k) to all persons who subscribe (l) for any shares or debentures on the faith of (m) the prospectus for the loss or

(c) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37 (1); compare *Re Ex parte Stone* (1889), 61 L. T. 82; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 198.

(d) *Re Newman, Ex parte Brooke* (1876), 3 Ch. D. 494, C. A.; *Greenwood v. Humber & Co. (Portugal), Ltd.*, [1898] W. N. 162; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 62—198.

(e) As to the meaning of prospectus, see p. 120, *ante*. The term does not include a statement in lieu of a prospectus.

(f) Including debenture stock (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285).

(g) For the definition of a company, see p. 36, *ante*; and *Christchurch Gas Co. v. Keily* (1887), 3 T. L. R. 634.

(h) As to promoters, see p. 47, *ante*. For the purposes of the enactment under consideration, the expression "promoter" means a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but not any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84 (5) [Directors Liability Act, 1890 (52 & 53 Vict. c. 64), s. 3 (2)]).

(i) As to the meaning of "person," see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 19.

(k) The "compensation" must be estimated and awarded with reference to the loss sustained, and does not resemble a "penalty, damages, or sum of money" imposed by statute as a punishment (*Thomson v. Clanmorris* (Lord), [1900] 1 Ch. 718, 726, C. A.). As to the measures of damages and evidence to found an inquiry as to them, see *Stevens v. Hoare* (1904), 20 T. L. R. 407.

(l) "Subscription" means application followed by allotment, and not subsequent purchase; see *Peck v. Gurney* (1873), L. R. 6 H. L. 377; *Arnison v. Smith* (1889), 41 Ch. D. 348, 357, C. A.; and compare *Henderson v. Lacon* (1867), L. R. 5 Eq. 249. Two or more subscribers for shares and debentures may be joined as plaintiffs in one action against the same defendant or defendants (*Drincqbier v. Wood*, [1899] 1 Ch. 393). The plaintiff may in the same action sue the company for rescission of his contract with it to take the shares or debentures (*Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, C. A.).

(m) The plaintiff must have relied on the false statement or material omission, and not merely on the names of the directors (*Baty v. Keswick* (1901), 85 L. T. 18; *Cackett v. Keswick*, [1902] 2 Ch. 456, 463, C. A.; *Nash v. Calthorpe*, [1905] 2 Ch. 237, C. A.; *Macleay v. Tait*, [1906] A. C. 24, 30 (cases under the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38, to which the Directors Liability Act, 1890 (53 & 54 Vict. c. 64), was held applicable where the person issuing

SECT. 8.
Prospectus.

damage (n) they may have sustained by reason of any untrue statement (o) therein (p), or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless the following matters are proved (q) :—

(1) That he had reasonable ground to believe, and did up to the time of allotment believe, that every untrue statement not purporting to be made on the authority of an expert (r), or of a public official document or statement, was true (s);

the prospectus knew of the contracts (*Broome v. Speak*, [1903] 1 Ch. 586, C. A.; affirmed *sub nom. Shephard v. Broome*, [1904] A. C. 342, 346; *Coats (J. & P.), Ltd. v. Crossland* (1904), 20 T. L. R. 800). As to the case of an honest mistake as to contracts, such as forgetting the fact of their existence, see *Macleay v. Tait*, [1906] A. C. 24; *Culthorpe v. Trechmann* (1906), 22 T. L. R. 149, H. L.

(n) The plaintiff must prove damage occasioned by the untrue statement (*Macleay v. Tait*, *supra*, at p. 31; *Shephard v. Broome*, *supra*; *Nash v. Culthorpe*, [1905] 2 Ch. 237, C. A.). At the trial he need only show that he has suffered damage, the amount of which can afterwards be ascertained by inquiry; and the measure of damage is the difference between the price paid for the shares or debentures and their fair value at the date of allotment (*Broome v. Speak*, *supra*; *McConnel v. Wright*, [1903] 1 Ch. 546, C. A.; *Stevens v. Hoare* (1904), 20 T. L. R. 407). And this is not affected by the fact that property untruly stated to have been acquired at the date of the prospectus is acquired shortly afterwards (*McConnel v. Wright*, *supra*).

(o) An "untrue statement" is a statement in fact untrue, not a statement in the belief of the director untrue (*Broome v. Speak*, *supra*). And it is immaterial that the statement was not fraudulent (*Shephard v. Broome*, *supra*). A misleading statement is an "untrue statement" within the meaning of the Act, and the absolute liability imposed is not affected by the consideration whether the statement was untrue in the sense in which it was used by those who made it (*Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A.). If, as regards contracts or otherwise, there is such an omission that the matter withheld would if disclosed reasonably deter or tend to deter an ordinary prudent investor from subscribing, he is entitled to relief (*Broome v. Speak*, *supra*, at p. 604). And it is immaterial that the statement was true in the sense in which it was used by those who issued the prospectus; the meaning which is important is that which the prospectus conveys to those who read it (*Greenwood v. Leather Shod Wheel Co.*, *supra*, at p. 434; *Dringbier v. Wood*, [1899] 1 Ch. 393, 402, 403). But the action will not lie if the statement, though untrue when the prospectus was issued, was true when the plaintiff subscribed (*Ship v. Crosskill* (1870), L. R. 10 Eq. 73); compare *McConnel v. Wright*, *supra*.

(p) That is, in the prospectus on the faith of which the shares or debentures are taken (*Dringbier v. Wood*, *supra*, at p. 405).

(q) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84 (1) [Directors Liability Act, 1890 (53 & 54 Vict. c. 64), s. 3]. The object of the Directors Liability Act was to remove the defect in the law shown by *Derry v. Peek* (1889), 14 App. Cas. 337, and to get rid of the effect of that decision so far, and so far only, as directors and promoters issuing such prospectuses on the one hand, and persons taking shares or debentures on the other hand, are concerned (*McConnel v. Wright*, *supra*, at p. 558); and to impose upon those who issue prospectuses the duty to take reasonable care not to make untrue statements (*Greenwood v. Leather Shod Wheel Co.*, *supra*, at p. 434). It created a new statutory duty of accuracy, and in effect a new action on the case to persons injured by the neglect of that duty (*Thomson v. Clanmorris (Lord)*, [1900] 1 Ch. 718, 727, C. A.).

(r) The expression "expert" includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84 (5) [Directors Liability Act, 1890 (53 & 54 Vict. c. 64), s. 3 (4)]).

(s) *Ibid.*, s. 84 (1) (a) [Directors Liability Act, 1890 (53 & 54 Vict. c. 64),

NOTE. 3. (2) That every untrue statement, purporting to be a statement by Prospectus. or contained in what purports to be a copy of or extract from a report or valuation of an expert, fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation (unless the director, person named as director, promoter, or person who authorised the issue of the prospectus, had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it, in which case liability attaches) (t);

(3) That every untrue statement, purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, was a correct and fair representation of the statement, or copy of, or extract from, the document (a).

Withdrawal
of consent
to issue
prospectus
and public
notice.

222. No person is, however, liable if it is proved that, having consented to become a director, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent (b); or that, after the issue of the prospectus, and before allotment thereunder, on becoming aware of any untrue statement therein, he withdrew his consent thereto, and gave reasonable public notice of the withdrawal and of the reason therefor (c).

s. 3 (1) (a)]. Liability can only be avoided by proving such reasonable ground of belief, and belief in fact (*Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A.). But only reasonable, not sufficient, ground for belief is required, and reliance may to some extent be placed on the advice and assistance of other persons (*Stevens v. Hoare* (1904), 20 T. L. R. 407, 409). Honest belief that the law does not require something material to be stated is no excuse (*Shepherd v. Broome*, [1904] A. C. 342, 347). Particulars of the alleged reasonable grounds of belief may be ordered to be given (*Alman v. Oppert*, [1901] 2 K. B. 576, C. A.).

(t) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84 (1) (b) [Directors Liability Act, 1890 (53 & 54 Vict. c. 64), s. 3 (1) (b)]. The defendants cannot rely on a report which was not in existence when the prospectus was issued (*Coats (J. & P.), Ltd. v. Crossland* (1904), 20 T. L. R. 800).

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84 (1) (c) [Directors Liability Act, 1890 (53 & 54 Vict. c. 64), s. 3 (1) (c)].

(b) Persons acting on advance copies of a prospectus issued without authority have not, *per se*, a right of action (*Hoole v. Speak*, [1904] 2 Ch. 732, where the statement that the directors cannot subsequently ratify the tort committed by the issuing person is, however, contrary to *Hull v. Pickersgill* (1819), 1 Brod. & Bing. 282, and other cases cited in note (m), p. 135, *ante*). A director who knows that a prospectus is to be issued, and does not ask to see it, cannot be heard to say that it was issued without his knowledge or consent; see *Drincohier v. Wood*, [1899] 1 Ch. 393, 405, 406; *Watts v. Bucknall*, [1902] 2 Ch. 628; [1903] 1 Ch. 766, C. A.; *Coats (J. & P.), Ltd. v. Crossland*, *supra*. In such a case he cannot repudiate the prospectus after action brought, and repudiation by his statement of defence is not "reasonable public notice" (*Drincohier v. Wood*, *supra*).

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84 (1) [Directors Liability Act, 1890 (53 & 54 Vict. c. 64), s. 3 (1)].

PART IV.—COMPANIES UNDER THE ACT OF 1908.

223. Where a company existing on August 18, 1890 (*d*), has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director is not liable in respect of any statement therein, unless he has authorised the issue of the prospectus, or has adopted or ratified it (*e*).

SECT. 8.
Prospectus.

Company
existing on
August 18,
1890.

224. Where the prospectus contains the name of a person as a director, or as having agreed to become a director, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to its issue, the directors (except any without whose knowledge or consent the prospectus was issued) and any other person who authorised its issue, are liable to indemnify him against all damages, costs, and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any action or legal proceedings brought against him in respect thereof (*f*).

Director's
right to
indemnity.

225. Every person who by reason of his being a director, or named as a director or as having agreed to become a director, or of his having authorised the issue of the prospectus, becomes liable to make any payment by way of compensation under the Act of 1908 (*g*), may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment (unless the person who has become so liable was, and that other person was not, guilty of fraudulent (*h*) misrepresentation) (*i*).

Director's
right to
contribution

Similarly, under the above provision, where an action is brought for a fraudulent misrepresentation which, independently of the statute, would have been ground for an action of deceit, the right of contribution exists amongst those who have knowledge of the fraud (*j*).

In an action to enforce contribution against persons who were not parties to the action in which the liability was established, the judgments in the report of the first action are an authority for holding that there was an untrue statement in the prospectus (*k*). The right to contribution may be enforced against directors, and the estates of deceased directors, who were not parties to the

(*d*) The date of the commencement of the Directors Liability Act, 1890 (53 & 54 Vict. c. 64).

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84 (2) [Directors Liability Act, 1890 (53 & 54 Vict. c. 64), s. 3 (3)], which in terms only refers to statements in the prospectus, and not, like *ibid.*, s. 84 (1), to statements also in reports or memoranda.

(*f*) *Ibid.*, s. 84 (3) [Directors Liability Act, 1890 (53 & 54 Vict. c. 64), s. 4].

(*g*) See p. 136, *ante*.

(*h*) That is to say, fraudulent within the meaning of the cases with reference to an action of deceit; see p. 133, *ante*.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84 (4) [Directors Liability Act, 1890 (53 & 54 Vict. c. 64), s. 5, amended]. The words in the text in brackets were not in the Act of 1890, and give effect to *Gerson v. Simpson*, [1903] 2 K. B. 197, C. A.

(*j*) *Gerson v. Simpson*, *supra*.

(*k*) *Shepherd v. Bray*, [1906] 2 Ch. 235.

SECT. 8. original action, the contribution payable being their share of the compensation and of the costs of the plaintiff in the original action, with interest, but no part of the defendant's costs therein, and no part of the original plaintiff's extra costs, the costs of appeals, or other payments made otherwise than under the provisions of the Act (*l*).

Period of
limitation.

226. The Civil Procedure Act, 1833 (*m*), which requires actions for penalties, damages, or sums of money given to a person grieved by any statute to be brought within two years of the cause of action, does not apply to actions for the statutory compensation (*n*). Such actions may apparently be brought within six years from the date on which the shares or debentures were subscribed (*n*).

Bankruptcy
or death of
parties.

227. The acts in respect of which proceedings may be taken being torts (*o*), the same rules apply, on the bankruptcy of a defendant, as in an action of deceit, at any rate if the untrue statement is fraudulent (*p*).

On the death of a person entitled to maintain an action for the statutory compensation, the right of action apparently survives to his personal representatives as in the case of an action of deceit (*q*). It has not been decided whether on the death of a person liable to make compensation the cause of action survives against his personal representatives, to the extent to which his estate has benefited, although the point has been discussed (*r*).

(vii.) *Criminal Proceedings.*

Criminal
proceedings
as regards
prospectuses.

228. A director, manager, or public officer of any body corporate or public company who makes, circulates, or publishes, or concurs

(*l*) *Shepherd v. Bray*, [1906] 2 Ch. 235, compromised on appeal, [1907] 2 Ch. 571, C. A., where COZENS-HARDY, M.R., said that it must not be assumed that the members of the court, as at present advised, having heard the full arguments of the appellant's counsel, and a good deal of the respondent's in answer, were prepared to assent to all that WARRINGTON, J., had decided in the court below.

(*m*) 3 & 4 Will. 4, c. 42, s. 3.

(*n*) *Thomson v. Clanmorris (Lord)*, [1900] 1 Ch. 718, C. A.

(*o*) Persons liable under the Act which s. 84 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), replaces, were joint tort-feasors (*Gerson v. Simpson*, [1903] 2 K. B. 197, 200, 204, C. A.). The contribution recoverable under s. 84 (4) of the Act of 1908 is "as in cases of contract." By issuing a prospectus which they had no right to issue those responsible for it have done the subscriber a "wrong" (*Frankenburg v. Great Horseless Carriage Co.*, [1900] 1 Q. B. 504, 509, C. A.).

(*p*) See p. 135, *ante*; and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 198.

(*q*) See p. 135, *ante*.

(*r*) See *Frankenburg v. Great Horseless Carriage Co.*, *supra*, at p. 507, where the counsel for the executors of a deceased director admitted liability to the extent to which the estate had benefited by any unlawful act of the deceased. But see Lindley, Law of Companies, 6th ed., p. 121, where it is said that the action "will not lie against the personal representative of the deceased director or other person liable for the untrue statements." It may be that, although the estate of a deceased director is not liable directly to the plaintiff, it is liable to contribute under s. 84 (4) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), where judgment has been obtained against other directors; see *Shepherd v. Bray*, [1906] 2 Ch. 235, 253.

in making, circulating, or publishing, any written statement which he knows to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such company, or with intent to induce any person to become a shareholder therein, or to intrust or advance any property to such body corporate or public company, is guilty of a misdemeanour (*s*). A prospectus is a written statement within the meaning of this provision (*t*).

SECT. 8.
Prospectus.
—

The prospectus may render the persons who are responsible for its issue liable to be indicted for obtaining money by false pretences (*u*).

Failure to comply with the statutory requirements as to the contents of the prospectus renders those responsible for it indictable for a misdemeanour (*a*).

Directors may be convicted of conspiracy by inducing persons to subscribe for or deal in shares or debentures of their companies by fraudulent statements (*b*).

SUB-SECT. 4.—*Statement filed in lieu of Prospectus.*

229. A company which is not a private company (*c*), and which has not allotted any shares or debentures before July 1, 1908 (*d*), and which does not issue a prospectus on or with reference to its formation (*e*), must not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar a statement in lieu of prospectus signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, containing the following particulars:—The nominal share capital of the company and the shares into which it is divided; the names, descriptions, and addresses of the directors or proposed directors (*f*); the minimum subscription (if any) fixed by the memorandum or articles of association on which the company may proceed to allotment (*g*); the number and amount of shares

Statement
in lieu of
prospectus.

(*s*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 84; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 660.

(*t*) *R. v. Gurney* (1869), Finlason's Report, p. 240.

(*u*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 88; see *R. v. Aspinall* (1876), 2 Q. B. D. 48, C. A.; *R. v. Silverlock*, [1894] 2 Q. B. 766, C. C. R.

(*a*) See p. 126, *ante*.

(*b*) *R. v. Esdaile* (1858), 1 F. & F. 213; *R. v. Timothy* (1858), 1 F. & F. 39; *R. v. Gurney*, *supra*; *Burnes v. Pennell* (1849), 2 H. L. Cas. 497, 525; *R. v. Aspinall*, *supra*.

(*c*) As to private companies, see p. 73, *ante*.

(*d*) The date of the commencement of the Companies Act, 1907 (7 Edw. 7, c. 50).

(*e*) Apparently, if a company intends at some future time to invite the public to subscribe for its shares, but has no intention of doing so at once, it must file the statement in lieu of a prospectus before going to allotment of its shares or debentures, and the filing of the statement does not free the company from complying with the requirements of s. 80 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), when a prospectus is issued.

(*f*) As to the authority for naming a director in the statement, see *ibid.*

(*g*) As to the effect of this on allotment, see p. 177, *post*; and as to the effect as to commencing business, see p. 262, *post*.

SECT. 8.
Prospectus.
Contents of
statement.

and debentures agreed to be issued as fully or partly paid up otherwise than in cash; the consideration for the intended issue of those shares and debentures; the names and addresses of the vendors of property purchased or acquired, or proposed to be purchased or acquired, by the company; the amount (in cash, shares, or debentures) payable to each separate vendor; the amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying the amount (if any) paid or payable for goodwill; the amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company (*h*), or the rate of the commission; the estimated amount of preliminary expenses; the amount paid or intended to be paid to any promoter, and the consideration for the payment; the dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the filing of the statement (*i*)); the time and place at which the contracts or copies thereof may be inspected; the names and addresses of the auditors of the company (if any); full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company; and whether the articles contain any provision precluding holders of shares or debentures receiving and inspecting balance-sheets or reports of the auditors or other reports (*j*).

SECT. 9.—*Membership.*

SUB-SECT. 1.—*In General.*

Who are
members.

230. The members of a company are those persons (including corporations (*k*), if any) who collectively constitute the company, or,

(*h*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 89 (1); and p. 92, *ante*.

(*i*) The company cannot, previously to the statutory meeting, vary the terms of a contract referred to in the statement, except subject to the approval of the statutory meeting (*ibid.*, s. 83 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 11; Companies Act, 1907 (7 Edw. 7, c. 50), s. 1 (2)]).

(*j*) *Ibid.*, s. 82, and Sched. II. [Companies Act, 1907 (7 Edw. 7, c. 50), s. 1 (1) and Sched. I.]; s. 82 of the Act of 1908 in substance requires the statement in lieu of a prospectus to contain the particulars which must be inserted in a prospectus; but there is no provision in the Act of 1908 which applies to a statement in lieu of a prospectus the provision of s. 84 of that Act, which replaced the Directors Liability Act, 1890 (53 & 54 Vict. c. 64).

(*k*) *Re Barned's Banking Co., Ex parte Contract Corporation* (1867), 3 Ch. App. 105, per Lord CAIRNS, L.J., at p. 113; see title CORPORATIONS, Vol. VIII., pp. 322, 364.

in other words, are its corporators. A member is not necessarily a shareholder, for an unlimited company or a company limited by guarantee may exist either with or without a share capital (*l*).

SECT. 9.
Member-
ship.

231. Whether the company is limited by shares, or by guarantee, or is unlimited, the subscribers of the memorandum of association become the first members of the company as from the date of incorporation mentioned in the registrar's certificate of incorporation (*m*). They are deemed to have agreed to become members of the company, and on its registration are to be entered as members in its register of members (*n*); but neither this entry nor any allotment of shares is a condition precedent to their becoming members (*o*).

Subscribers of
the memo-
randum.

232. Each subscriber at once, by subscribing, irrevocably agrees to take from the company the number of shares placed opposite his signature (*a*), unless all its share capital has been duly allotted to other persons (*b*). The fact that no shares are allotted to him and that he has ceased to be treated as a member for a considerable time does not relieve him from liability (*c*), though a valid surrender will do so (*d*). A subscriber who is a director is bound to see that the allotment is made (*e*).

Subscribers'
liability.

The subscriber's obligation to take shares is not satisfied by a transfer to him, or by an allotment to him of shares, credited as fully paid up, to which a third person is entitled (*f*). The obligation of a person who subscribes in his own name, but on behalf of his firm, is satisfied by the firm taking the number of shares subscribed for (*g*).

If a subscriber of the memorandum subsequently applies for

(*l*) *Re South London Fish Market Co.* (1888), 39 Ch. D. 324, C. A.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7. c. 69), s. 16 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 18]; *Dalton Time Lock Co. v. Dalton* (1892), 66 L. T. 704, C. A.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 24 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 23].

(*o*) *Nicol's Case*, *Tufnell and Ponsonby's Case* (1885), 29 Ch. D. 421, 445, C. A.; *Evans's Case* (1867), 2 Ch. App. 427; *Hall's Case* (1870), 5 Ch. App. 707; *Sidney's Case* (1871), L. R. 13 Eq. 228; *Re London and Provincial Consolidated Coal Co.* (1877), 5 Ch. D. 525; *Re Argyle Coal and Cannel Co., Ex parte Watson* (1885), 54 L. T. 233.

(*a*) *Alexander v. Automatic Telephone Co.*, [1899] 2 Ch. 302; but unless otherwise agreed, by the articles or otherwise, the subscriber is only bound to pay when calls are made (*ibid.*).

(*b*) *Mackley's Case* (1875), 1 Ch. D. 247; and see *Evans's Case*, *supra*; *Drummond's Case* (1869), 4 Ch. App. 772, 780.

(*c*) *Re Imperial Land Co. of Marseilles*, *Levick's Case* (1870), 40 L. J. (OH.) 180; *Ex parte London and Colonial Co., Tooth's Case* (1868), 19 L. T. 599; *Sidney's Case*, *supra*.

(*d*) *Re Freen & Co.* (1866), 15 W. R. 166; *Snell's Case* (1869), 5 Ch. App. 22; *Hall's Case*, *supra*; *Re London and Provincial Consolidated Coal Co.*, *supra*.

(*e*) *Evans's Case*, *supra*; *Hall's Case*, *supra*, at p. 711.

(*f*) *Migotti's Case* (1867), L. R. 4 Eq. 238; *Forbes and Judt's Case* (1870), 5 Ch. App. 270; *Dent's Case*, *Forbes's Case* (1873), 8 Ch. App. 768; and compare *Re Pen'Alit Silver Lead Mining Co., Fraser's Case* (1873), 42 L. J. (OH.) 358.

(*g*) *Dunster's Case*, [1894] 3 Ch. 473, C. A.

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ship.

and obtains an allotment of shares, the allotment, unless otherwise agreed, will include the shares subscribed for (*h*).

The shares so subscribed for may be paid for either in cash or in money's worth (*i*). But the shares paid for money's worth must be identified with the shares subscribed for (*k*).

A subscriber for preference shares may take the like amount of ordinary shares instead (*l*). If a person subscribes for ordinary shares, and also for shares to be allotted as fully paid up, he is only liable as contributory in respect of the former; but if he subscribes for fully paid up shares only, he is liable for them as unpaid (*m*), except in so far as he has actually paid for them.

Members
forming the
corporation.

233. The subscribers of the memorandum, together with such other persons as from time to time become members of the company, are a body corporate (*n*). Each of those other persons becomes a member by agreeing to become a member of the company and by his name being entered in its register of members (*o*).

Where
number of
members to
be stated in
articles.

In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital the articles must state the number of members with which the company proposes to be registered (*a*); and when the company increases the number beyond the registered number, it must give to the registrar, within fifteen days after the increase was resolved on or took place, notice of the increase of members (*b*).

Share
warrant
holders.

The bearer of a share warrant (*c*) may, if the articles of association so provide, be deemed to be a member of the company, either to the full extent or for any purposes defined in the articles, except that, in cases where a share qualification is required by the articles for being a director or manager of the company, he is not so qualified in respect of the shares or stock specified in the warrant (*d*).

(*h*) *Re Freen & Co.* (1866), 15 W. R. 166; *Gilman's Case* (1886), 31 Ch. 420; *Drummond's Case* (1869), 4 Ch. App. 772; *Dunster's Case*, [1894] 3 Ch. 473, C. A.

(*i*) *Drummond's Case*, *supra*; *Pell's Case* (1869), 5 Ch. App. 11; *Re Baglan Hall Colliery Co.* (1870), 5 Ch. App. 346; *Jones' Case* (1870), 6 Ch. App. 48; *Maynard's Case* (1873), 9 Ch. App. 60; see p. 179, *post*. Directors cannot pay for the shares out of fees paid to themselves *ultra vires* (*Re Great Northern and Midland Coal Co., Ex parte Currie* (1862), 11 W. R. 46, C. A.); or out of the moneys of the company paid to other persons *ultra vires* (*Hay's Case* (1875), 10 Ch. App. 593; compare *Re Canadian Oil Works Corporation, Eastwick's Case* (1876), 34 L. T. 84).

(*k*) *Fothergill's Case* (1873), 8 Ch. App. 270.

(*l*) *Duke's Case* (1876), 1 Ch. D. 620.

(*m*) *De Beville's (Baron) Case* (1868), L. R. 7 Eq. 11.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 16 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 18].

(*o*) *Ibid.*, s. 24 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 23]. As to the registration of members, see p. 148, *post*.

(*a*) *Ibid.*, s. 10 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 14].

(*b*) *Ibid.*, s. 44 (1) [Companies Act, 1862, s. 34]. There is a penalty of not exceeding £5 a day for default, on the company, and on every director or manager who knowingly and wilfully authorises or permits the default.

(*c*) As to share warrants, see p. 185, *post*.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 37 (4) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 30]. Where the articles required

The holder of a scrip certificate entitling him to shares on fulfilling certain conditions is not a member of the company (e).

SECT. 9.
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SUB-SECT. 2.—*Contract for Membership.*

234. The Act of 1908 (f) only requires an agreement to constitute membership, followed in some cases by registration, and that agreement is not different from agreements in relation to other matters (g). No particular form is required (h). As in the case of other agreements, it may be express or implied, and either written or oral (i).

Contract for
membership.

To constitute an express agreement as to shares, there must be an absolute and unqualified acceptance of a proposal to take or allot them and a communication of the acceptance to the proposer; but in case of a qualified acceptance there is a contract if the qualification is agreed to, or if the applicant pays for the shares within the specified time (k). Where an application for shares is subject to a condition precedent, the condition must be performed to create a liability to take them (l). Where, however, the application is subject to a condition subsequent, the liability arises although the condition is never complied with (m). An application

Express
contract.

directors to hold share warrants as a qualification, the validity of the provision was apparently not questioned (*Pearson's Case* (1877), 5 Ch. D. 336, C. A.).

(e) *Ormerod's Case* (1867), L. R. 5 Eq. 110; and compare *Re Asiatic Banking Corporation, Ex parte Collum* (1869), L. R. 9 Eq. 236; *McIlwraith v. Dublin Trunk Connecting Rail. Co.* (1871), 7 Ch. App. 134.

(f) 8 Edw. 7, c. 69, ss. 16, 24.

(g) *Nicol's Case* (1885), 29 Ch. D. 421, C. A.

(h) *Ritso's Case* (1877), 4 Ch. D. 774, C. A.

(i) *New Theatre Co., Bloxam's Case* (1864), 33 Beav. 529, C. A., which shows that contracts to take shares are not within s. 17 of the Statute of Frauds (29 Car. 2, c. 3), now replaced by s. 4 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). As to the effect of subscribing to the memorandum, see p. 143, ante.

(k) *Re Adelphi Hotel Co., Best's Case* (1865), 34 L. J. (CH.) 523, C. A.; *Addinell's Case* (1865), L. R. 1 Eq. 225; *Jackson v. Turquand* (1869), L. R. 4 H. L. 305; *Oriental Steam Navigation Co. v. Briggs* (1861), 4 De G. F. & J. 191; *Pentelou's Case* (1869), 4 Ch. App. 178; *Capper's Case* (1850), 1 Sim. (N. S.) 178; *Gustard's Case* (1869), L. R. 8 Eq. 438; *Beck's Case* (1874), 9 Ch. App. 392; *Re Leeds Banking Co., Ex parte Barrett* (1865), 2 Drew. & Sm. 415; and see p. 173, post.

(l) *Rogers' Case, Harrison's Case* (1868), 3 Ch. App. 633; compare *Wood's Case* (1873), L. R. 15 Eq. 236; *Re London and Provincial Provident Association, Re Mogridge* (1888), 57 L. J. (CH.) 932; *Re Anglo-Danish and Baltic Steam Navigation Co., Ex parte Sahlgreen and Carrall* (1867), 16 W. R. 121; *Re Sunken Vessels Recovery Co., Ex parte Wood* (1858) 3 De G. & J. 85, C. A.; *Simpson's Case* (1869), 4 Ch. App. 184; *Ex parte Harwood* (1869), 20 L. T. 736; *Simpson v. Heaton's Steel and Iron Co.* (1871), 19 W. R. 614, C. A.; *Gorrissen's Case* (1873), 8 Ch. App. 507; *Re Brinsmead (Thomas Edward) & Sons, Tomlin's Case* (1897), 14 T. L. R. 53, C. A.; *Rankin v. Hop and Malt Exchange Co.* (1869), 20 L. T. 207; *Perrett's Case* (1873) L. R. 15 Eq. 250; *Spitzel v. Chinese Corporation* (1899), 15 T. L. R. 281; and see *Alabaster's Case* (1868), L. R. 7 Eq. 273; *Stace and Worth's Case* (1869), 4 Ch. App. 682; *Dougan's Case* (1873), 8 Ch. App. 540 (all cases of ineffectual amalgamation).

(m)
Co.,
App.

(1866), L. R. 2 Eq. 349; *Re Alexandra Park Co., Sharon's Claim*, [1866] W. N. 231; *Re Life Association of England, Thomson's Case* (1865), 4 De G. J. & Sm. 749, C. A.; *Re Southport and West Lancashire Banking Co., Fisher's Case* (1885), 55 L. J. (CH.) 497, C. A.; *Mare, Holmwood & Co. v. Anglo-Indian Steamship Co.* (1886), 3 T. L. R. 142, C. A.

SECT. 9.
Member-
ship.

Implied
contract.

for shares, being a mere offer, may be withdrawn before it is accepted(n).

235. In the absence of any written or verbal contract, an agreement to take shares may be implied from conduct(o). Although a person's name is entered in the register as the holder of shares allotted to him, no agreement will be implied, by reason only of his receiving notice of the allotment, if he has not acted as the holder of the shares or otherwise accepted them(p), or if he has forthwith repudiated them(q). In such a case, even when a winding up has supervened, he can have his name removed from the register in respect of the shares(r).

Where the articles of association of a company require a director to have a share qualification, the fact of a person becoming a director may be evidence of an agreement to take the required qualification shares(s). Similarly, the memorandum and articles may show a contract to take shares, as where they require every original holder of a founders' share to apply for and take a specified number of ordinary shares(t). But a statement in a prospectus that the directors will take all ordinary shares not taken by the vendors does not show a contract by them to take such shares(a).

Estoppel.

A person may be estopped by his conduct from denying that he agreed to accept any shares, as, for instance, where, being the registered holder of shares forming part of an irregular or invalid issue of capital, he deals with them as his own, by paying calls or receiving dividends on them, or by attempting to transfer them(b), or where he has held himself out as having in fact subscribed(c).

Agent's
contract.

236. A person who agrees, on behalf of another, to take shares, without disclosing the agency, is personally liable to take them(d). Where he so agrees, without authority(e), he is liable,

(n) See title CONTRACT, Vol. VII., p. 347; and compare *Ramsgate Victoria Hotel Co. v. Montefiore, Same v. Goldsmid* (1866), L. R. 1 Exch. 109; *Re Bowron, Baily & Co., Ex parte Baily* (1868), 3 Ch. App. 592. As to acceptance by allotment, see p. 174, *post*.

(o) See p. 175, *post*.

(p) *Chapman and Barker's Case* (1867), L. R. 3 Eq. 361, 365; *Oakes v. Turquand and Harding* (1867), L. R. 2 H. L. 325, 350, 351; *Somerville's Case* (1871), 6 Ch. App. 266; *Wynne's Case* (1873), 8 Ch. App. 1002; *Baillie's Case*, [1898] 1 Ch. 110.

(q) *Austin's Case* (1866), L. R. 2 Eq. 435; *Re Imperial Land Credit Corporation* (1868), 16 W. R. 1191.

(r) *Arnot's Case* (1887), 36 Ch. D. 702, C. A.

(s) *Portal v. Emmens* (1876), 1 O. P. D. 664, C. A.; and see p. 213, *post*.

(t) *General Phosphate Corporation v. Horrocks* (1892), 8 T. L. R. 350.

(a) *Re Moore Brothers & Co., Ltd.*, [1899] 1 Ch. 627, C. A.

(b) *Campbell's Case* (1873), 9 Ch. App. 1, 15.

(c) *New Brunswick Rail. Co. v. Boore* (1858), 3 H. & N. 249; *Re Oola Lead and Copper Mining Co., Palmer's Case* (1868), 2 I. R. Eq. 573; and see *Ex parte Roney* (1864), 33 L. J. (CH.) 731, C. A.; *Tothill's Case* (1865), 1 Ch. App. 85; *Re Patent File Co., Ex parte White* (1867), 16 L. T. 276.

(d) *Re Southampton etc. Boat Co., Bird's Case* (1864), 4 De G. J. & Sm. 200.

(e) A parol authority is insufficient (*Leishman v. Cochrane* (1863), 9 L. T. 104, C. A.). A person applying for shares in an infant's name is himself liable (*Richardson's Case* (1875), L. R. 19 Eq. 589; *Re North of England Banking Co., Reaveley's Case* (1848), 1 De G. & Sm. 530; *Re Electric Telegraph Co. of Ireland, Maxwell's Case* (1857), 24 Beav. 321).

unless the other person ratifies the act (*f*), to pay damages for breach of warranty of authority, the measure of damages in the case of an insolvent company being the nominal amount of the shares (*g*).

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A person purporting to contract to take shares on behalf of a fictitious or non-existent person is himself bound to take them (*h*).

If an application is made for shares on behalf of a person who is ignorant of the matter, and he is registered as the holder, and the directors know that the person applying does not intend to take the shares himself, neither the person registered nor the applicant is liable as a shareholder; but the applicant is liable to those who are deceived for breach of an implied warranty of authority (*i*).

237. A contract by a company to take shares in another company is only binding if the former company has power to hold shares (*j*). Company taking shares.

An infant's agreement to take shares is voidable at his election on his attaining majority (*k*); but if they are registered in his name and, after attaining his majority, he acts as the shareholder (*l*), or does not within a reasonable time (*m*) repudiate the shares, he cannot afterwards do so (*n*). Infants.

A married woman's agreement to take shares, made on or after December 5, 1893, binds her separate property whenever acquired, to which no restraint on anticipation attaches, whether she has or has not, when the contract is made, any separate property, and the contract is also enforceable against all property which she is thereafter while discoverer possessed of or entitled to (*o*). Married woman's contract.

(*f*) *Levita's (G. H.) Case* (1870), 5 Ch. App. 489.

(*g*) *Re National Coffee Palace Co., Ex parte Panmure* (1883), 24 Ch. D. 367, C. A.

(*h*) *Re Wheal Emily Mining Co., Cox's Case* (1863), 4 De G. J. & Sm. 53, C. A.; *Pugh and Sharman's Case* (1872), L. R. 13 Eq. 566; *Savigny's Case*, [1899] W. N. 2.

(*i*) *Coventry's Case*, [1891] 1 Ch. 202, 203, 211, C. A.; *Collen v. Wright* (1857), 8 E. & B. 647, Ex. Ch.; see *Re London, Bombay, and Mediterranean Bank* (1881), 18 Ch. D. 581.

(*j*) *Salomons v. Laing* (1850), 12 Beav. 339; *Great Western Rail. Co. v. Metropolitan Rail. Co.* (1863), 32 L. J. (CH.) 382, C. A.; *Re European Society Arbitration Acts, Ex parte British Nation Life Assurance Association (Liquidators)* (1878), 8 Ch. D. 679, C. A.

(*k*) *Newry and Enniskillen Railway v. Coombe* (1849), 3 Exch. 565; *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589.

(*l*) *Lumaden's Case* (1868), 4 Ch. App. 31.

(*m*) What is a reasonable time depends on the circumstances of the particular case; see *Ebbett's Case* (1870), 5 Ch. App. 302.

(*n*) *Ibid.*; *Cork and Bandon Rail. Co. v. Cazenove* (1847), 10 Q. B. 935; *Mitchell's Case* (1870), L. R. 9 Eq. 363; *Re Yeoland Consols, Ltd.* (No. 2) (1888), 58 L. T. 922. A director knowingly allotting shares to an infant is liable to the company for any loss thereby occasioned (*Re Crenver and Wheal Abraham United Mining Co., Ex parte Wilson* (1872), 8 Ch. App. 45).

(*o*) Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1; see, generally, title HUSBAND AND WIFE. After January 1, 1883, and before December 5, 1893, the agreement only bound the separate property if the company proved that when it was made the married woman had separate property not subject to restraint, and the onus of proving that she had separate property, and contracted with reference to it, was on the company (*Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), ss. 1 (3), (4), 19; *Palliser v. Gurney* (1887), 19 Q. B. D. 519; *Re Shakespear, Deakin v. Lakin* (1885), 30 Ch. D. 169; *Harrison v. Harrison* (1888), 13 P. D. 180, C. A.; *Leak v. Driffield* (1889), 24 Q. B. D. 98). As to the liability of the husband of a female contributory married before the above Acts, see p. 489, *post*.

SECT. 9.

Member-
ship.Taking shares
at a discount.

238. A contract with a company to take its shares at a discount cannot be enforced (*p*). Even when the shares are allotted, and the allottee is registered as the holder thereof, he may have the register rectified (*q*); but if he acts as the owner of them (*r*), or does not within a reasonable time after registration, and before winding up, apply to have his name removed from the register as holder, an agreement to accept and pay for the shares in full will be implied (*a*). In the distribution of surplus assets in a winding up, where some shares have been paid in full and some issued at a discount, the members who have paid in full must receive back what they have paid on their shares in excess of the sum paid on the shares issued at a discount before the holders of shares so issued receive any part of the surplus (*b*).

Option to
take shares.

239. A company may, for value, agree to give an option to any one to take all or any of its shares, and the option may be exercised after the commencement of winding up, in which case the liquidator can issue the shares and receive the money payable in respect thereof, and place the name of the person exercising the option on the register of members and the list of contributories (*c*). If the liquidator refuses to issue the shares the measure of damages is the difference between the amount which the person would have received as his share of the assets if the shares had been issued to and paid for by him, and the amount which he was to pay for them if the former exceeds the latter amount (*d*).

SUB-SECT. 3.—Register of Members.

(i.) Contents.

Register of
members.

240. Every company must keep in one or more books a register of its members (*e*).

A book or document, intended to be a register of members, may be admitted in evidence as such, although the requirements of the Act as to how it should be kept have not been regularly complied with; but rough memoranda or sheets of paper intended as materials from which a register might be prepared are not a register (*f*).

(*p*) *Re Almada and Tirito Co.* (1888), 38 Ch. D. 415, C. A.; and see p. 91, *ante*.

(*q*) *Re Midland Electric Light and Power Co.* (1889), 37 W. R. 471; *Re Zoedone Co., Ex parte Higgins* (1889), 60 L. T. 383.

(*r*) *Re Railway Time Tables Publishing Co., Ex parte Sandys* (1889), 42 Ch. D. 98, C. A.

(*a*) *Re Addlestone Linoleum Case* (1887), 37 Ch. D. 191, C. A.

(*b*) *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66, C. A.

(*c*) *Hirsch & Co. v. Burns* (1897), 77 L. T. 377, H. L. As to options to take shares at par, see *Hilder v. Dexter*, [1902] A. C. 474; and p. 93, *ante*.

(*d*) *Hirsch & Co. v. Burns*, *supra*.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 25 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 25]. There may be one book called the "register of members" and another the "members' ledger" (*Weikersheim's Case* (1873), 8 Ch. App. 831).

(*f*) *Re Printing Telegraph and Construction Co. of the Agence Havas, Ex parte Cammell*, [1894] 2 Ch. 392, C. A.

241. The register must commence from the date of the registration of the company (*g*), and the company must enter therein the following particulars:—(1) The names and addresses, and the occupations (if any) of the members, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member; (2) the date at which each person was entered in the register as a member; (3) the date at which any person ceased to be a member (*h*). The subscribers of the memorandum, as well as other persons agreeing to become members, must be entered in the register (*i*).

SECT. 9.
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ship.**

Entries to be made in register.

Besides the particulars above specified, every company having a share capital must insert in a separate part of the register of members the list of members and summary required to be annually forwarded to the registrar, which must be completed within seven days after the fourteenth day after the first or only ordinary general meeting in the year (*k*).

Entry of list and summary.

The company must not enter in the register a statement that it has a lien on the shares of a member (*l*), and cannot insist on putting on the register anything except what is required by the statute to be inserted therein (*m*).

242. In order to constitute membership entry on the register is necessary, except in the case of signatories to the memorandum of association (*n*), or where there is a subsisting contract to take shares capable of being specifically enforced (*o*).

How far entry necessary for membership.

Where the name of a firm is entered in the register as the holder of shares the members of the firm are jointly liable for the shares (*p*). Where two or more persons hold a share or shares jointly they can insist on having their names registered in such order as they choose (*q*).

243. On the issue of a share warrant (*r*) the company must strike out of its register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member, and must enter in the

Entries where share warrants.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 30 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 32].

(*h*) *Ibid.*, s. 25 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 25]. Failure to comply with the section renders the company, and every director or manager knowingly and wilfully authorising or permitting the default, liable to a fine not exceeding £5 for every day during which the default continues (*ibid.*, s. 25 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 25]).

(*i*) *Ibid.*, s. 24; see p. 143, *ante*.

(*k*) *Ibid.*, s. 26 (1), (4) [Companies Act, 1862 (25 & 26 Vict. c. 86), s. 26]; see p. 263, *post*.

(*l*) *Re Key (W.) & Son, Ltd.*, [1902] 1 Ch. 467.

(*m*) *Re Saunders (T. H.) & Co.*, [1908] 1 Ch. 415.

(*n*) See p. 143, *ante*.

(*o*) *East Gloucestershire Rail. Co. v. Bartholomew* (1867), L. R. 3 Exch. 15; *Portal v. Emmens* (1876), 1 O. P. D. 201; *Nicol's Case, Tufnell and Ponsonby's Case* (1886), 29 Ch. D. 421, C. A.; *Re Macdonald, Sons & Co.*, [1894] 1 Ch. 89, C. A.

(*p*) *Weikersheim's Case* (1873), 8 Ch. App. 831; and see *Dunster's Case*, [1894] 3 Ch. 473, C. A.

(*q*) *Re Saunders (T. H.) & Co.*, *supra*.

(*r*) As to share warrants, see p. 185, *post*.

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register the following particulars:—(1) The fact of the issue of the warrant; (2) a statement of the shares or stock included in the warrant, distinguishing each share by its number; and (3) the date of the issue of the warrant (*s*).

Until the warrant is surrendered, the above particulars are deemed to be the particulars required to be entered in the register of members (*t*). The warrant-bearer is, subject to the articles of association, entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members; and the company is responsible for any loss incurred by any person by reason of the entry in the register of the name of a warrant-bearer in respect of the shares or stock therein specified without the warrant being surrendered and cancelled (*u*). On the surrender, the date of the surrender must be entered in the register as if it were the date at which a person ceased to be a member (*w*).

Notice of
trusts not to
be entered.

244. No notice of any trust, expressed, implied, or constructive, is to be entered on the register, or be receivable by the registrar, in the case of companies registered in England or Ireland (*x*).

Although a member is, to the knowledge of the company, merely a trustee of shares registered in his name, he is liable to the company for calls and other obligations of membership (*a*). He is, however, entitled to be indemnified against all such liabilities by his *cestui que trust* (*b*); but he cannot maintain an action to enforce this right unless the liability has been or is about to be enforced against him (*c*). The right of indemnity may be assigned to the liquidator of the company, and enforced by him (*d*).

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 37 (5) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 31]. The summary above referred to must state the total amount of shares or stock for which share warrants are outstanding at the date of the return, the total amount of share warrants issued and surrendered respectively since that date, and the number of shares or amount of stock comprised in each share warrant (*ibid.*, s. 26 (2) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 132]).

(*t*) *Ibid.*, s. 37 (6) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 31].

(*u*) *Ibid.*, s. 37 (3) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 29].

(*w*) *Ibid.*, s. 37 (6).

(*x*) *Ibid.*, s. 27 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 30]. As to Scotland, see *Muir v. City of Glasgow Bank* (1879), 4 App. Cas. 337, 360. As to executors, see p. 168, *post*.

(*a*) *Chapman and Barker's Case* (1867), L. R. 3 Eq. 361; *Muir v. City of Glasgow Bank*, *supra*; compare *Re Moseley Green Coal and Coke Co., Ltd.*, *Barrett's Case* (1864), 4 De G. J. & Sm. 416; *Re Phoenix Life Assurance Co.*, *Hoare's Case* (1862), 2 John. & H. 229; *Gray's Case* (1876), 1 Ch. D. 664. As to trust shares being sufficient to qualify a director, see p. 216, *post*. As to lien on trust shares, see p. 169, *post*.

(*b*) *Hardoon v. Belilios*, [1901] A. C. 118, P. C.; *Hemming v. Maddick* (1872), 7 Ch. App. 395; *Hughes-Hallett v. Indian Mammoth Gold Mines Co.* (1882), 22 Ch. D. 561, 564; *Butler v. Cumpston* (1868), L. R. 7 Eq. 16; *James v. May* (1873), L. R. 6 H. L. 328; *Cruse v. Paine* (1869), 4 Ch. App. 441; *Chapman and Barker's Case*, *supra* (trusts for the company). A person holding shares as a trustee is accountable to his *cestui que trust* (*Rooney v. Stanton* (1900), 17 T. L. R. 28, C. A.). As to his right of indemnity generally, see title TRUSTS AND TRUSTEES.

(*c*) *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, *supra*; *Hobbs v. Wagel* (1887), 36 Ch. D. 256; see *Re National Financial Co., Ex parte Oriental Commercial Bank* (1868), 3 Ch. App. 791.

(*d*) *Hemming v. Maddick*, *supra*; *Massey v. Allen* (1878), 9 Ch. D. 164; *Heritage v. Paine* (1876), 2 Ch. D. 594.

Where the articles of association supplement the statutory provision by expressly providing that the company shall be entitled to treat a shareholder as the absolute owner of his registered shares, and shall not be bound to recognise any equitable interest in shares, the company is not bound to accept or preserve notices of equitable interests, and such notices do not affect the company or its officers or agents with any trust (e).

SECT. 9.
Member-
ship.

Accepting
notices.

Notice to the company does not, as between two persons claiming title to shares registered in the name of a third, give any priority (f).

245. A person who has an equitable claim to shares may prevent his claim from being prejudiced by the registered holder dealing with them, by serving upon the company a *distringas* (g), after which the company cannot permit the shares claimed to be dealt with by the registered holder, except after proper notice to the claimant (h).

Distringas
and charging
order.

A charging order cannot be made on shares for a debt due from the registered shareholder, if he is a trustee of the shares; for they are not held by the judgment debtor "in his own right" (i).

(ii.) *Evidence of Matters Recorded.*

246. The register of members is *primâ facie* evidence of any matters by the Act directed or authorised to be inserted therein (k), and in a winding up it is, as between the contributories of the company, *primâ facie* evidence of the truth of all matters purporting to be therein recorded (l). The register is not conclusive evidence, although the courts endeavour to make it as conclusive as they can consistently with the provisions of the Act (m).

Evidence of
register.

(e) *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20, 30; *Simpson v. Molsons' Bank*, [1895] A. C. 270, P. C. Probably, even where the articles contain no such provision, the company is not bound to accept notices of equitable interests, but may treat a registered shareholder as the absolute owner of shares registered in his name. A trading company which, after notice of an equitable charge on its share and being affected in its capacity of a trader with knowledge of the chargee's interest, gives credit to the shareholder cannot, however, assert its lien against the chargee (*Bradford Banking Co. v. Briggs* (1886), 12 App. Cas. 29, applying the principle of *Hopkinson v. Rolt* (1861), 9 H. L. Cas. 514; and see *Bank of Africa v. Salisbury Gold Mining Co.*, [1892] A. C. 281, P. C.). As to the equitable claims where shares have been transferred by an assignment for the benefit of creditors, see *Peat v. Clayton*, [1906] 1 Ch. 659.

(f) *Roots v. Williamson* (1888), 38 Ch. D. 485; *Moore v. North Western Bank*, [1891] 2 Ch. 599. The principle of *Dearle v. Hall* (1828), 3 Russ. 1, does not apply (*Société Générale de Paris v. Walker*, *supra*, at p. 30).

(g) R. S. C., Ord. 46, rr. 3—11; see title EXECUTION.

(h) *Société Générale de Paris v. Tramways Union Co.* (1884), 14 Q. B. D. 424, 453, C. A.; affirmed *sub nom. Société Générale de Paris v. Walker*, *supra*. As to equitable claims, see further p. 197, *post*.

(i) Within the meaning of s. 14 of the Judgments Act, 1838 (1 & 2 Vict. c. 110) (*Cooper v. Griffin*, [1892] 1 Q. B. 740, C. A.; *Howard v. Sadler*, [1893] 1 Q. B. 1). The charge affects the beneficial interest (*Cragg v. Taylor* (1867), L. R. 2 Exch. 131; *South Western Loan Co. v. Robertson* (1881), 8 Q. B. D. 17; *Dixon v. Wrench* (1869), L. R. 4 Exch. 154; *Bolland v. Young*, [1904] 2 K. B. 824, C. A.; *Ideal Bedding Co., Ltd. v. Holland*, [1907] 2 Ch. 157). As to charging orders generally, see title EXECUTION.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 33 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 37].

(l) *Ibid.*, s. 220 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 154].

(m) See *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64,

SECT. 9.

Member-
ship.Inaccurate
register.

Inaccuracies or omissions in or from the register do not necessarily prevent it from being evidence (n). As, however, it is only *prima facie* evidence, a person whose name is registered, or omitted from the register, may adduce evidence to show that he ought not or ought to have been registered (o).

(iii.) *Custody and Inspection.*Custody of
register.

247. The register of members, commencing from the date of the registration of the company, must be kept at its registered office (p), and the directors cannot deal with it, as, for instance, by way of charge or lien, in such a way as to interfere with the purposes for which it is kept at the office (q).

Closing
register.

248. A company may, on giving notice by advertisement in some newspaper circulating in the district in which its registered office is situate, close the register for any time or times not exceeding in the whole thirty days in each calendar year (r).

Right to
inspection.

Except when so closed the register must during business hours (subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis, and to the inspection of any other person on payment of 1s., or such less sum as the company may prescribe, for each inspection (s). This right of inspection ceases when the company is being wound up (t). The inspection may be made, under proper restrictions, by an agent of the member or members desiring inspection (a).

Copies.

Any member or other person may require a copy of the register, or of any part thereof, or of the list and summary (b), or any part

per Lord CAIRNS, at p. 80; *Re Briton Medical and General Life Association* (1888), 39 Ch. D. 61, per STIRLING, J., at p. 71.

(n) *Wills v. Murray* (1850), 4 Exch. 843; *Bain v. Whitehaven and Furness Junction Rail. Co.* (1850), 3 H. L. Cas. 1; *Southampton Dock Co. v. Richards* (1840), 1 Man. & G. 448; *London and Brighton Rail. Co. v. Fairclough* (1841), 2 Man. & G. 674.

(o) *Carmarthen Rail. Co. v. Wright* (1858), 1 F. & F. 282; *Portal v. Emmens* (1876), 1 C. P. D. 201, 212; affirmed (1876), 1 C. P. D. 664, C. A.; *Hallmark's Case* (1878), 9 Ch. D. 329, C. A.

(p) Companies (Consolidation) Act, 1908 (8 Edw. c. 69), s. 30 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 32].

(q) *Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, 418, C. A., where it was held that a solicitor had not acquired a lien as against the liquidator.

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 31 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 33]; *Gibson v. Barton* (1875), L. R. 10 Q. B. 329.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 30 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 32]. The object of giving non-members inspection is to enable them to ascertain what assets they may rely on (*Re Overend Gurney & Co.*, *Oakes v. Turquand and Harding* (1867), L. R. 2 H. L. 325, 366); compare the similar provision under the Companies Clauses (Consolidation) Act, 1845 (8 Vict. c. 16); see p. 690, *post*; and title CORPORATIONS, Vol. VIII., pp. 323, 324.

(t) *Re Kent Coalfields Syndicate*, [1898] 1 Q. B. 754, C. A.; *Re Yorkshire Fibre Co.* (1870), L. R. 9 Eq. 650.

(a) *Re Joint-Stock Discount Co.*, *Ex parte Buchanan* (1866), 15 W. R. 99; *Bevan v. Webb*, [1901] 2 Ch. 59, C. A.; *Norey v. Keep*, [1909] 1 Ch. 561.

(b) See p. 264, *post*.

thereof, on payment of 6*d.*, or such less sum as the company may prescribe, for every hundred words or fractional part thereof required to be copied (c); but he is not entitled to take copies on his own account (d).

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Member-
ship.

If any such inspection or copy is refused, the company is liable for each refusal to a fine not exceeding £2, and to a further fine not exceeding £2 for every day during which the refusal continues (e). Every director and manager of the company who knowingly authorises or permits the refusal is also liable to the like penalty (e). Any judge of the High Court, or the judge of the court exercising the stannaries jurisdiction in the case of companies subject to that jurisdiction, may by order compel an immediate inspection of the register (e).

Refusal of
inspection.

(iv.) *Rectification.*

249. The directors of a company may in some cases, as, for instance, mutual mistake, rectify the register of members without any application to the court, if the court would, under similar circumstances, rectify it (f).

Rectification
by directors.

250. The register of members may be rectified by the court if (1) the name of any person is, without sufficient cause, entered in or omitted from the register; or (2) if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member (g).

Rectification
by court.

The court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register (h). The court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved (i). The company can only be ordered to pay damages when the register is ordered to be rectified (k). If money has been

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 30 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 32, as amended by the Companies Act, 1907 (7 Edw. 7, c. 50), s. 50, and Sched. III.].

(d) *Re Balaghât Gold Mining Co.*, [1901] 2 K. B. 665, C. A., overruling *Boord v. African Consolidated Land and Trading Co.*, [1898] 1 Ch. 596; compare the similar provisions relating to the register of debenture-holders; see p. 357, *post*.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 30 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 32].

(f) *Hartley's Case* (1875), 10 Ch. App. 157; *Smith v. Brown*, [1896] A. C. 614, 622, P. C.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 32 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35].

(h) *Ibid.*, s. 32 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35].

(i) *Ibid.*, s. 32 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35]. The wording of the new Act is in more general terms than that of s. 35 of the Act of 1862.

(k) *Re Ottoe Kopje Diamond Mines, Ltd.*, [1893] 1 Ch. 618, C. A. As to the

SECT. 9.
Member-
ship.

Jurisdiction
to rectify
register.

paid on the shares the amount will be ordered to be returned with interest at 4 per cent. (l), and the amount with costs is provable in a winding up (m).

251. The jurisdiction is practically unlimited, but discretionary (n). If, from its complexity or otherwise, the court thinks that any case could be more satisfactorily dealt with in an action, the court, without prejudice to the applicant's right to institute an action for rectification, will decline to make an order (o).

When the court entertains the application it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition (p).

The power to rectify has been exercised where there has been misrepresentation in the prospectus (q); where it is expedient to have an order which will bind all the shareholders and effectually bar any subsequent application for restoration of a name struck out by the directors (r); where shares have been improperly issued at a discount (s); where the application for shares has been made in the name of a person, as, for instance, an underwriter, without his authority (t); where there is no valid allotment of shares (a); where allotment is not made within a reasonable time (b); in the case of an irregular allotment (c); where a transfer of shares has

measure of damages, see *Re Ottos Kopje Diamond Mines, Ltd.*, [1893] 1 Ch. 618, C. A.; *Skinner v. City of London Marine Insurance Corporation* (1885), 14 Q. B. D. 882, C. A.

(l) *Karberg's Case*, [1892] 3 Ch. 1, C. A.; *Re Metropolitan Coal Consumers' Association, Wainwright's Case* (1890), 62 L. T. 30, affirmed 63 L. T. 429, C. A.; see *Re Railway Time Tables Publishing Co., Ex parte Sandys* (1889), 42 Ch. D. 98, 108, C. A.

(m) *Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, C. A.

(n) *Ex parte Shaw* (1877), 2 Q. B. D. 463, C. A.; *Re Kimberley North Block Diamond Co., Ex parte Wernher* (1888), 59 L. T. 579, C. A.; compare *Ward and Henry's Case* (1867), 2 Ch. App. 431, 441; *Re Tahiti Cotton Co., Ex parte Sargent* (1874), L. R. 17 Eq. 273, 276.

(o) *Re National and Provincial Marine Insurance Co., Ex parte Parker* (1867), 2 Ch. App. 685; *Simpson's Case* (1869), L. R. 9 Eq. 91; *Stewart's Case* (1866), 1 Ch. App. 574, 585; *Re Gresham Life Assurance Society, Ex parte Penney* (1872), 8 Ch. App. 446, 448; *Askew's Case* (1874), 9 Ch. App. 664; *Re Bagnall & Co., Ex parte Dick* (1875), 32 L. T. 536.

(p) *Trevor v. Whitworth* (1887), 12 App. Cas. 409, 440; *Sichell's Case* (1867), 3 Ch. App. 119; *Bellerby v. Rowland and Marwood's Steamship Co., Ltd.*, [1902] 2 Ch. 14, C. A.; and see note (d), p. 127, ante.

(q) See p. 127, ante.

(r) *Martin's Case* (1865), 2 Hem. & M. 669; *Higgs's Case* (1865), 2 Hem. & M. 657; *Re Bank of Hindustan, China and Japan, Ex parte Los* (1865), 34 L. J. (OH.) 609.

(s) See p. 91, ante.

(t) *Re Consort Deep Level Gold Mines, Ltd., Ex parte Stark*, [1897] 1 Ch. 575, C. A.; compare *Re Bentley (Henry) & Co. and Yorkshire Breweries, Ex parte Harrison* (1893), 69 L. T. 204, C. A.; *Hindley's Case*, [1896] 2 Ch. 121, C. A.; *Carmichael's Case*, [1896] 2 Ch. 643.

(a) *Re Homer District Consolidated Gold Mines, Ex parte Smith* (1888), 39 Ch. D. 546; *Re Portuguese Consolidated Copper Mines, Ltd.* (1889), 42 Ch. D. 160, C. A. As, for instance, where a director has, without his authority, been placed on the register in respect of qualification shares (*Re Printing Telegraph and Construction Co. of the Agence Havas, Ex parte Cammell*, [1894] 2 Ch. 392, C. A.).

(b) *Re Bowron, Baily & Co., Ex parte Baily* (1868), 3 Ch. App. 592.

(c) *Re Homer District Consolidated Gold Mines, Ex parte Smith*, *supra*.

been improperly registered or refused registration (*d*); where the company puts on its register matters which are not required by the statute (*e*); and in order to set right allotments of shares which have been issued as fully paid without a proper contract being filed (*f*). The application to rectify must be made promptly (*g*).

SECT. 9.
Member-
ship.

252. The tribunal having jurisdiction is the High Court of Justice or any judge thereof sitting in chambers, or the judge of the court exercising the stannaries jurisdiction in the case of companies subject to that jurisdiction (*h*). Courts having jurisdiction.

253. The application may be made by the person aggrieved, or any member of the company, or the company (*i*). The application may be made in the High Court by motion, or by originating summons when the application is in chambers, or in the case of the stannaries court by application—the nature of which is not defined—or in such other manner as the court concerned may direct (*k*). When the application is by the company to remove a number of names it may be made *ex parte* (*l*). An action may, without any direction by the court, be instituted for rectification of the register (*m*), a course which should be followed where there is much complexity, or where other relief is required. Procedure.

(*d*) *Pulbrook v. Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610; *Re Bahia and San Francisco Rail. Co.* (1868), L. R. 3 Q. B. 584 (forged transfer); *Re Stranton Iron and Steel Co.* (1873), L. R. 16 Eq. 559 (transfer to increase voting power); *Re Manchester and Oldham Bank* (1885), 54 L. J. (CH.) 926; see also *Re Tahiti Cotton Co., Ex parte Sargent* (1874), L. R. 17 Eq. 273, and *Ex parte Shaw* (1877), 2 Q. B. D. 463, C. A. (disputes between transferor and transferee); *Re Stockton Malleable Iron Co.* (1875), 2 Ch. D. 101 (lien); *Re Ystalyfera Gas Co.*, [1887] W. N. 30; *Re Violet Consolidated Gold Mining Co.* (1899), 80 L. T. 684; and p. 187, *post*.

(*e*) *Re Key (W.) & Son, Ltd.*, [1902] 1 Ch. 467; *Re Saunders (T. H.) & Co.*, [1908] 1 Ch. 415.

(*f*) *Re New Zealand Kapanga Gold Mining Co., Ex parte Shaw* (1873), L. R. 18 Eq. 17, n.; *Re Denton Colliery Co., Ex parte Shaw* (1874), L. R. 18 Eq. 16; *Re Broad Street Station Dwellings Co.*, [1887] W. N. 149; *Re Nottingham Brewery* (1888), 4 T. L. R. 429; *Re Maynards, Ltd.*, [1898] 1 Ch. 515; *Re Lovibond (Henry) & Sons* (1901), 17 T. L. R. 315; *Re Darlington Forge Co.* (1887), 34 Ch. D. 522, where the contract was oral.

(*g*) *Sewell's Case* (1868), 3 Ch. App. 131, 138.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 32 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35]. The High Court and the county court with the stannaries jurisdiction have concurrent jurisdiction to rectify (*Re Penhale and Lomax Consolidated Silver Lead Mining Co.* (1867), 2 Ch. App. 398). The winding-up judge has no special jurisdiction to rectify (*Re British Columbian Exploitation and Gold Estates Co.*, [1899] W. N. 32).

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 32 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35].

(*k*) *Ibid.*, s. 32 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35]. In the Chancery Division the application should be by motion (*Duffin v. Mexican Gold and Silver Ore Reduction Co.*, [1890] W. N. 116). In the King's Bench Division it is made by originating summons, to a judge in chambers (Chitty's Forms, 13th ed., 536). As to directing an issue to be tried, see p. 156, *post*. Notice of motion must be served on the company itself, not on its solicitor (*Re Denver United Breweries, Ltd.*, [1890] W. N. 173).

(*l*) *Re London Electrobos Co.* (1906), 22 T. L. R. 677.

(*m*) *Bloxam v. Metropolitan Cab and Carriage Co.* (1864), 12 W. R. 736; *Roots v. Williamson* (1888), 38 Ch. D. 485; *Moore v. North Western Bank*, [1891] 2 Ch. 599; *Lynde v. Anglo-Italian Hemp Spinning Co.*, [1896] 1 Ch. 178; *McKeown v. Boudard Peveril Gear Co.* (1896), 74 L. T. 712, C. A.

SECT. 9.
Member-
ship.

Rectification
after
winding up.

The court may, no doubt, order any party to the proceedings, even where not by action, to pay costs (n), and may direct an issue to be tried (o).

Although there is a separate power to rectify the register where the company is being wound up (p), the court has power, notwithstanding winding up has commenced, to rectify under the statutory power above referred to, on any of the grounds above-mentioned; but the leave of the court must be obtained for the application and a strong case must be made out (q). The rectification may be made retrospectively, and with due regard to the rights of third parties (r). Rectification will not be ordered at the instance of the liquidator when the inaccuracy of the register is due to the default of the company (s).

Notice to
registrar.

In the case of a company required to send a list of its members to the registrar (t), the court must, in the order for rectification, direct notice of the rectification to be given to him (a).

How register
altered.

Where the court orders the register to be rectified by removing a name from it, the name should not be erased, but a line should be drawn through it, and an abstract of the order signed by the secretary of the company should be added (b).

(v.) *Colonial Register.*

Colonial
register of
members.

254. A company having a share capital, whose objects comprise the transaction of business in a colony (c) may, if so authorised by

(n) See Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5; *Re Fisher*, [1894] 1 Ch. 450, C. A., although s. 32 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), omits the special but limited provisions as to costs contained in s. 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89), as to which see *Re Tees Bottle Co.*, *Davies' Case* (1876), 33 L. T. 834; *Re Tahiti Cotton Co.*, *Ex parte Sargent* (1874), L. R. 17 Eq. 273; *Ex parte Shaw* (1877), 2 Q. B. D. 463, C. A.; *Re Bank of Hindustan, China and Japan*, *Ex parte Kintrea* (1869), 5 Ch. App. 95, 101. As to giving solicitor and client costs, see *Pontifex's Case* (1867), 36 L. J. (CH.) 903; *Wood's Case* (1873), L. R. 15 Eq. 236; *Anderson's Case* (1881), 17 Ch. D. 373; *Andrews v. Barnes* (1888), 39 Ch. D. 133, C. A.; *Cockburn v. Edwards* (1881), 18 Ch. D. 449, 459, C. A.; *Barnett v. Eccles Corporation*, [1900] 2 Q. B. 104.

(o) See R. S. C., Ord. 33. The express power to direct such an issue given by s. 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89), is omitted from s. 32 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

(p) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 163 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 98, 99]; and p. 496, *post*.

(q) *Re Onward Building Society*, [1891] 2 Q. B. ... summons is necessary (*ibid.*, at p. 477).

(r) *Re Sussex Brick Co.*, [1904] 1 Ch. 598, C. A.; *Re Scottish Universal Finance Bank*, *Breckenridge's Case* (1865), 2 Hem. & M. 642; *Baillie's Case*, [1898] 1 Ch. 110.

(s) *Sichell's Case* (1867), 3 Ch. App. 119; see also *Re General Floating Dock Co.*, *Hughes' Case* (1867), 15 W. R. 476; *Parsons' Case* (1869), L. R. 8 Eq. 656.

(t) That is to say, a company having a share capital (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 26).

(a) *Ibid.*, s. 32 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 36].

(b) *Re Iron Ship Building Co.* (1865), 34 Beav. 597. If, by resignation or otherwise, there is no officer left to obey the order of the court, the court may direct the rectification to be made by the applicant or some person appointed for the purpose (R. S. C., Ord. 42, r. 30; *Re L. L. Syndicate, Ltd.*, [1901] W. N. 144).

(c) The term "colony" includes British India and the Commonwealth of

its articles, cause to be kept in any colony in which it transacts business a branch register of members resident in that colony (called a colonial register) (*d*). Subject to the statutory provisions below mentioned, any company may, by its articles, make such provisions as it may think fit respecting the keeping of colonial registers (*e*).

A colonial register is deemed to be part of the company's register of members (called the principal register) (*f*).

255. The colonial register must be kept in the same manner in which the principal register is required to be kept, except that the advertisement before closing it must be inserted in some newspaper circulating in the district in which the colonial register is kept, and that any competent court in the colony may exercise the same jurisdiction to rectify it as is in respect of the principal register exercisable by the High Court, and that the offences of refusing inspection or copies of a colonial register, and of authorising or permitting the refusal, may be prosecuted summarily before any tribunal in the colony having summary criminal jurisdiction (*g*).

Subject to the provision below mentioned with respect to the duplicate register, the shares registered in a colonial register must be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a colonial register must, during the continuance of that registration, be registered in any other register (*h*).

The company must give to the registrar notice of the situation of the office where any colonial register is kept, and of any change in its situation, and of the discontinuance of the office in the event of its being discontinued (*i*). It must also transmit to its registered office a copy of every entry in the colonial register as soon as may be after the entry is made, and cause to be kept at its registered office, duly entered up from time to time, a duplicate of its colonial register, which duplicate is deemed to be part of the principal register (*k*).

256. The company may discontinue to keep any colonial register, and thereupon all entries therein must be transferred to some other

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Member-
ship.

How colonial
register kept.

Notice to
registrar.

Ceasing to
keep colonial
register.

Australia (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 34 (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 43]); and see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (3).

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 34 (1) [Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30), s. 3 (1)].

(*e*) *Ibid.*, s. 35 (6) [Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30), s. 3 (8)].

(*f*) *Ibid.*, s. 35 (1) [Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30), s. 3 (3)].

(*g*) *Ibid.*, s. 35 (2) [Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30), s. 3 (3)].

(*h*) *Ibid.*, s. 35 (4) [Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30), s. 3 (5)].

(*i*) *Ibid.*, s. 34 (2) [Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30), s. 3 (2)].

(*k*) *Ibid.*, s. 35 (3) [Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30), s. 3 (4)].

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Member-
ship.

Stamp duties.

colonial register kept by the company in the same colony, or to the principal register (*l*).

257. In relation to stamp duties (1) an instrument of transfer of a share registered in a colonial register is deemed to be a transfer of property situate out of the United Kingdom, and unless executed in any part of the United Kingdom is exempt from British stamp duty; and (2) on the death of a member registered in a colonial register, his shares are, if he died domiciled in the United Kingdom, but not otherwise, deemed, so far as relates to British duties, to be part of his estate and effects situate in the United Kingdom for or in respect of which probate or letters of administration is or are to be granted in like manner as if he were registered in the principal register (*m*).

SUB-SECT. 4.—Rights and Liabilities of Members.

(i.) *Rights of Members.*

Rights of
members
generally.

258. The rights of a member of a "company," as that word is defined by the Act of 1908 (*n*), are:—(1) Statutory; (2) given by the company's memorandum and articles; (3) given by the general law, especially as it relates to contracts and members of corporations.

The company is a statutory corporation made up of members, who can act within certain limits which must be ascertained from the statute under which it is created (*o*). The rights of the members are not necessarily those which belong to the members of a corporation with inherent common law rights (*p*).

Statutory
rights of
individual
members.

259. The statutory rights of an individual member include his right to have his name properly inserted in the company's register of members, to have inspection and copies of the register, and to have it rectified when defective (*q*); to have copies of the list and summary required by the Act of 1908 (*r*); to inspect the company's registers of mortgages and charges and debentures (*s*); to obtain a copy of the company's memorandum and articles of association on payment of the prescribed fee (*t*); to recover

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 35 (5) [Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30), s. 3 (6)].

(*m*) *Ibid.*, s. 36 [Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30), s. 3 (7), as amended by the Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 18].

(*n*) *Ibid.*, s. 285; see p. 36, *ante*.

(*o*) *Wenlock (Baroness) v. River Dee Co.* (1883), 36 Ch. D. 675, n., C. A.

(*p*) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653; *London County Council v. A.-G.*, [1902] A. C. 165; *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87; see, generally, title CORPORATIONS, Vol. VIII., pp. 356 *et seq.*

(*q*) See p. 153, *ante*.

(*r*) See p. 264, *post*.

(*s*) See p. 357, *post*.

(*t*) Every company must send to every member, at his request, and on payment of 1s. or such less sum as the company may prescribe, a copy of the memorandum, and of the articles (if any), and in default the company is liable for each offence to a fine not exceeding £1 (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 18 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 19]).

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ship.

compensation for misrepresentation, although not fraudulent, by directors or promoters (*u*); to obtain repayment from the company of moneys paid in respect of shares which cannot legally be allotted (*a*); to petition for a winding-up order (*b*); to take proceedings for misfeasance against directors and officers of the company in a winding up (*c*); to make application to the court in a voluntary winding up (*d*); to require his interest to be purchased on a reconstruction of the company (*e*); to attend and vote at the statutory meeting of the company (*f*); to receive the statutory report certified prior to that meeting except in the case of a private company (*g*); to inspect the list of shares and shareholders produced, and to discuss matters raised at that meeting (*h*); and, on payment, to have copies of special resolutions passed by the company (*i*).

260. The members of a company collectively have statutory rights, some of which are exercisable by a bare majority, as, for instance, a resolution at the statutory meeting (*k*); others by a particular majority, as in the case of a reconstruction (*l*); and others by a minority, as in the case of a requisition for a meeting of shareholders (*m*), or of an application to the Board of Trade to appoint an inspector to investigate the company's affairs (*n*).

Statutory
right of
members
collectively.

Statutory rights cannot be taken away or modified by any provisions of the memorandum or articles (*o*).

261. Rights not inconsistent with the statute under which the company is incorporated may be given by its memorandum of association. Such rights are unalterable except in the cases in which there is a statutory right of alteration (*p*), even where the clauses conferring such rights are not by statute required to be inserted in the memorandum (*q*).

Rights under
memorandum
of association.

(*u*) See p. 136, *ante*.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 85, 86; see p. 177, *post*.

(*b*) See p. 401, *post*.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 215; see p. 478, *post*.

(*d*) *Ibid.*, s. 193; see p. 582, *post*.

(*e*) *Ibid.*, s. 192; see p. 589, *post*.

(*f*) *Ibid.*, s. 65; see p. 248, *post*.

(*g*) *Ibid.*, s. 65 (4).

(*h*) *Ibid.*

(*i*) *Ibid.*, s. 70; see p. 261, *post*.

(*k*) See p. 248, *post*.

(*l*) See p. 586, *post*.

(*m*) See p. 251, *post*.

(*n*) See p. 270, *post*.

(*o*) *Re Feveril Gold Mines, Ltd.*, [1898] 1 Ch. 122, C. A.; *Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate*, [1899] 2 Ch. 80, C. A.; *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308; *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, C. A.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 7; see p. 69, *ante*; p. 328, *post*.

(*q*) *Ashbury v. Watson* (1885), 30 Ch. D. 376, C. A.

SECT. 9.
Member-
ship.

Rights under
articles.

262. Some rights given by statute to members collectively are only exercisable when authorised by the company's articles of association, such as the powers to alter capital by increasing or reducing it, consolidating or sub-dividing it, or by converting paid-up shares into stock, or reconverting the stock into paid-up shares (*r*). In several cases the exercise of the right requires confirmation by the court or the Board of Trade, as, for instance, where the objects of the company are altered (*s*), or where capital is reduced, or reorganised, or applied in payment of interest on the cost of construction of works (*t*).

The rights of a member under the regulations or articles of the company include those with regard to dividends, the transfer and transmission of shares, participation in allotments of new capital, attending and voting at meetings of the company, appointment and removal of directors, appointment of auditors, and participation in the surplus assets of the company (*a*).

Rights under
the general
law.

263. The rights of a member under the general law include his right, where he has been induced to take shares by misrepresentation, to recover damages for misrepresentation if fraudulent, or to obtain a rescission of his contract to take shares, and rectification of the share register, together with a return of the money paid by him on the shares (*b*); and to restrain directors from acting *ultra vires* of the company (*c*) or of their own powers (*d*) or acting unfairly to its members (*e*).

(ii.) *Liability of Members.*

Where less
than required
number of
members.

264. Whether a company is unlimited or limited, and if limited, whether limited by shares or by guarantee, if at any time the number of its members is reduced, in the case of a private company (*f*) below two, or, in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months, and is cognisant of the fact that it is carrying on business with fewer than two members, or seven members, as the case may be, is severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same, without joinder in the action of any other member (*g*). The trustee of a bankrupt

(*r*) See pp. 95 *et seq.*, *ante*.

(*s*) see p. 328, *post*.

(*t*) See pp. 103, 116, 117, *ante*.

(*a*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A.

(*b*) See pp. 127 *et seq.*, *ante*.

(*c*) See pp. 289 *et seq.*, *post*.

(*d*) See pp. 289 *et seq.*, *post*.

(*e*) *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, C. A. As to the courts refusing to interfere with the internal management of a company's affairs, see *Foss v. Harbottle* (1843), 2 Hare, 461; and p. 289, *post*.

Act, 1908 (8 Edw. 7, c. 69), s. 115 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 48, as amended with respect to private companies by s. 37 of the Companies Act, 1907 (7 Edw. 7, c. 50)].

member, or the personal representative of a deceased member, is not (h), but members holding shares in a fiduciary capacity are, counted in the number of seven or two, as the case may be (i).

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**Member-
ship.**

265. Where the company is registered as an unlimited one, the liability of a member of it is only limited by the amount of its debts and liabilities, and the costs, charges, and expenses of its winding up (j). With regard, however, to any policy of insurance or other contract, the liability of individual members may by the terms of the policy or contract be restricted, or the funds of the company alone made liable (k). If an unlimited company has a share capital the liability on the shares is defined by its articles of association, which must state the amount of share capital with which it is registered (l). The liability on the shares, if any, is the only liability which can be enforced by the company whilst it is carrying on business, although there is then an unlimited liability to creditors (m).

Unlimited
company.

266. The liability of a member of a company limited by guarantee and without a share capital is limited to the amount which he undertakes by the memorandum of association to subscribe to the assets of the company in the event of its being wound up (n), although by the articles of association he may, as regards his fellow members, incur an additional liability (o), which in the event of winding up must be enforced by action (p).

Guarantee
company.

267. Subject to the provision above mentioned as to unlimited liability where business is carried on with an unduly diminished number of members, the liability of a member of a company limited by shares is limited to the amount for the time being remaining unpaid on the nominal amount of his shares (q), though the articles may impose a further liability on him in relation to other members (r). Except where the articles otherwise provide, or by the terms of some special contract, there is no liability before winding up to pay for shares even in the case of signatories to the memorandum of association, except in pursuance of calls duly made in accordance with the articles (s). A member of a company limited

Company
limited by
shares.

(h) *Re Bowling and Welby's Contract*, [1895] 1 Ch. 663, C. A.

(i) *Salomon v. Salomon & Co.*, [1897] A. C. 22.

(j) Companies Consolidation Act, 1908 (8 Edw. 7, c. 69), s. 123 (1); *Re Mayfair Property Co.*, *Bartlett v. Mayfair Property Co.*, [1898] 2 Ch. 28, 36. This is a liability which neither the company nor its directors can dispose of to the prejudice of the creditors (*ibid.*).

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (vi.); *Re Accidental Death Insurance Co.* (1878), 7 Ch. D. 568; see *Lethbridge v. Adams, Ex parte International Life Assurance Society (Liquidator)* (1872), L. R. 13 Eq. 547.

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 10 (3).

(m) *Re Mayfair Property Co.*, *Bartlett v. Mayfair Property Co.*, *supra*.

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (v.); see *ibid.*, s. 4. If a guarantee company has a share capital, the liability on the shares is determined by its articles, which may adopt all or any of the regulations contained in Table A (*ibid.*, s. 10); see p. 77, *ante*.

(o) *Lion Insurance Association v. Tucker* (1883), 12 Q. B. D. 176, C. A.

(p) *Baird's Case*, [1899] 2 Ch. 593.

(q) See p. 88, *ante*.

(r) *Maxwell's Case*, *Hill's Case* (1875), L. R. 20 Eq. 585.

(s) *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, C. A.; *Nicol's Case*, *Tufnell and Ponsonby's Case* (1885), 29 Ch. D. 421, C. A.

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Member-
ship.

by shares renders himself liable to pay the nominal amount of his shares, either by agreement with the company, or in pursuance of calls duly made by the directors of a company while the company is a going concern (t), or of calls made in the winding up of the company (a).

Past members.

The liability of a shareholder in respect of the amount uncalled upon his shares ceases on his ceasing to be a member unless a winding up supervenes within twelve months thereafter (b).

Trustee share-
holder.

A person cannot become a member of a company in a representative capacity so as to be free from personal liability in respect of his shares (c). If, however, the shares are an investment authorised by the trust instrument or by statute, a trustee is entitled to be indemnified out of the trust estate, and he is entitled to be indemnified by a beneficial owner who is *sui juris*, whether such owner created the trust by which the registered shareholder is affected, or accepted a transfer of the beneficial ownership with knowledge of the trust (d).

(iii.) *Calls.*

Definition of
"call."

268. Calls are the claims for any amount which has not been paid or satisfied on a share, made by the company or its governing body from its members prior to winding up, or by its liquidator when it is in course of winding up (e), and the amount received is frequently called a "call." While the company is a going concern, or, in other words, prior to the time when its winding up commences, the liability to calls on a member is defined by its articles of association (f). Even though the prospectus of a company relating to the issue of certain shares states that it is not intended to call up more than a specified amount per share, the company may call up the balance (g). If the articles provide that a certain amount shall not be called up except in a winding up, the company may by special resolution alter the articles by giving power to the directors to call up all the money unpaid upon the shares (h).

Reserve
liability.

Where, however, a limited company by special resolution determines that any portion of its share capital which has not been already called up shall not be capable of being called up, except

(t) See p. 163, *post*.

(a) See pp. 500 *et seq.*, *post*.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (i.) (ii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38]. As to the liability for calls unpaid at the date of a transfer, see p. 168, *post*. As to the effect of forfeiture of shares, see p. 203, *post*. As to the liability in a winding up, see pp. 487 *et seq.*, *post*.

(c) *Fearnside and Dean's Case*, *Dobson's Case* (1866), 1 Ch. App. 231; see also *Buchan's Case* (1879), 4 App. Cas. 549, where the liability was unlimited.

(d) *Hardoon v. Belilios*, [1901] A. C. 118, P. C.

(e) As to calls in a winding up, see pp. 500 *et seq.*, *post*. Only calls prior to winding up are dealt with in this part of the article. A demand for payment of a sum due under terms of allotment is not a call (*Croskey v. Bank of Wales* (1863), 4 Gif. 314).

(f) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clauses 12—17.

(g) *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56 C. A.; *Nicol's Case*, *Tufnell and Ponsonby's Case* (1885), 29 Ch. D. 421, C. A.

(h) *Accidental and Marine Insurance Corporation v. Davis* (1866), 15 L. T. 182.

in the event of and for the purposes of the company being wound up, that portion of its share capital cannot be called up except in that event and for those purposes (i). An unlimited company with a share capital may, by its resolution for registration as a limited company, do either or both of the following things, namely, (1) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purposes of the company being wound up; (2) provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the same event and for the same purposes (k).

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ship.

269. Calls made prior to winding up are made and payment of them is enforced in pursuance of the power given by the company's articles of association (l). Enforcement of calls.

The power to make calls before the company is in winding up may be vested either in a general meeting of the company or in the directors, and unless the power is expressly reserved to the company in general meeting, it may be exercised by the directors (m).

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 59; *Malleison v. National Insurance and Guarantee Corporation*, [1894] 1 Ch. 200.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 58 [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 5]; and see *Re Bristol Joint Stock Bank* (1890), 44 Ch. D. 703.

(l) The Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), is, like its predecessor, silent, except in Table A, as to making or enforcing payment of calls. Table A contains the following clauses, 12—16, as to calls, and similar clauses more or less amplified or abbreviated are to be found in the articles of companies which exclude Table A, or adopt it with modification:—

“12. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payment) pay to the company at the time or times so specified the amount called on his shares.” (As to making two calls payable at different times, at one meeting, see *Universal Corporation v. Hughes*, [1909] S. C. 1434.)

“13. The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

“14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five pounds per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

“15. The provisions of these regulations as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

“16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.”

By clause 9 of Table A the company has a lien on shares for moneys called up in respect of them, and by clause 20 of Table A, or an article to the same effect, it may decline to register a transfer of shares on which it has a lien, the result being that the shareholders on the register when the call is made are those who are liable to pay the call; see *North American Association v. Bentley* (1856), 19 L. J. (Q. B.) 427.

(m) *Ambergate, Nottingham and Boston, and Eastern Junction Rail. Co. v.*

SECT. 9.

Member-
ship.Differences as
to calls.

Calls are specialty debts due from the members to the company (a).

270. A company, if so authorised by its articles, may make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares (b). Similarly, it may accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any shares held by him, although no part of that amount has been called up (c). The exercise of this latter power will be valid though it confers a collateral benefit on the directors (d), but not if it is exercised solely for their benefit (e). Capital cannot be paid up in advance by setting off a debt *in presenti* (f).

How calls
made.

271. A power to make calls can only be exercised by a quorum of directors present at a meeting duly convened, unless the articles otherwise provide (g). But a call made at an adjourned meeting is not bad because notice of the adjourned meeting was not given to each director (h).

A call made by a quorum may be bad if the total number of directors is less than the minimum number prescribed by the articles, but if the direction as to the minimum number is not

Mitchell (1849), 6 Ry. & Can. Cas. 235. A single shareholder cannot constitute a meeting (*Sharp v. Dawes* (1876), 2 Q. B. D. 26, C. A.).

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 14 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 11, 16]; see p. 80, *ante*. As to the effect of this provision, see *Pritchard's Case* (1873), 8 Ch. App. 956, 960; *Eley v. Positive Government Security Life Assurance Co.* (1876), 1 Ex. D. 88, C. A.; *Browne v. La Trinidad* (1887), 37 Ch. D. 1, C. A.; *Re Wheel Buller Consols* (1888), 38 Ch. D. 42, C. A.; *Welton v. Saffery*, [1897] A. C. 299; *Re New British Iron Co., Ex parte Beckwith*, [1898] 1 Ch. 324; *Isaacs' Case*, [1892] 2 Ch. 158, C. A.; *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, C. A.; *Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate*, [1899] 2 Ch. 80, C. A. A call, which is a specialty debt, is not statute-barred until twenty years have expired after it became due (*Cork and Brandon Rail. Co. v. Goode* (1853), 13 C. B. 826).

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 89), s. 39 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 24]. As to dividends in such cases, see p. 272, *post*.

(c) *Ibid.*, Sched. I., Table A, contains the following clause:—

"17. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by him; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors." As to the effect of such a payment in winding up, see p. 532, *post*. As to paying interest on such sums, see p. 117, *ante*.

(d) *Poole, Jackson and Whyte's Case* (1878), 9 Ch. D. 322, C. A., where a debt was paid off for which the directors were liable; compare *Re South London Fish Market Co.* (1888), 39 Ch. D. 324, C. A.

(e) *Sykes' Case* (1872), L. R. 13 Eq. 255, where the money was used to pay the directors' fees; compare *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95, C. A.

(f) *Kent's Case* (1888), 39 Ch. D. 259, C. A.; compare *Ferrao's Case* (1874), 9 Ch. App. 355; and see *Re Liverpool and London Guarantee and Accident Insurance Co.* (1882), 30 W. R. 378.

(g) *Moore v. Hammond* (1827), 6 B. & C. 456.

(h) *Wills v. Murray* (1850), 4 Exch. 843.

imperative the call is good (i), and a director who is one of the quorum may be estopped from denying the validity of the call (k).

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ship.

An invalid call may be confirmed by a duly convened and constituted board (l).

There must be properly appointed directors to make a call (m), unless by statute (a) or by the articles it is provided that all appointments of directors are to be deemed to be valid, and all acts of such directors are to be valid notwithstanding any defect is subsequently discovered in their appointments or qualifications, and the defect is discovered subsequently (b).

The power to make calls cannot be delegated except under an express power to delegate the power of directors (c).

272. Conditions precedent to the making of calls, such as those relating to time and amount, must be complied with (d). Where, however, by the regulations of the company (e) the subscription of the whole, or a prescribed part of the capital, is not a condition precedent to the exercise of the powers of the directors generally or their power to make calls, a call may be made, although only a part of such capital is subscribed (f).

Conditions as
to making
calls.

The requirements and formalities of the company's articles (g) must be strictly complied with and observed (h).

273. The discretion which directors possess as to making or abstaining from making calls is not reviewed by the court in the absence of bad faith (i). The power to make calls is fiduciary as

Discretion as
to making
calls.

(i) *Bottomley's Case* (1880), 16 Ch. D. 681; *Re British Empire Match Co., Ex parte Ross* (1888), 59 L. T. 291; *Faure Electric Accumulator Co. v. Phillipart* (1888), 58 L. T. 525; *Thames Haven Dock and Rail. Co. v. Rose* (1842), 4 Man. & G. 552.

(k) See *Faure Electric Accumulator Co. v. Phillipart, supra*.

(l) *Austin's Case* (1871), 24 L. T. 932.

(m) *Howbeach Coal Co. v. Teague* (1860), 5 H. & N. 151 (see as to this case *Re London and Southern Counties Freehold Land Co.* (1885), 31 Ch. D. 223); *Garden Gully United Quartz Mining Co. v. McLister* (1875), 1 App. Cas. 39, P. O.; *Tyne Mutual Steamship Insurance Association v. Peter Brown* (1896), 74 L. T. 283.

(a) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 74 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67].

(b) *Briton Medical, General and Life Association v. Jones* (2) (1889), 61 L. T. 384; *Dawson v. African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6, C. A.; *British Asbestos Co., Ltd. v. Boyd*, [1903] 2 Ch. 439.

(c) *Southampton Dock Co. v. Richards* (1840), 1 Man. & G. 448; *Howard's Case* (1866), 1 Ch. App. 561.

(d) *Baillie v. Edinburgh Oil Gas Light Co.* (1835), 3 Cl. & Fin. 639, H. L.; *Stratford and Moreton Rail. Co. v. Stratton* (1831), 2 B. & Ad. 518; *Welland Rail. Co. v. Berrie* (1861), 6 H. & N. 416.

(e) *North Stafford Steel etc. Co. v. Ward* (1868), L. R. 3 Exch. 172, Ex. Ch.

(f) *Ornamental Pyrographic Woodwork Co. v. Brown* (1863), 2 H. & C. 63, overruling a dictum in *Howbeach Coal Co. v. Teague, supra*; and see *Re Great Cambrian Mining and Quarrying Co., Hawkins' Case* (1856), 2 K. & J. 253; *Elder v. New Zealand Land Improvement Co.* (1874), 30 L. T. 285.

(g) As to the clauses of Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, see p. 163, *ante*.

(h) *Chubwa Tea Co. of Assam v. Barry* (1866), 15 L. T. 449. Where directors can make calls with the consent of a general meeting a shareholder present cannot some time afterwards object that the call is invalid on the ground of slight irregularity in convening the meeting (*Re British Sugar Refining Co.* (1857), 3 K. & J. 408).

(i) *Odessa Tramways Co. v. Mendel* (1878), 8 Ch. D. 235, C. A.; *Re Sankey Brook Coal Co.* (1870), L. R. 9 Eq. 721; *Re British Provident Life and Fire Assurance*

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regards the shareholders, and in making or abstaining from making calls the directors must have regard to the interests of the company, and their powers must be exercised fairly as between different shareholders, and not with a view to giving themselves an unfair advantage (*k*). But the directors are not trustees for the company's creditors (*l*).

Resolution for
call.

274. A resolution for a call may be good, although it does not specify the place where, or the person to whom, the payment is to be made, if the notice of the call contains such particulars, and there has been no change in the directorate between the passing the resolution and the giving of the notice (*m*). But the resolution must state the amount of the call and the time at which it is to be paid, otherwise the call will be invalid (*n*).

Notice of call.

275. The notice of call must be served as directed by the articles of association; and, if addressed to a member at his registered address, is good, notwithstanding his previous death, if the company has no notice of his death (*o*). The form of the notice (*p*), provided that it is clear notice of a call (*q*), and the fact that no notice has been sent to other shareholders (*r*), are immaterial.

Misapplica-
tion of
proceeds.
Set off against
calls.

276. A call lawfully made cannot be set aside by the court because the directors have misapplied the proceeds (*s*).

277. A debt due and owing by the company to a shareholder, but not one which is only payable at a future date, can be set off against a sum due from him upon calls while the company is a going concern (*t*). An agreement to set off a present liability of the

Society, Ex parte Stanley (1864), 33 L. J. (CH.) 535, C. A.; *Tatham v. Palace Restaurants, Ltd.* (1909), 53 Sol. Jo. 743; compare *Bailey v. Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (1850), 12 Beav. 433.

(*k*) *Gilbert's Case* (1870), 5 Ch. App. 559; *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, C. A.; *Preston v. Grand Collier Dock Co.* (1840), 11 Sim. 327; as to the fiduciary character of directors, see further p. 221, *post*.

(*l*) *Poole, Jackson and Whyte's Case* (1878), 9 Ch. D. 322, 328, C. A.; compare *Gas-light Improvement Co. v. Terrell* (1870), L. R. 10 Eq. 168, 175.

(*m*) *Sheffield and Manchester Rail. Co. v. Woodcock* (1841), 7 M. & W. 574; *Great North of England Rail. Co. v. Biddulph* (1840), 7 M. & W. 243.

(*n*) *Johnson v. Lyttle's Iron Agency* (1877), 5 Ch. D. 687, C. A.; *Re Cawley & Co.* (1889), 42 Ch. D. 209, C. A.

(*o*) *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622, C. A.

(*p*) *Shackleford, Ford & Co. v. Dangerfield* (1868), L. R. 3 C. P. 407, where a company in course of changing its name used the new name.

(*q*) *Chubwa Tea Co. of Assam v. Barry* (1866), 15 L. T. 449.

(*r*) *Newry and Enniskillen Rail. Co. v. Edmunds* (1848), 2 Exch. 118.

(*s*) *Orr v. Glasgow, Airdrie and Monklands Rail. Co.* (1860), 8 W. R. 643, H. L. A director may, before a call is made, transfer his shares out and out to escape liability (*Re Cawley & Co.* (1889), 42 Ch. D. 209, C. A.); and directors may pay the amount uncalled on their shares, and apply it in payment of a debt of the company in the ordinary course of business, even if the effect is to relieve them of their liability as guarantors of such debt (*Poole, Jackson and Whyte's Case, supra*). As to payments in advance of calls on shares held by directors, see p. 117, *ante*; and *Re Exchange Banking Co., Ramwell's Case* (1881), 50 L. J. (CH.) 827. As to applying the advance in payment of the director's fees being a fraudulent preference, see *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95, C. A.

(*t*) *Habershon's Case* (1868), L. R. 5 Eq. 286; *Holden's (Henry) Case* (1869), L. R. 8 Eq. 444; *Adamson's Case* (1874), L. R. 18 Eq. 670; and see *Re Norwich Equitable Fire Assurance Co.*, *Brusnott's Case* (1884), 32 W. R. 1010. Compare

company against future calls is also good (*u*). A set off within three months of a winding-up petition is a fraudulent preference (*a*).

278. The regulations of the company, if contained in separate articles, usually provide in Table A (*b*) and do provide, for payment of interest on calls in arrear (*c*). In the absence of any provision for interest, after notice to pay on a fixed day has been given, interest at 5 per cent. is payable from the date fixed until payment (*d*). Interest on calls in arrear can be recovered after forfeiture for non-payment of the calls (*e*).

Where shares are forfeited for non-payment of calls and then sold to another person "discharged from all calls due prior to the date" of the share certificate, the company may, nevertheless, make calls on the purchaser for the balance due on the shares, including the amount previously called but unpaid (*f*). On winding up, however, the purchaser is liable for calls only in respect of the balance owing on the shares after giving credit for any sums paid on the shares by the original holder, whether as a shareholder or as being a debtor under articles which render him liable after forfeiture (*g*).

279. Calls which are unpaid at the date of the bankruptcy of a shareholder, and the value of his liability in respect of any future calls, are provable in the bankruptcy (*h*). If the dividend received is less than 20s. in the pound on the amount of the proof, payment of the dividend does not make the shares fully paid, so as to enable the bankrupt's estate to rank as a fully-paid shareholder in the distribution of surplus assets of the company (*i*).

SECT. 9.
Member-ship.

Interest on calls.

Calls on forfeited shares.

Effect of bankruptcy.

Sykes' Case (1872), L. R. 13 Eq. 255; *Christie v. Taunton, Delmarch, Lane & Co.*, [1893] 2 Ch. 175 (calls set-off against debenture debt); *Rance's Case* (1870), 6 Ch. App. 104, 115. Payment of a call cannot, as a rule, be accepted in goods or other money's worth; see *Black & Co.'s Case* (1872), 8 Ch. App. 254; *Pellatt's Case* (1867), 2 Ch. App. 527; *Elkington's Case* (1867), 2 Ch. App. 511; *Re London and Colonial Co., Ex parte Clark* (1869), L. R. 7 Eq. 550. A director who, before winding up, gives a promissory note to secure a debt of the company cannot, after winding up, set off the amount against a call made before the winding up (*Re Norwich Equitable Fire Assurance Co., Brasnett's Case, supra*). As to set-off against calls in a winding up, see *Government Security Investment Co. v. Dempsey* (1888), 50 L. J. (CH.) 199; *Re G. E. B.*, [1903] 2 K. B. 340; and p. 502, *post*.

u) *Re Jones, Lloyd & Co., Ltd.* (1889), 41 Ch. D. 159.

a) *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95, C. A.

b) See p. 163, *ante*.

c) The provisions do not apply to calls made in a winding up (*Re Welsh Flannel and Tweed Co.* (1875), L. R. 20 Eq. 360).

d) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28; *Re Overend, Gurney & Co., Ex parte Lintott* (1867), L. R. 4 Eq. 184; *Barrow's Case* (1868), 3 Ch. App. 784; *Stocken's Case* (1868), 3 Ch. App. 412. As to the payment of interest generally, in the absence of a special provision, see title MONEY AND MONEY-LENDING.

e) *Faure Electric Accumulator Co. v. Phillipart* (1888), 58 L. T. 525.

f) *New Balkis Eersteling, Ltd. v. Randt Gold Mining Co.*, [1904] A. C. 165.

g) *Re Randt Gold Mining Co.*, [1904] 2 Ch. 468. As to the power of forfeiture under Table A, see p. 201, *post*. A declaration of forfeiture under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 29, is not a defence to an action for calls (*Great Northern Rail. Co. v. Kennedy* (1849), 4 Exch. 417).

h) *Hill's Case* (1875), L. R. 20 Eq. 595; *Re McMahon, Fuller v. McMahon*, [1900] 1 Ch. 73; *Re Rowe, Ex parte West Coast Gold Fields, Ltd.*, [1904] 2 K. B. 489, where the company had a security by lien on the shares. As to disclaimer of a contract to take shares and proof thereon, see *Re Hooley, Ex parte United Ordnance and Engineering Co.*, [1899] 2 Q. B. 579.

i) *Rowe's Trustee's Claim*, [1905] 1 Ch. 597; affirmed [1906] 1 Ch. 1, C. A.

SMOT. 9.	The estate of a deceased shareholder is liable for the payment of calls upon shares standing in his name, whether the calls are made before or after his death, and his legal personal representatives are only liable in their representative character (<i>k</i>). If there is no legal personal representative, the court grants administration to the company's nominee as a creditor of the deceased person's estate (<i>l</i>). If legal personal representatives unequivocally request that the shares should be transferred into their own names, they become personally liable, although on the register they are designated executors (<i>m</i>).
Member-ship.	
Death.	
Joint holders.	Where there is no special clause as to several liability, two or more holders of the same share are only jointly liable (<i>n</i>). Calls made before winding up are recoverable by action, as in the case of other specialty debts (<i>o</i>).
Effect of winding up.	Calls made but not paid before winding up may be enforced by an action brought by the liquidator in the name of the company, although he has obtained a balance order (<i>p</i>).
Transfer.	Where shares have been transferred, it is apprehended that the transferor remains liable for calls already made (<i>q</i>).

(iv.) *Lien on Shares.*

Lien on shares.

280. A company has a lien on a member's shares for moneys owing (*r*) by him to the company, where the lien is given by agreement or by the articles of association (*s*). Where fully-paid shares are, under the original articles, exempt from lien, the

(*k*) *Houldsworth v. Evans* (1868), L. R. 3 H. L. 263; *Baird's Case* (1870), 5 Ch. App. 725; *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622, C. A. As to an executor *de son tort*, see *Blackstaff Flax Spinning and Weaving Co. v. Cameron*, [1899] 1 I. R. 252.

(*l*) *Tomlinson v. Gilby* (1885), 54 L. J. (P.) 80.

(*m*) *Buchan's Case* (1879), 4 App. Cas. 549.

(*n*) *Hill's Case* (1875), L. R. 20 Eq. 595.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 14.

(*p*) *Westmoreland Green and Blue Slate Co. v. Feilden*, [1891] 3 Ch. 15, C. A.

(*q*) See p. 195, *post*.

(*r*) The lien extends to moneys unpaid as directors' fees under a mistake of fact (*Re Bodega Co., Ltd.*, [1904] 1 Ch. 276).

(*s*) *Re Kingstown Yacht Club* (1888), 21 L. R. Ir. 199; *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, C. A., where a lien was held good against executors. It has been suggested that, by analogy to the rule in partnership (see title PARTNERSHIP), a company has, in every case where it is not inconsistent with the right to transfer shares, without any express contract or article, a lien on the shares of its members for what is due by them to the company in respect of the shares (Lindley, *Law of Companies*, 6th ed., p. 635). Where shares may be forfeited if money due in respect of them is not paid, no lien is conferred (*Re Dunlop, Dunlop v. Dunlop* (1882), 21 Ch. D. 583, C. A.; *Re Kingstown Yacht Club*, *supra*). Table A to the Companies Act, 1862 (25 & 26 Vict. c. 89), did not give any active lien on shares, but clause 10 empowered the company to decline to register a transfer of shares to a person "indebted to them," and "indebted" meant on any account whatever, and either solely or jointly with other persons (*Ex parte Stringer* (1882), 9 Q. B. D. 436; *Re Beniham Mills Spinning Co.* (1879), 11 Ch. D. 900, C. A.). Articles of association have for years past given a much more extensive lien actively enforceable by sale of the shares, but confining the lien to shares not fully paid up, except where a stock exchange quotation was not required. Articles excluding a lien on fully-paid shares can be altered by extending the lien to them (*Allen v. Gold Reefs of West Africa, Ltd.*, *supra*). Clause 9 of Table A to the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), gives the company a lien on "every share (not

articles may be altered so as to subject the existing fully-paid shares to the lien with respect to existing debts (t). If, however, the company has already proved in the bankruptcy of the shareholder, it will not be allowed to set up such subsequently acquired lien (u).

SECT. 9.
Member-
ship.

281. The lien is an equitable charge which attaches not only to the shares, but to the proceeds of sale thereof, or moneys payable in respect thereof in a winding up (w). Definition.

If articles of association give a company a paramount lien on shares held by more persons than one in respect of all moneys owing to the company by any of the holders, alone or jointly with any other persons, the company is entitled to a lien on shares held by trustees in respect of debts due to the company by a firm, of which one of such trustees is a member, paramount to the claims of the beneficiaries (x).

But the company has no lien for debts due from the *cestuis qui trustent* who are not registered holders of shares (y), and cannot alter its register of shareholders by substituting their names for those of the trustees (a).

282. Where the company has by its articles a paramount lien on every share for all debts due from the holder to the company, it has no priority in respect of moneys which become due from the shareholder to the company after the company has received notice of a charge given to someone else (b). The lien, however, exists although the shareholder has given the company unmatured bills for his debt; and it prevails over a charge given after the giving of the bills but before maturity (c). Effect on
lien of charge
on shares.

The company's lien is lost if it registers a transfer of the shares subject to the lien (d); but a dividend declared after the execution but before registration of a transfer can be retained under the lien (e). When a transfer is made of certain shares forming part How lien lost
or discharged.

being a fully-paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share," "all shares (other than fully-paid shares) standing in the name of a single person, for all moneys presently payable by him or his estate to the company." Clauses 10 and 11 provide for enforcing the lien by sale of the shares.

(t) *Allen v. Gold Reefs of West Africa, Ltd.*, [1906] 1 Ch. 656, C. A.; compare *McArthur (W. & A.), Ltd. (Liquidator) v. Gulf Line*, [1909] S. C. 732.

(u) *Re Rowe's Trustee's Claim*, [1905] 1 Ch. 597; affirmed, [1906] 1 Ch. 1, C. A.

(w) *Re General Exchange Bank, Re Lewis* (1871), 6 Ch. App. 818. A lien on the proceeds of sale of shares is a lien on the shares (*Deering and McQuestion v. Hibernian Joint-Stock Banking Co.* (1868), 16 W. R. 578). The lien will authorise a loan to a shareholder under a power to lend on security, if loans on shares are not forbidden (*Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, C. A.).

(x) *New London and Brazilian Bank v. Brocklebank* (1382), 21 Ch. D. 302, C. A.

(y) *Re Perkins, Ex parte Mexican Santa Barbara Mining Co.* (1890), 24 Q. B. D. 613, C. A.; see *Re Collie, Ex parte Manchester and County Bank* (1876), 3 Ch. D. 481, C. A.

(a) *Re Ystalyfera Gas Co.*, [1887] W. N. 30.

(b) *Bradford Banking Co. v. Briggs* (1886), 12 App. Cas. 29, overruling on this point *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, C. A.

(c) *Re London, Birmingham and South Staffordshire Banking Co.* (1865), 34 Beav. 332.

(d) *Higgs v. Assam Tea Co.* (1869), L. R. 4 Exch. 387; *Re Northern Assam Tea Co., Ex parte Universal Life Assurance Co.* (1870), L. R. 10 Eq. 458.

(e) *Re M'Murdo, Penfold v. M'Murdo* (1892), 8 T. L. R. 507.

SECT. 9.
Member-
ship.

of a larger number on which the company has a lien, the lien must, as between the transferor and transferee, be satisfied out of the remaining shares, if sufficient (*f*).

A lien on shares may be discharged by a new arrangement between the company and the shareholder, the terms of which are incompatible with its retention, or which show an intention to waive it (*g*).

On payment of the debt in respect of which there is a lien, the debtor can require the company to assign the lien to his nominee (*h*).

(v.) *Alteration of Members' Position.*

Alteration of
members'
position.

283. Rights given by statute are, generally speaking, only alterable in accordance with statute (*i*). Rights and liabilities under the memorandum of association are, in respect of matters required to be inserted in the memorandum, only alterable in the cases and in the mode and to the extent for which express provision is made by the Act of 1908 (*k*). Provisions inserted in the memorandum which are not required by the Act to be there inserted are unalterable (*l*) except in pursuance of a power of modification given by the memorandum (*m*). Rights and liabilities created by the articles of association alone may be altered by altering the articles in the manner pointed out in the Act (*n*), although rights given by a contract separate from the articles cannot be altered merely by the company's alteration of its articles (*o*).

A member in the case of his bankruptcy ceases to be such when the trustee is registered as a member in his place, as he can be, if the articles permit it (*p*), or when the trustee's transferee is registered (*q*), or when the trustee disclaims the shares (*r*). Membership also ceases on death (*s*); on the registration of a transfer to the member's own transferee (*t*); by a valid surrender or forfeiture of his shares (*a*); on the registration as a member of a purchaser of his shares under a sale to satisfy a lien (*b*); or on the dissolution of the company (*c*).

(*f*) *Gray v. Stone and Funnell* (1893), 69 L. T. 282.

(*g*) *Bank of Africa v. Salisbury Gold Mining Co.*, [1892] A. C. 281, P. C.; *Hunter v. Stewart* (1861), 4 De G. F. & J. 168.

(*h*) *Everitt v. Automatic Weighing Machine Co.*, [1892] 3 Ch. 506.

(*i*) See p. 159, *ante*.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 7; and p. 159, *ante*.

(*l*) *Ashbury v. Watson* (1885), 30 Ch. D. 376, C. A.

(*m*) *Re Welsbach Incandescent Gas Light Co., Ltd.*, [1904] 1 Ch. 87, C. A.

(*n*) See p. 207, *post*.

(*o*) *Punt v. Symons & Co., Ltd.*, [1903] 2 Ch. 506; *British Equitable Assurance Co., Ltd. v. Baily*, [1906] A. C. 35.

(*p*) *Re Bentham Mills Spinning Co.* (1879), 11 Ch. D. 900, C. A.; and see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clauses 22, 23.

See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 188.

Ibid., pp. 191, 192.

As to rights and liabilities on death, see p. 190, *post*.

(*t*) See p. 195, *post*. As to his liability as a past member in winding up, see p. 195, *post*.

(*a*) See pp. 198, 201, *post*.

(*b*) See p. 168, *ante*.

(*c*) See p. 567, *post*.

SECT. 10.—*Shares.*SECT. 10.
Shares.SUB-SECT. 1.—*In General.*

284. The nominal capital, if any (*d*), of a company is divided into shares of the fixed pecuniary amount named in its memorandum of association, whether it is a company limited by shares or a guarantee company with a share capital (*e*). In the latter case and in the case of an unlimited company with a share capital the articles must state the amount of share capital (*f*), and it is usual in the articles of an unlimited company to state that the capital (if there is any) is divided into shares of a certain amount (*g*). A provision in the memorandum or articles, or in any resolution of a guarantee company registered on or after January 1, 1901 (*h*), purporting to divide the company's undertaking into shares or interests, is treated as a provision for a share capital, although the nominal amount or number of the shares or interests is not thereby specified (*i*). In the case of a guarantee company not having a share capital and registered on or after the same date, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, any such provision is void (*k*). Division of capital.

Generally all the shares are of equal amount, but it is not necessary that they should be so, nor need they be all of the same class; some may be preference shares and others ordinary, and there is no restriction on the number of classes of shares (*l*). Different classes of shares.

285. A share is a share (defined as to amount) in the share capital of a company (*m*), carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are Attributes of shares.

(*d*) See p. 87, *ante*.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 3, 4; and see p. 76, *ante*.

(*f*) *Ibid.*, s. 10. The form of articles in *ibid.*, Sched. III., Form C, in the case of a guarantee company does not comply in this respect with the Act.

(*g*) See *ibid.*, Sched. III., Form D.

(*h*) The date when the Companies Act, 1900 (63 & 64 Vict. c. 48), came into operation.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 21 (2) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 27 (2)]. The object of this provision was to prevent further evasion of obligations as to paying capital duty etc.; see *Malleson v. General Mineral Patents Syndicate, Ltd.*, [1894] 3 Ch. 533.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 21 (1) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 27 (3)].

(*l*) See p. 90, *ante*.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285. A share cannot properly be likened to a sum of money, settled upon and subject to executory limitations to arise in the future; it is the interest of the holder in the company, measured, for the purposes of liability and dividend, by a sum of money, but consisting of a series of mutual covenants entered into by all the shareholders *inter se*, in accordance with the Act (*ibid.*, s. 14), and made up of various rights and liabilities contained in the contract, including the right to a certain sum of money (*Borland's Trustee v. Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279). In the Act of 1908, unless the context otherwise requires, the term includes stock, except where a distinction between stock and shares is expressed or implied. As used in *ibid.*, s. 14, it never means stock, for stock can only be created after shares have been issued and been fully paid up; see p. 99, *ante*.

SECT. 10. personal estate (*n*), transferable in the manner provided by its articles (*o*), and are not of the nature of real estate (*p*).
Shares.

Each share in a company having a share capital must be distinguished by its appropriate number (*q*).

Shareholders. **286.** Where a company has a capital limited by shares, the shareholders are the only members (*r*). The members are the subscribers of its memorandum of association, who thereby agree to become members even if they are not registered as members (*s*), and who must each take at least one share (*t*), and other persons who agree to become members of a company, and whose names are entered in its register of members (*u*).

Contracts to take shares. **287.** The principles applicable to a contract to take or subscribe (*w*) for shares in a company are identical with those which apply to other contracts; there must be the consent of two parties to the contract, and if one of them makes an offer, the other must accept it, or do something equivalent to an acceptance which satisfies the court, by words or conduct, that the offer has been accepted to the knowledge of the party who made it (*x*). A company may obtain specific performance of an agreement to take shares from it (*y*). Share certificates are the proper subject of interpleader proceedings (*z*).

SUB-SECT. 2.—*Allotment and Issue.*

(i.) *Application and Allotment.*

Application and allotment. **288.** In most cases the contract with the company is constituted by an application being made by the intending shareholder to the

(*n*) Shares are "goods" which may be ordered to be sold under R. S. C., Ord. 50, r. 2 (*Evans v. Davies*, [1893] 2 Ch. 216). In a will they may pass under a gift of securities (*Re Rayner, Rayner v. Rayner*, [1904] 1 Ch. 176; compare *Ogle v. Knipe* (1869), L. R. 8 Eq. 434). Shares transferable only by deed are "things in action" within the meaning of s. 44 (iii.) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*Colonial Bank v. Whinney* (1886), 11 App. Cas. 426); and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 174.

(*o*) As to transfers, see p. 186, *post*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 22 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 22].

(*q*) *Ibid.*, s. 22 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 22]. The number referred to is usually called "the denoting number." The provision is merely directory, to enable the title of particular persons to be traced (*Ind's Case* (1872), 7 Ch. App. 485; compare *Wolverhampton Waterworks Co. v. Hawksford* (1860), 7 C. B. (N. S.) 795; *East Gloucestershire Rail. Co. v. Bartholomew* (1867), L. R. 3 Exch. 15, 21). The provision is not applicable to a joint stock company registering under Part VII. of the Act of 1908, whose shares are not numbered (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 263 (ii.) (b)).

(*r*) See p. 143, *ante*.

(*s*) *Ibid.*

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 3, 4, 5.

(*u*) *Ibid.*, s. 24 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 23]; and see p. 144, *ante*.

(*w*) As to the meaning of "subscribe," see *Whitwam v. Watkin* (1898), 78 L. T. 188.

(*x*) *Gunn's Case* (1867), 3 Ch. App. 40, 43, 44; see title CONTRACT, Vol. VII., pp. 345, 350 *et seq*.

(*y*) *Robinson v. Jenkins* (1890), 24 Q. B. D. 275; R. S. C., Ord. 57, r. 1.

(*z*) *Odessa Tramways Co. v. Mendel* (1878), 8 Ch. D. 235, O. A.; and see *New Brunswick, etc. Co. v. Muggeridge* (1859), 4 Drew. 686; *Oriental Steam Navigation Co. v. Briggs* (1861), 4 De G. F. & J. 191.

SECT. 10.
Shares.

company for an allotment (a) to him of so many shares, and by an allotment being made, and notified to him. The application is an offer by him to take a certain number of shares, and the allotment by the company is an acceptance of the offer. A binding contract is constituted to take, and issue, the shares when, and not before, the acceptance is notified to the applicant (b).

If notice of allotment is sent by post, the acceptance is notified when the notice is posted (c), even though it never reaches the applicant (d). In some cases, as, for instance, on a reconstruction or amalgamation, the offer may, in effect, come from the company, and the application then operates as an acceptance (e).

Either the offer or the acceptance may be oral (f). Before notification of the acceptance is received (g), or if sent by post, posted (h), the offer may be withdrawn. Even if the offer is made in writing, it may be withdrawn orally (i).

There is no contract where the offer to take shares in a company is made by a man who believes it to be a totally different company, and that belief is fostered by those who represent the company (j).

289. In the case of a conditional offer to take shares, if the condition is a condition subsequent, there is a binding agreement to take the shares as soon as the company notifies its acceptance of the offer; where, however, the condition is a condition precedent, there is no binding agreement to take the shares unless and until the condition

Conditional
offer or
allotment.

(a) As to contracts to pay on allotment where the company is never registered, see *Wheeler v. Fradd* (No. 1) (1898), 14 T. L. R. 302.

(b) *Nicol's Case*, *Tufnell and Ponsonby's Case* (1885), 29 Ch. D. 421, 426, C. A.; *Hebb's Case* (1867), L. R. 4 Eq. 9.

(c) As to acceptance by post, see title CONTRACT, Vol. VII., pp. 352 *et seq.*; *Quenerduaine v. Cole* (1883), 32 W. R. 185; *Household Fire Insurance Co. v. Grant* (1879), 4 Ex. D. 216, C. A. (overruling *Constantinople and Alexandria Hotels Co., Finucane's Case* (1869), 17 W. R. 813; *Reidpath's Case* (1870), L. R. 11 Eq. 86; and *British and American Telegraph Co. v. Colson* (1871), L. R. 6 Exch. 108); *Re Cardiff and Caerphilly Iron Co., Gledhill's Case* (1861), 3 De G. F. & J. 713, C. A.; *Re Exhall Mining Co., Miles' Case* (1864), 4 De G. J. & Sm. 471, C. A.; *Re Natal Investment Co., Wilson's Case* (1869), 20 L. T. 962; *Re Metropolitan Fire Insurance Co.* (1900), 16 T. L. R. 513; *Re Whitley, Steel's Case* (1879), 49 L. J. (CH.) 176; *Re Scottish Petroleum Co., MacLagan's Case* (1882), 51 L. J. (CH.) 841; *Wall's Case* (1872), L. R. 15 Eq. 18; *Ritso's Case* (1877), 4 Ch. D. 774, C. A.; *Truman's Case*, [1894] 3 Ch. 272; *Re General International Agency Co., Ex parte Chapman (Abel)* (1866), 14 L. T. 752. As to contracts made by telegram, see title CONTRACT, Vol. VII., p. 353; *Godwin v. Francis* (1870), L. R. 5 C. P. 295; *Cowan v. O'Connor* (1888), 20 Q. B. D. 640.

(d) *Household Fire Insurance Co. v. Grant*, *supra*.

(e) *Adams' Case* (1872), L. R. 13 Eq. 474; *Re United Ports and General Insurance Co., Brown's Case*, *Tucker's Case* (1871), 41 L. J. (CH.) 157; compare *Wallace's Case*, [1900] 2 Ch. 671; *Re New Eberhardt Co., Ex parte Menzies* (1889), 48 Ch. D. 118, C. A.

(f) *Re Electric Telegraph Co. of Ireland, Cookney's Case* (1858), 3 De G. & J. 170, 173, C. A.; *New Theatre Co., Bloxam's Case* (1864), 33 Beav. 529; *Levita's Case* (1867), 3 Ch. App. 36.

(g) *Ritso's Case*, *supra*; *Re London and Northern Bank, Ex parte Jones*, [1900] 1 Ch. 220; *Wallace's Case*, *supra*; compare *Re Portuguese Consolidated Copper Mines, Ltd., Ex parte Badman, Ex parte Bosanquet* (1890), 45 Ch. 16, where notification of an invalid allotment had been received; *Re Whitley, Partners, Ltd., Steel's Case* (1879), 28 W. R. 241; and see p. 176, *post*.

(h) *Harrie's Case* (1872), 7 Ch. App. 587; *Wall's Case*, *supra*; *Re Natal Investment Co., Wilson's Case*, *supra*; *Truman's Case*, *supra*.

(i) *Ritso's Case*, *supra*.

(j) *Baillie's Case*, [1898] 1 Ch. 110; *Cundy v. Lindsay* (1878), 3 App. Cas. 459.

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is either fulfilled or waived (*k*). If an acceptance introduces a new term it will not constitute a contract unless the new term is acquiesced in (*l*).

An allotment may be made conditionally on the happening of some event, such as the allottee indicating his acceptance of the shares and paying certain moneys; in such a case he does not become a member until the condition is performed, even if his name is (conditionally) registered (*m*).

Definition
and effect of
"allotment."

290. Allotment is generally the acceptance by the company of an offer to take shares, and is an appropriation of a certain number of shares, but not of any specific shares; it does not make the allottee a member from that moment, and only constitutes a binding contract between him and the company (that the latter shall make a complete allotment of, and the former shall take, the particular number of shares) when, and not before, notice of the allotment is given to the allottee (*n*). The legal effect of the appropriation depends on circumstances; for it may be an offer of shares to the allottee or an acceptance of an application for shares by him; of itself an allotment does not necessarily create the status of membership, although when notice of the acceptance has been given the allottee has acquired a title to the shares (*o*). The statute, however (*p*), makes the placing of the shareholder's name on the register, when he is not a signatory to the memorandum of association, a condition precedent to membership (*q*).

A contract is not constituted by an allotment of shares other than those applied for, as, for instance, when the shares allotted are unpaid or partly paid instead of fully paid (*r*), or of larger nominal

(*k*) *Elkington's Case* (1867), 2 Ch. App. 511; *Pellatt's Case* (1867), 2 Ch. App. 527; *Bridger's Case* (1870), 5 Ch. App. 305; *Fisher's Case*, *Sherrington's Case* (1885), 31 Ch. D. 120. C. A.; *Boyer (Paul), Ltd. v. Edwardes* (1900), 17 T. L. R. 16; *Re Bultfontein Sun Diamond Mine, Ex parte Cox, Hughes and Norman* (1897), 75 L. T. 669; *Shackleford's Case* (1866), 1 Ch. App. 567; *Rogers' Case*, *Harrison's Case* (1868), 3 Ch. App. 633; *Wood's Case* (1873), L. R. 15 Eq. 236.

(*l*) *Addinell's Case* (1865), L. R. 1 Eq. 225; *Beck's Case* (1874), 9 Ch. App. 392; compare *Howard's Case* (1866), 1 Ch. App. 561; *Jackson v. Turquand* (186 L. R. 4 H. L. 305; *Harris' Case* (1872), 7 Ch. App. 587.

(*m*) *Spitzel v. Chinese Corporation* (1899), 80 L. T. 347; compare *Pentelow's Case* (1869), 4 Ch. App. 178; *Peek's Case* (1869), 4 Ch. App. 532.

(*n*) *Nicol's Case*, *Tufnell and Ponsonby's Case* (1885), 29 Ch. D. 421, 426, C. A.; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, 430, C. A.; and see the cases cited in note (*f*), p. 176, *post*.

(*o*) *Spitzel v. Chinese Corporation*, *supra*. Compare *Re Northern Electric Wire and Cable Co.* (1890), 2 Meg. 288; and for other examples of offers by companies see *Rowley v. Unwin* (1855), 2 K. & J. 138, and *Re Malam, Malam v. Hitchens*, [1894] 3 Ch. 578.

(*p*) See p. 144, *ante*. No allotment is necessary in the case of memorandum shares (*Sidney's Case* (1871), L. R. 13 Eq. 228).

(*q*) *Nicol's Case*, *Tufnell and Ponsonby's Case*, *supra*, at p. 447; *Re Macdonald, Sons & Co.*, [1894] 1 Ch. 89, 104, C. A. But the allottee may be estopped by his conduct from setting up the non-registration of his name (*Burnes v. Pennell* (1849), 2 H. L. Cas. 497; *Sheffield and Manchester Rail. Co. v. Woodcock* (1841), 7 M. & W. 574; *Challis's Case*, *Somerville's Case* (1871), 6 Ch. App. 266; *Campbell's Case* (1873), 9 Ch. App. 1; *Winstone's Case* (1879), 12 Ch. D. 239). The register may be rectified by inserting the name before winding up (see p. 153, *ante*), and in the winding up of the company an allottee who is not on the register may be made liable as a contributory; see p. 488, *post*.

(*r*) *Blake v. Mowatt* (1856), 21 Beav. 603; *Arnot's Case* (1887), 36 Ch. D. 702,

amount (s), or fewer in number, than those applied for (t). If, however, the allottee accepts the shares and acts as shareholder, though under a mistake as to his liability, he is bound (u). Where an allotment has been made on a binding contract to take shares, it cannot be cancelled by the company (v). But an allotment may be rescinded which is invalid as *ultra vires* (w), or which has been made, by mistake, of unpaid instead of fully-paid shares (x), or to the wrong person (y), or when the allottee has the right to repudiate the contract on the ground of misrepresentation (z).

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291. The term "issue," as regards shares, has been used by the legislature (a). The shares which are signed for by the signatories to the memorandum are issued when the company is registered (b). As regards other shares, when a person is on his own authority entered on the register as a shareholder the shares have been issued to him, although he has not obtained the share certificate (c). But a resolution to allot shares is not necessarily the issue of them, and the term seems to mean some act distinct from and subsequent to allotment whereby the title of the allottee became complete, either by his receiving the certificate, or by being registered, or by some other step by which the title derived from allotment may be completed (d).

Issue of
shares.

C. A.; *Re Almada and Tirito Co.* (1888), 38 Ch. D. 415, C. A.; *Re New Eberhardt Co., Ex parte Menzies* (1889), 43 Ch. D. 118, C. A.; *Wynne's Case* (1873), 3 Ch. App. 1002; *Beck's Case* (1874), 9 Ch. App. 392.

(s) *Gustard's Case* (1869), L. R. 8 Eq. 438.

(t) *Ex parte Roberts* (1852), 1 Drew. 204; *Re Oxford and Worcester Extension and Chester Junction Rail. Co., Re Barber* (1851), 15 Jur. 51. It is, however, usual for the prospectus to intimate that the number of shares allotted may be less than the number applied for, and for the applicant to offer to accept the number applied for, or any smaller number that may be allotted.

(u) *Dent's Case, Forbes' Case* (1873), 8 Ch. App. 768; *Re Railway Time Tables Publishing Co., Ex parte Sandys* (1889), 42 Ch. D. 98, C. A.

(v) *Adams' Case* (1872), L. R. 13 Eq. 474; *Duff's Executors' Case* (1886), 32 Ch. D. 301, C. A.; *Re Saloon Steam Packet Co., Ex parte Fletcher* (1867), 37 L. J. (CH.) 49; *Re Companies Guardian Society, Wallscourt's (Lord) Case*, [1899] W. N. 258; compare *Hall's Case* (1870), 5 Ch. App. 707; *Re London and Provincial Consolidated Coal Co.* (1877), 5 Ch. D. 525, where no allotment had been made.

(w) *Barnett's Case* (1874), L. R. 18 Eq. 507; *Bath's Case* (1878), 8 Ch. D. 334, C. A., where, however, the allottee was held liable as a past member; compare *Re British Provident etc. Assurance Society, Coleman's Case* (1863), 1 De G. J. & Sm. 495.

(x) *Hartley's Case* (1875), 10 Ch. App. 157.

(y) *Re Hoylake Rail. Co., Ex parte Keightley*, [1874] W. N. 18, 47, O. A.

(z) *Wright's Case* (1871), 7 Ch. App. 55; *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64, 74; compare *Re Life Association of England, Blake's Case* (1865), 34 Beav. 639.

(a) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 39 [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 24]; *ibid.*, c. 41 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 12].

(b) *Dalton Time Lock Co. v. Dalton* (1892), 66 L. T. 704, C. A.

(c) *Blyth's Case* (1876), 4 Ch. D. 140, C. A.; *A.-G. v. Regent's Canal and Dock Co.*, [1904] 1 K. B. 263, C. A. Compare *Bush's Case* (1874), 9 Ch. App. 554.

(d) *Clarke's Case* (1878), 8 Ch. D. 635, C. A.; and see *Spitzel v. Chinese Corporation* (1899), 80 L. T. 347; *Pool's Case* (1887), 35 Ch. D. 579. But it would seem that the meaning of "issue" depends on the context of the enactment in which the word occurs; see *Campbell's Case* (1873), 9 Ch. App. 1; *A.-G. v. Anglo-Argentine Tramways Co., Ltd.*, [1909] 1 K. B. 677; *Re Perth Electric Tramways, Ltd., Lyons v. Tramways Syndicate, Ltd., and Perth Electric Tramways, Ltd.*,

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Shares.

Notice of
allotment.

(ii) Notice of allotment.

292. Unless the notice of allotment is communicated to the applicant or his agent for the purpose of receiving the notice (e), the contract is not complete, even when the applicant's name is registered (f).

Only slight evidence is required as to the service of notice (g); and even where there is no formal notice the receipt of notice of allotment may be implied from the conduct of the applicant (h).

The stamp duty on a notice of allotment is 6d. (i).

If there is unreasonable delay in accepting an application for shares, the applicant may repudiate them within a reasonable time after receiving notice of allotment (j), and before a winding up commences (k).

(iii.) Restrictions on Allotment.

Statement in
prospectus.

293. Every prospectus offering shares to the public for subscription or purchase, and issued by or on behalf of a company or a person who is or has been interested in its formation, must state the amount payable on application and allotment on each share (l). The amount payable on application must not be less than 5 per cent. of the nominal amount of each share (m).

[1906] 2 Ch. 216. The term is not a technical, but a mercantile, term (*Levy v. Abercorris Slate and Slab Co.* (1887), 37 Ch. D. 260, 264).

(e) See *Re London and Northern Bank, Ex parte Jones*, [1900] 1 Ch. 220; *Harward's Case* (1871), L. R. 13 Eq. 30; *Levita's (G. H.) Case* (1870), 5 Ch. App. 489; *Re Lafitte (Charles) & Co., De Rosaz's Case* (1869), 21 L. T. 10, C. A.

(f) *Gunn's Case* (1867), 3 Ch. App. 40; *Sahlgreen and Carrall's Case* (1868), 3 Ch. App. 323; *Wallis's Case* (1868), 4 Ch. App. 325, n.; *Crawley's Case, Robinson's Case* (1869), 4 Ch. App. 322; *Re Land Shipping Colliery Co., Ex parte Harwood, Gull, Geary and Stafford* (1869), 20 L. T. 736; *Ward's Case* (1870), L. R. 10 Eq. 659; *Re Horner (Joseph) & Sons, Plimsoll's Case* (1871), 24 L. T. 653.

(g) *Re National Funds Assurance Co., Sparling's Case* (1877), 26 W. R. 41.

(h) *Richards v. Home Assurance Association* (1871), L. R. 6 C. P. 591; *Re Valparaiso Water Works Co., Davies' Case* (1872), 41 L. J. (CH.) 659, C. A.; *Re Hampshire Co-operative Milk Co., Purcell's Case* (1880), 29 W. R. 170; 25 Ch. D. 291; *Re Saloon Steam Packet Co., Fletcher's Case* (1867), 17 L. T. 136; *Crawley's Case, Robinson's Case, supra, Levita's Case* (1867), 3 Ch. App. 36; *United Ports and General Insurance Co., Ex parte Brown, Jenkins and Tucker* (1871), 20 W. R. 88; *Re Imperial Land Credit Co., Ex parte Eve* (1868), 37 L. J. (CH.) 844.

(i) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 9. An unstamped allotment letter was received as evidence of the reception of a notice of allotment when the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 17, was unrepealed (*Re Whitley, Partners, Steel's Case* (1879), 49 L. J. (CH.) 176).

(j) *Ramsgate Victoria Hotel Co. v. Montefiore, Same v. Goldsmid* (1866), L. R. 1 Exch. 109; *Re Bowron, Baily & Co., Baily's Case* (1868), 3 Ch. App. 592; compare *Pentelow's Case* (1869), 4 Ch. App. 178; *Peek's Case* (1869), 4 Ch. App. 532.

(k) *Re Land Loan Mortgage and General Trust Co. of South Africa, Boyle's Case* (1885), 54 L. J. (CH.) 550.

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (1) (d) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10 (1) (d)]; Companies Act, 1907 (7 Edw. 7, c. 50), s. 2 (1) (d)]. The statement need not be inserted in the statement in lieu of a prospectus filed by a company which does not issue a prospectus on or with reference to its formation; see *ibid.*, s. 82, Sched. II.; and p. 141, ante.

(m) *Ibid.*, s. 85 (3).

294. In the case of the first allotment of shares offered to the public (*n*) for subscription (*o*), no allotment must be made of any share capital of a company offered to the public for subscription, unless (1) the minimum subscription, if any, or if not, the whole amount of share capital offered for subscription, has been subscribed; and (2) the sum payable on application for the minimum subscription, or such whole amount, as the case may be, has been paid to and received by the company (*p*).

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Shares.
—
Minimum subscription in case of public company.

The minimum subscription referred to in the Act is the amount (if any) fixed by the memorandum or articles of association and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment, and that amount, or if no such amount is fixed, then the whole amount, must be reckoned exclusively of any amount payable otherwise than in cash (*q*).

It is sufficient if the articles state that no allotment shall be made unless and until a named percentage of the shares offered have been subscribed (*r*). A statement, however, in a prospectus that a company may go to allotment if a certain number of shares is subscribed is probably insufficient (*s*).

The amount payable on application on each share (*t*), whether on a first or subsequent offer to the public, must be actually paid to and received by the company (*u*). Any means by which money can be remitted may be used, but the amount must be paid in cash, and when a cheque for the amount is given, until it is cleared the amount is not paid to and received by the company (*a*).

Payment of application money.

Any condition requiring or binding any applicant for shares to waive compliance with any of the above requirements is void (*b*).

Waiver clauses.

295. If the above-mentioned conditions have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares must be forthwith repaid to them without interest; if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company are jointly and severally liable to repay the money with interest at 5 per cent. per annum from the expiration of the forty-eighth day, but a director is not liable if he proves that the

Non-compliance with statutory requirements.

(*n*) As to what is an offer to the public, see p. 121, *ante*.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 85 (6) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4 (6)].

(*p*) *Ibid.*, s. 85 (1) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4 (1)].

(*q*) *Ibid.*, s. 85 (1), (2) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4 (2)].

(*r*) *Re West Yorkshire Darracq Agency, Ltd.*, [1908] W. N. 236.

(*s*) *Roussell v. Burnham*, [1909] 1 Ch. 127, 132. The minimum subscription should only be stated in the memorandum where the company is registered without articles.

(*t*) See p. 176, *ante*.

(*u*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 85 (3), (6) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4 (3), (6)].

(*a*) *Mears v. Western Canada Pulp and Paper Co., Ltd.*, [1905] 2 Ch. 353, C. A.; *Re National Motor Mail-Coach Co., Anstis' and McLean's Claims*, [1908] 2 Ch. 228; *Burton v. Bevan*, [1908] 2 Ch. 240; compare *Glasgow Pavilion, Ltd. v. Motherwell* (1903), 6 F. (Ct. of Sess.) 116.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 85 (5) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4]; compare *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, C. A.

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loss of the money was not due to any misconduct or negligence on his part (c).

The above provisions apply only before allotment, and the company cannot after allotment pay back the application money (d). An allotment, however, made by a company to an applicant in contravention of them is voidable at the instance of the applicant within one month after the holding of the statutory meeting and not later, and is so voidable notwithstanding the company is in course of being wound up (e).

**Rescission
and other
relief.**

296. The applicant may within the month prescribed either (1) commence an action claiming relief—namely, rescission of the allotment, rectification of the register, return of the moneys paid, and an injunction to restrain the company from parting or dealing with the moneys (f); or (2) give notice of avoidance (which need not specify the ground); but the notice must be followed by prompt legal proceedings (g). The time limit of a month does not apply at all when the company was registered before January 1, 1901 (h).

Any director who knowingly contravenes (i) or permits or authorises the contravention of any of the above provisions with respect to allotment is liable to compensate the company and the allottee respectively for any loss, damages, or costs which the company or the allottee may have sustained or incurred thereby, if proceedings to recover any such loss, damages, or costs are commenced within two years from the date of the allotment (j).

**Allotment by
private
company.**

297. A private company, as defined by the Act, is prohibited by its articles from inviting the public to subscribe for any shares (k), and is excepted from the operation of the provisions restricting the allotment of shares in a *quasi* private company (l); but it must not so allot its shares as to make the number of its members (exclusive of persons who are in its employment) more than fifty (m).

**Restrictions
on allotment
by *quasi*
private
company.**

298. Where a company is a *quasi* private company (n), no allotment must be made, in the case of the first allotment of share capital payable in cash, unless (1) the amount of the minimum subscription

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 85 (4) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4 (4)].

(d) *Burton v. Bevan*, [1908] 2 Ch. 240, *per* NEVILLE, J., at p. 246.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 86 (1) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 5 (1)]. As to the statutory meeting, see p. 248, *post*.

(f) *Mears v. Western Canada Pulp and Paper Co.*, [1905] 2 Ch. 353, C. A.

(g) *Re National Motor Mail-Coach Co., Anstis' and McLean's Claims*, [1908] 2 Ch. 228.

(h) *Finance and Issue, Ltd. v. Canadian Produce Corporation, Ltd.*, [1905] 1 Ch. 37.

(i) This means to contravene with knowledge of the facts; but a director cannot escape liability by being ignorant of the law (*Burton v. Bevan*, *supra*).

(j) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 86 (2) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 5 (2)]. As to costs, see *Barnett v. Eccles Corporation*, [1900] 2 Q. B. 423, 427, C. A.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 121; and see p. 73, *ante*.

(l) See *infra*.

(m) See p. 73, *ante*.

(n) See p. 72, *ante*.

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(if any), or, if there is no minimum subscription, then the whole amount of the share capital, other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash, has been subscribed, and (2) an amount not less than 5 per cent. of the nominal amount of each share payable in cash has been paid to and received by the company (o).

The minimum subscription is the amount fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment (p).

Minimum
subscription.

There is no statutory provision that, where a *quasi* private company fails to comply with the requirements above mentioned, moneys received from applicants shall be returned; but failure to comply makes the allotment voidable, and places directors under the same liability as where the requirements in respect of companies inviting share subscriptions are not complied with (q).

(iv.) *Return of Allotments and Filing Contracts.*

299. When a company limited by shares makes any allotment of its shares, it must within one month thereafter file with the registrar:—(1) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses, and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and (2) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract (r) in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted (s); and where the contract is not reduced to writing, the company must within one month after the allotment file with the registrar the prescribed particulars (t) of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to

Return of
allotments to
registrar.

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 85 (7) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 1 (3)]. "Cash," as used in the first part of the section, may mean "cash" as defined in *Spargo's Case* (1873), 8 Ch. App. 407; *Larocque v. Beauchemin*, [1897] A. C. 358, P. C. But the cash payable on application is money payable in the manner referred to in *Mears v. Western Canada Pulp and Paper Co., Ltd.*, [1905] 2 Ch. 353, C. A.

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 85 (7) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 1 (3)]. Strictly speaking, the minimum subscription is either the amount so fixed, or if no amount is so fixed, the "whole amount" referred to in the section, but it is unusual to describe the whole as the minimum.

(q) See *ibid.*, s. 86; and p. 177, *ante*.

(r) As to an option not being a contract, see *Re Coolgardie Consolidated Mines, Ltd.* (1898), 14 T. L. R. 277.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 88 (1) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 7 (1)]. As to what is an adequate statement of the consideration, see *Re Frost & Co.*, [1899] 2 Ch. 207; *Re Maynards, Ltd.*, [1898] 1 Ch. 515; compare *Re Watson (Robert) & Co.*, [1899] 2 Ch. 509.

(t) See Board of Trade Order, March 29, 1909, Form 52.

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Shares.

Extending
time for
filing docu-
ments.

writing, and the particulars are deemed to be an instrument within the meaning of the Stamp Act, 1891 (*u*), and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under that Act (*w*).

300. Where there has been a default in filing within due time of any document required to be filed, the company, or any person liable for the default, may apply for relief to the court, which, if satisfied that the omission to file the document was accidental or due to inadvertence or that it is just and equitable to grant relief, may make an order extending the time for filing for such period as it thinks proper (*a*).

(*u*) 54 & 55 Vict. c. 39, s. 122.

(*x*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 88 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 6]; see Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 12. If default is made in complying with the above-mentioned requirements, every director, manager, secretary, or other officer of the company, who is knowingly a party to the default, is liable to a fine not exceeding £50 for every day during which the default continues (Companies (Consolidation) Act, 1908, s. 88 (3) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 7 (2)]).

(*a*) *Ibid.*, s. 88 (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 6]. By s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), every share in any company was to be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same was otherwise determined by a contract duly made in writing, and filed with the registrar at or before the issue of such shares. It was the company's duty to file the contract (*Ibbotson v. Ibbotson Brothers, Ltd.*, [1898] 14 T. L. R. 278). The Companies Act, 1898 (61 & 62 Vict. c. 26), provided that when no contract or no sufficient contract had been filed in compliance with the Act of 1867, the company or any person interested in such shares or any of them, might apply to the court for relief, and that the court, if satisfied that the omission to file a contract or sufficient contract was accidental or due to inadvertence, or that for any reason it was just and equitable to grant relief, might make an order for the filing with the registrar of a sufficient contract in writing, and directing that on such contract being filed within a specified period, it should, in relation to such shares, operate as if it had been duly filed before the issue of such shares. S. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), was repealed by s. 33 of the Companies Act, 1900 (63 & 64 Vict. c. 48), which also provided that no proceedings under s. 25 of the Act of 1867 should be taken after December 31, 1900. The Companies Act, 1900 (63 & 64 Vict. c. 48), did not give a means of relief from penalties to the company where a contract had not been filed under s. 7 of that Act, the consequence being that failure to comply with the requirements as to filing rendered officers of the company, including, probably, a voluntary liquidator (see *Re X. Co., Ltd.*, [1907] 2 Ch. 92), liable to penalties until filing took place. This omission was remedied by s. 6 of the Companies Act, 1907 (7 Edw. 7, c. 50), which has been replaced by s. 88 (3) of the Act of 1908. The Act of 1898 was repealed by s. 286 of the Act of 1908, and there is no provision of the latter Act re-enacting its provisions. *Re Brutton and Burney, Ltd.*, *Re Burney's New Cross Brewery Co., Ltd.*, [1901] 1 Ch. 637, O. A., shows that there may be cases in which it is expedient to obtain relief under the Act of 1898, when s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), has not been complied with, and there is no doubt that s. 38 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), preserves the right to apply for relief under the repealed Act of 1898 (*Re Herts and Essex Waterworks Co., Ltd.*, [1909] W. N. 48). Whether the application ensues on a failure to comply with the Act of 1867, or with s. 88 of the Act of 1908 (or any enactment thereby replaced), a wide discretion is vested in the court, and the statutory provisions apply whether any part or the whole of the consideration was other than cash (*Re Tom Tit Cycle Co., Fisher's Case*, [1899] W. N. 35). Relief was granted under the Act of 1898, when the filed contract was insufficiently or erroneously stated (*Re May's Metal Separating Syndicate*, [1898] W. N. 159; *Re Northern*

SUB-SECT. 3.—*Certificates of Shares.*

SECT. 10.

Shares.Time for
issuing.

301. Every company must, within two months after the allotment of any of its shares, and within two months after the registration of the transfer of any such shares, complete and

Cresoting and Sleeper Co., [1898] W. N. 159; and see *Markham and Darter's Case*, [1899] 2 Ch. 480, C. A.; where there was no contract (*Re Jackson & Co., Ltd.*, [1899] 1 Ch. 348); and where the contract was only verbal (*Re Victoria Brick Works Co., Ltd.*, *Seaton's Case* (1898), 5 Mans. 350). "Accidental" means due to accident, and an accident is probably an unlooked-for mishap, or an untoward event which was not expected or designed (see *Fenton v. Thorley (J.) & Co., Ltd.*, [1903] A. C. 443; and title MASTER AND SERVANT). "Inadvertence" includes cases where there has been delay in adjudicating on the stamp duty (*Re Lucky Guss, Ltd.* (1898), 79 L. T. 722), or ignorance or forgetfulness of the law (*Re Jackson & Co., Ltd.*, *supra*; *Re Tom Tit Cycle Co., Fisher's Case*, [1899] W. N. 35). As to when it is just and equitable, see *Spiers and Bevan's Case*, [1899] 1 Ch. 210. In the case of an application under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 88 (3), the difficulty as to granting relief is absent which exists when the failure to file a contract under s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), is in respect of shares signed for by the signatories to the memorandum of association, because such shares may now be paid for in kind; see *Re Baglan Hall Colliery Co.* (1870), 5 Ch. App. 346; *Re Jarvis (F. W.) & Co., Ltd.*, [1899] 1 Ch. 193; *Re Dawnay (Archibald D.), Ltd.* (1900), 83 L. T. 47; *Re Timmins (Ebenezer) & Sons, Ltd.*, [1902] 1 Ch. 238; and compare *Re Whitehead & Brothers, Ltd.*, [1900] 1 Ch. 804.

As regards cases under the Act of 1908, it is in the interest of the company and its officers to make the application in order to be relieved from penalties. The shareholder is under no liability by reason of the omission to file the contract, and the omission does not prevent the shares from being fully or partly paid, as the case may be.

The court to which the application is to be made is the court having jurisdiction to wind up the company (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285); see p. 392, *post*. Where the winding-up jurisdiction is in the High Court of Justice, the application may be made either to the winding-up judge or (subject as mentioned below) to any other judge of the High Court (*Re Victoria Brick Works*, [1898] W. N. 162; *Re Concessions Acquisition Syndicate*, [1898] W. N. 162; *Re Lucky Guss, Ltd.*, *supra*; *Re Whitefriars Financial Co., Ltd.*, *Re Reeves & Son, Ltd.*, [1899] 1 Ch. 184; *Re Ferguson* (1901), 4 F. (Ct. of Sess.) 64). But where there is no winding up the application, if in the Chancery Division, should be made to one of the judges of that division, who may or may not be the winding-up judge (*Re British Columbian Exploitation and Gold Estates, Ltd.*, [1899] W. N. 32).

The application, if to a judge of the Chancery Division who is not the judge exercising the winding-up jurisdiction, is by summons or motion (*Re Whitefriars Financial Co., Ltd.*, *Re Reeves & Son, Ltd.*, *supra*). Notwithstanding the observations in that case, the application is usually by originating motion, and, where the applicant is the company, by originating *ex parte* motion. The application, if made by shareholders, may be made by some only, and not necessarily all of them (*ibid.*), and when shareholders apply the company must be served with the summons or notice of motion. Where the application is by originating motion, the notice of motion must be taken to the Writ Department of the Central Office and there marked with the name of the judge of the Chancery Division by whom it is to be heard (R. S. C., Ord. 5, r. 9; *Re Dowson's Submission to Arbitration*, [1889] W. N. 222; *Re Legal and General Investment Co.*, [1901] W. N. 72). The application is supported by affidavits.

In cases under the Act of 1898 either the original or a supplemental contract, or copies, or a memorandum specifying the consideration, was ordered to be filed (*Re Jackson & Co., Ltd.*, *supra*; *Re May's Metal Separating Syndicate*, [1898] W. N. 159; *Re Northern Cresoting and Sleeper Co.*, [1898] W. N. 159). In cases under the Act of 1908 the court orders the contract to be filed; or, if there is no contract in writing, the particulars prescribed by the Order of the Board of Trade of March, 1909, and Form 52 thereto

SECT. 10.
Shares.

have ready for delivery the certificates of all shares allotted or transferred, unless the conditions of issue of the shares otherwise provide (b).

Independently of the Act, and subject to the conditions of issue, a shareholder is entitled to delivery of his certificate within a reasonable time (c).

"Clean "
certificates.

302. A member is entitled to a "clean" certificate, that is to say, one which does not contain on it any statement derogatory to his title (d).

Effect of
share
certificate.

303. A certificate under the common seal of the company, specifying any shares or stock as held by any member, is *primâ facie* evidence of the title of the member to the shares or stock (e). The company has power (f) to issue certificates certifying that each individual shareholder named therein is the registered holder of the shares specified therein, the object being to give shareholders the opportunity of more easily dealing with their shares in the market and at once showing a marketable title (g). The certificate is the only documentary evidence of title in the possession of a shareholder (h). It is not a negotiable instrument or a warranty of title by the company issuing it (i). It declares to all the world that the person who is named in it, and to whom it is given, is the registered holder of certain shares or stock in the company (j), and that the shares are paid up to the extent therein mentioned (k); and it is given with the intention that it shall be used as such a declaration (l), so that the company is estopped from disputing the truth of any statement in it as against any person not knowing that the statement is untrue, who has acted or refrained from acting on the faith of it, and has thereby suffered loss (m).

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 92 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 5 (1)]. Default renders the company, and every director, manager, secretary, or other officer who is knowingly a party to it, liable to a fine not exceeding £5 for every day during which the default continues (*ibid.*, s. 92 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 5 (2)]).

(c) *Burdett v. Standard Exploration Co.* (1899), 16 T. L. R. 112.

(d) *Re Key (W.) & Son, Ltd.*, [1902] 1 Ch. 467. As to the order in which the names of joint holders are to appear, see *Re Saunders (T. H.) & Co.*, [1908] 1 Ch. 415.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 23 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 31].

(f) A person cannot insist on having a certificate of his title as a shareholder until he has done everything required to make him a shareholder (*Wilkinson v. Anglo-Californian Gold Co.* (1852), 18 Q. B. 728).

(g) *Re Bahia and San Francisco Rail. Co.* (1868), L. R. 3 Q. B. 584, 595.

(h) *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20, 29. It only applies to the legal, and not to the equitable title to the shares (*Shropshire Union Railways and Canal Co. v. R.* (1875), L. R. 7 H. L. 496, 509).

(i) *Longman v. Bath Electric Tramways, Ltd.*, [1903] 1 Ch. 646, C. A.

(j) *Re Bahia and San Francisco Rail. Co.*, *supra*; *Shropshire Union Railways and Canal Co. v. R.*, *supra*.

(k) *Bloomenthal v. Ford*, [1897] A. C. 156; *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004; *Barrow's Case* (1879), 14 Ch. D. 432, C. A.; *Waterhouse v. Jamieson* (1879), L. R. 2 Sc. & Div. 29, 33.

(l) *Re Bahia and San Francisco Rail. Co.*, *supra*.

(m) *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396; *Bloomenthal v.*

SECT. 10.
Shares.
Estoppel.

304. If the company is estopped from denying that a share is fully paid as against a holder without notice, such holder can give a good title to the share as fully paid even to a transferee who has notice that the shares are not fully paid (*n*). Further, where a person who lends money to a company on the terms of having as security fully-paid shares, receives certificates of the shares as fully paid, and the shares are allotted, and he is registered accordingly, the company is estopped from asserting against him any liability in respect of them (*o*).

The test is whether the shares were taken honestly on the faith of the certificate, and, if so, whether the holder afterwards honestly acted on the certificate or relied on it to his detriment (*p*). If a person did not take the shares on the faith of the certificate, or ought to have known that the statements in it were untrue, there is no estoppel as against the company (*q*). Moreover, the company is only estopped or liable in respect of its share certificate where it is issued by those who have authority to issue it; where its secretary forges the signatures of directors to the certificate, it is not estopped from disputing the title of the person named in the certificate as the holder of the shares (*r*). Payment of dividends on shares does not estop the company from denying the title of the payee to the shares (*s*).

A person who by reason of the issue of a certificate is entitled to shares by estoppel, and who acts on the certificate to his detriment, may recover from the company as damages the value of the shares at the time of the refusal of the company to recognise him as a

Ford, [1897] A. C. 156; *Dixon v. Kennaway & Co.*, [1900] 1 Ch. 833; *Parbury's Case*, [1896] 1 Ch. 100; *Barrow's Case* (1879), 14 Ch. D. 432, C. A.; *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004; *Re Ottos Kopje Diamond Mines, Ltd.*, [1893] 1 Ch. 618, C. A.; *Shaw v. Port Philip Gold Mining Co.* (1884), 13 Q. B. D. 103; *Monarch Motor Car Co. v. Pease* (1903), 19 T. L. R. 148; compare *Simm v. Anglo-American Telegraph Co.*, *Anglo-American Telegraph Co. v. Spurling* (1879), 5 Q. B. D. 188, C. A.; *Re Railway Time Tables Publishing Co., Ex parte Sandys* (1889), 42 Ch. D. 98, C. A.; *Re London Celluloid Co.* (1888), 39 Ch. D. 190, C. A.; *Markham and Darter's Case*, [1899] 1 Ch. 414; *Re Newport and South Wales Shipowner's Co.*, *Rowland's Case*, [1880] W. N. 80, C. A.

(*n*) *Barrow's Case*, *supra*.

(*o*) *Blumenthal v. Ford*, *supra*. This case and *Parbury's Case*, *supra*, extend the doctrine of *Burkinshaw v. Nicolls*, *supra*, which was that of a transferee to the case of an original allottee.

(*p*) *Hart v. Frontino etc. Gold Mining Co.* (1870), L. R. 5 Exch. 111; *Dixon v. Kennaway & Co.*, *supra*.

(*q*) *Blyth's Case* (1876), 4 Ch. D. 140, C. A.; *Simm v. Anglo-American Telegraph Co.*, *Anglo-American Telegraph Co. v. Spurling*, *supra*; *Re Vulcan Ironworks Co.*, [1885] W. N. 120. As to shares improperly issued at a discount, see *Markham and Darter's Case*, *supra*; *Parbury's Case*, *supra*; *Re Railway Time Tables Publishing Co., Ex parte Sandys*, *supra*. As to estoppel, see also *Pickard v. Sears* (1837), 6 Ad. & El. 469; *Freeman v. Cooke* (1848), 2 Exch. 654; *Jorden v. Money* (1854), 5 H. L. Cas. 185; *Carr v. London and North Western Rail. Co.* (1875), L. B. 10 O. P. 307; and title ESTOPPEL.

(*r*) *Ruben v. Great Fingall Consolidated*, [1906] A. C. 439; compare *Shaw v. Port Philip and Colonial Gold Mining Co.* (1884), 13 Q. B. D. 103. As to the effect of the secretary improperly obtaining the directors' actual signatures, see *Dixon v. Kennaway & Co.*, *supra*, which see also as to directors being individually estopped; and see *British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A.; and p. 245, *post*.

(*s*) *Foster v. Tyne Pontoon and Dry Docks Co.* (1893), 63 L. J. (Q. B.) 50.

SECT. 10.
Shares.

shareholder, together with interest from that date (*t*). Similarly, a person who relies on a certificate until he loses his power to get redress against a third party may recover damages from the company (*u*). If, however, he has not altered his position on the faith of the certificate, or has obtained it by producing to the company a forged transfer, he cannot recover damages (*v*).

Note on
certificate.

305. The usual note on a certificate, that without its production no transfer will be registered, is a mere warning to take care of it, and not an invitation to all the world to deal with the certificate on the footing of a contract with the holder for the time being not to allow a transfer to be registered without its production (*x*).

SUB-SECT. 4.—*Transfer, Transmission and Mortgage of Shares.*

(i.) *Contract to sell Shares.*

Contract to
sell shares.

306. A contract for the sale of shares may, except in the case of bank shares, be made orally (*a*).

Specific performance may be ordered of a contract to sell shares (*b*), even although the company, pending the litigation, has gone into liquidation (*c*), and also of a contract to take a transfer of shares whereon nothing has been paid (*d*).

Seller's
obligation.

Under an ordinary contract for sale of shares, made subject to the rules of the London Stock Exchange, the seller's only duty is to execute a valid transfer, hand it and the certificate to the purchaser, and do all that is necessary on his part to enable the purchaser to be registered, it being the purchaser's duty to obtain registration of the transfer. Unless registration is refused because the transferor has no right to execute the transfer, the transferee must pay the consideration for the transfer, although registration is refused (*e*). The transferor is, however, bound not to prevent or delay the registration of the transferee as owner (*f*).

(*t*) *Re Bahia and San Francisco Rail. Co.* (1868), L. R. 3 Q. B. 584; *Hart v. Frontino etc. Gold Mining Co.* (1870), L. R. 5 Exch. 111; *Re Ottos Kopje Diamond Mines, Ltd.*, [1893] 1 Ch. 618, C. A.; *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 316. As to the effect of the note on the shares being in the order and disposition of a bankrupt, see *Re Butler*, [1900] 1 I. R. 153.

(*u*) *Dixon v. Kennaway & Co.*, [1900] 1 Ch. 833.

(*v*) *Simm v. Anglo-American Telegraph Co., Anglo-American Telegraph Co. v. Spurling* (1879), 5 Q. B. D. 188, C. A.

(*x*) *Rainford v. Keith (James) and Blackman Co., Ltd.*, [1905] 1 Ch. 296, per FARWELL, J.; reversed on another ground, [1905] 2 Ch. 147, C. A.; *Guy v. Waterlow Brothers and Layton, Ltd.* (1909), 25 T. L. R. 515; compare *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20. As to the company's duties with regard to certificates deposited with it for the purpose of certification of transfers, see p. 193, *post*.

(*a*) *Humble v. Mitchell* (1839), 11 Ad. & El. 205; *Watson v. Spratley* (1854), 10 Exch. 222; *Bowlby v. Bell* (1846), 3 C. B. 284; *Brudley v. Holdsworth* (1838), 3 M. & W. 422. As to bank shares, see p. 615, *post*. As to the obligation to execute a duly stamped contract note, see Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 78; as to the increased sale of duties on contract notes, see *ibid.*, s. 77; and title REVENUE.

(*b*) *Duncuft v. Albrecht* (1841), 12 Sim. 189; *Poole v. Middleton* (1861), 4 L. T. 631.

(*c*) *Paine v. Hutchinson* (1868), 3 Ch. App. 388.

(*d*) *Cheale v. Kenward* (1858), 3 De G. & J. 27.

(*e*) *Stray v. Russell* (1859), 1 E. & E. 888; affirmed (1860), 1 E. & E. 916, Ex. Ch.; *London Founders Association v. Clarke* (1888), 20 Q. B. D. 576, C. A.; *Ward and Henry's Case* (1867), 2 Ch. App. 431, 438; see *East Wheel Martha Mining Co.* (1863), 33 Beav. 119, 121.

(*f*) *Hooper v. Herts*, [1906] 1 Ch. 549, C. A.

(ii.) *Share Warrants.*

SECT. 10.

Shares.Share
warrants.

307. A company, if limited by shares, and if so authorised by its articles, may, with respect to any fully paid up shares or to stock, issue under its common seal a share warrant (*g*) stating that the bearer thereof (*h*) is entitled to the shares or stock therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares or stock included in the share warrant (*i*).

The share warrant entitles the bearer to the shares or stock therein specified, which may be transferred by delivery of the warrant (*j*). It is a negotiable instrument (*k*).

The bearer of the warrant is, subject to the articles, entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members; and the company is responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled (*l*).

308. Any person who (1), with intent to defraud, forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any share warrant or coupon, or any document purporting to be a share warrant or coupon, issued in pursuance of the Act of 1908, or by means of any such forged or altered share warrant, coupon, or document, purporting as aforesaid, demands or endeavours to obtain or receive any share or interest in any company under the Act, or to receive any dividend or money payable in respect thereof, knowing the warrant, coupon, or document to be forged or altered; or who (2) falsely and deceitfully personates any owner of any share or interest in any company, or of any share warrant or coupon, and thereby obtains or endeavours to obtain any such share or interest or share warrant or coupon, or receives or endeavours to receive any money due to any such owner, as if the offender were the true and lawful owner, is guilty of felony,

Criminal
offences as
to share
warrants.

(*g*) As to the alterations to be made in the register, see p. 149, *ante*. As to the particulars of share warrants to be entered in the annual list and summary, see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 26; and p. 264, *post*. Clauses 35—40 of *ibid.*, Sched. I., Table A, are the regulations as to share warrants of a company governed by Table A. By s. 107 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), if a share warrant is issued without being duly stamped, the issuing company, and also every person who at the time of the issue is the managing director, secretary, or other principal officer of the company, will incur a fine of £50. But where a composition has been paid under s. 115 (1), (3) of the same Act, share warrants representing stock on which the composition has been paid are exempt from duty. As to the stamp duties chargeable, see Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 76.

(*h*) As to how far the bearer of a share warrant is to be deemed a member of the company, see p. 144, *ante*.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 37 (1) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 27].

(*j*) *Ibid.*, s. 37 (2) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 28].

(*k*) *Webb, Hale & Co. v. Alexandria Water Co.* (1905), 93 L. T. 339; compare *Stern v. R.*, [1896] 1 Q. B. 211; and see title *BILLS OF EXCHANGE ETC.*, Vol. II., p. 569.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 37 (3) [Companies Act 1867 (30 & 31 Vict. c. 131), s. 29].

SECT. 10.
Shares.

and on conviction is liable, at the discretion of the court, to penal servitude for life or for any term not less than three years (*m*).

Any person who without lawful authority or excuse, proof of which lies on him, engraves or makes on any plate, wood, stone, or other material any share warrant or coupon purporting to be a share warrant or coupon so issued or made by any particular company, or to be a blank share warrant or coupon so issued or made, or to be a part of such a share warrant or coupon, or uses any such plate, wood, stone, or other material for the making or printing of any such share warrant or coupon, or of any such blank share warrant or coupon, or any part thereof respectively, or who knowingly has in his custody or possession any such plate, wood, stone, or other material, is guilty of felony, and on conviction is liable, at the discretion of the court, to penal servitude for any term not exceeding fourteen years and not less than three years (*n*).

(iii.) *Transfer.*

Transfer of
shares.

309. Shares specified in a share warrant are transferable by the delivery of the warrant (*o*). Other shares, and any other interests of a member in a company, are transferable in the manner provided by its articles of association (*p*). There are no restrictions on transfer except such as are imposed by the articles (*q*); and, as a general rule, a director is just as free to deal with his shares as any other person, although he may, by parting with his qualification shares, cease to hold office as a director (*r*). The mere fact that a transfer of shares is made to increase the voting power of the transferor, or in his interests, is no ground of objection to the transfer (*s*), nor is the fact that the transfer is made to avoid a prospective call (*t*). If a transfer is real, in the sense that it was intended to effect an out-and-out assignment and there was no covert agreement or understanding to the contrary, it is immaterial that the transferee is insolvent and unable to pay any future calls (*a*). But a colourable transfer, as to a clerk or foreman of the transferor, will not discharge the

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 38 (1) [Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 34, 35].

(*n*) *Ibid.*, s. 38 (2) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 36]; see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 756—757.

(*o*) See p. 185, *ante*.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 22 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 22]. By *ibid.*, s. 248, shares in a company registered under the Joint Stock Companies Acts (see p. 37, *ante*) may be transferred in the manner in use or as the company may direct.

(*q*) *Weston's Case* (1868), 4 Ch. App. 20, 27; *Bargate v. Shortridge* (1855), 5 H. L. Cas. 297; *Re Stockton Malleable Iron Co.* (1875), 2 Ch. D. 101; *Gilbert's Case* (1870), 5 Ch. App. 559, 565. As to the meaning of a transfer "in the usual common form," see *Re Leatherby and Christopher, Ltd.*, [1904] 1 Ch. 815.

(*r*) *Gilbert's Case*, *supra*; *Re Cawley & Co.* (1889), 42 Ch. D. 209, C. A.; compare *Re South London Fish Market Co.* (1888), 39 Ch. D. 324, C. A.

(*s*) *Re Stranton Iron and Steel Co.* (1873), L. R. 16 Eq. 559; *Cannon v. Trask* (1875), L. R. 20 Eq. 669; *Pender v. Lushington* (1877), 6 Ch. D. 70; *Moffatt v. Farquhar* (1877), 7 Ch. D. 591.

(*t*) *Re Cawley & Co.* (1889), 42 Ch. D. 209, C. A.; *Re Hafod Lead Mining Co., Slater's Case* (1866), 35 Beav. 391. But if the making of the call has been postponed on the faith of a representation that no transfer will be made, registration of the transfer may be refused (*Re National and Provincial Marine Insurance Co., Ex parte Parker* (1867), 2 Ch. App. 685); and see *Gilbert's Case*, *supra*.

(*a*) *R. v. Lambourn Valley Rail. Co.* (1888), 22 Q. B. D. 463, 465; *Re*

transferor from liability (b), nor will a transfer in a case where some benefit is reserved to the transferor (c). Even an out-and-out transfer is unavailable if registration of it was obtained by misrepresentation as to the transferee's position or the consideration paid (d).

SECT. 10.
Shares.

310. In order that a company may be a private company within the meaning of the Act of 1908, its articles must restrict the right to transfer its shares (e), and the articles of most companies contain some restrictions on the right of transfer (f). There is apparently no limit to the restriction on transfer which may be so imposed, although restrictive provisions are strictly construed (g). The shares are subjected to the restrictions in their inception and as one of their incidents, that is to say, they are taken on the terms and conditions of

Restrictions
on transfer.

Lead Mining Co., Slater's Case (1866), 35 Beav. 391; *Masters' Case* (1872), 7 Ch. App. 292; *Re Mexican and South American Co., De Pass's Case* (1859), 4 De G. & J. 544, C. A.

(b) *Re Mexican and South American Co., Hyam's Case* (1859), 1 De G. F. & J. 75, C. A.; *Re Mexican and South American Co., Costello's Case* (1860), 2 De G. F. & J. 302, C. A.; *Re Mexican and South American Co., Lund's Case* (1859), 27 Beav. 465; compare *Re National and Provincial Marine Insurance Co., Ex parte Parker* (1867), 2 Ch. App. 685; *Re Bank of Hindustan, China and Japan, Ex parte Kintrea* (1869), 5 Ch. App. 95; *Re Imperial Mercantile Credit Association, Wilkinson's Case*, [1869] W. N. 211.

(c) *Re Athenæum Life Assurance Society, Chinnock's Case* (1860), John. 714; compare *Re Esquair Mwyn Mining Co., Alexander's Case* (1861), 9 W. R. 410.

(d) *Payne's Case* (1869), L. R. 9 Eq. 223; *Williams' Case* (1869), L. R. 9 Eq. 225, n.; *Re Bank of Hindustan, China and Japan, Snow's Case* (1871), 19 W. R. 1057. It may be that the question whether a transfer is an out-and-out transfer is not the only test, and that the court must also consider the equities between the transferor and transferee (*Re Electric Telegraph Co., of Ireland, Budd's Case* (1861), 3 De G. F. & J. 297, C. A.; but see *Re Hafod Lead Mining Co., Slater's Case*, *supra*; *Re Discoverers Finance Corporation, Ltd., Lindlar's Case*, [1910] 1 Ch. 312, C. A., overruling *Re Discoverers Finance Corporation, Ltd.*, [1908] 1 Ch. 141, which was compromised on appeal, [1908] 1 Ch. 334, C. A.).

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 121; and see p. 73, *ante*.

(f) *Ibid.*, Sched. I., Table A, clause 20, enables the directors to decline to register any transfer of shares, not being fully paid up, to a person of whom they do not approve, or any transfer of shares on which the company has a lien; and further restrictions are often contained in articles. As to the principles on which the directors should act in the former case, and as to whether a person seeking registration of transfers can show that the directors, where not assigning reasons, have acted improperly, see *Robinson v. Chartered Bank* (1865), L. R. 1 Eq. 32, as explained in *Re Gresham Life Assurance Society, Ex parte Penney* (1872), 8 Ch. App. 446; *Re Stranton Iron and Steel Co.* (1873), L. R. 16 Eq. 559; *Moffatt v. Farquhar* (1877), 7 Ch. D. 591; *Pinkett v. Wright* (1842), 2 Hare, 120; *Re Bell Brothers, Ltd., Ex parte Hodgson* (1891), 65 L. T. 245; *Re Coalport China Co.*, [1895] 2 Ch. 404, C. A. A discretionary power to register transfers must be exercised reasonably and *bonâ fide* and for the company's benefit, and not arbitrarily (*ibid.*; see *Poole v. Middleton* (1861), 29 Beav. 646, 651; *Slee v. International Bank* (1868), 17 L. T. 425; *Shepherd's Case* (1866), 2 Ch. App. 16; *Re Yuruari Co.* (1889), 6 T. L. R. 119, C. A.; *Re South Yorkshire Wine, Spirit and Mineral Water Co.* (1892), 8 T. L. R. 413; *Re Hannan's King (Browning) Gold Mining Co.* (1898), 14 T. L. R. 314, C. A.; *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141). The directors need not give their reasons (*Re Gresham Life Assurance Society, Ex parte Penney, supra*).

(g) See *Re Bentham Mills Spinning Co.* (1879), 11 Ch. D. 900, C. A., where a provision that the company might refuse to register a transfer by a member who was indebted was held not to justify refusal to register his trustee in bankruptcy. Compare *Cannock and Rugeley Colliery Co., Ex parte Harrison* (1885), 28 Ch. D. 363, C. A.; and see *Chappell's Case* (1871), 6 Ch. App. 902.

SMOT. 10.
Shares.

the articles (h). Any condition precedent to transfer, such as obtaining the consent of the directors, must be observed (i), although the consent may be inferred from entries in the company's books (j), or from a constant disregard of the prescribed mode (k). The rule against perpetuity has no application in such cases (l). Provisions for the compulsory sale and transfer of shares at a fixed price, on the happening of a certain event, such as bankruptcy, are valid (m).

A company is not bound to send notice to a transferee of its refusal to register a transfer (n).

Directors'
consent to
transfer.

Where the directors' consent is required to a transfer, a transfer with their approval, for the purpose of compromising threatened proceedings against them, is invalid (o). Where their consent is necessary, they may refuse to consent to a transfer where the price payable is merely nominal, and the company is insolvent (p); but they may approve of an out-and-out transfer for a nominal consideration to the transferor's clerk on his agreeing to guarantee the payment of a call just about to be made (q). It is their duty to refuse to register a transfer giving a false description of the transferee and falsely stating the consideration (r).

Transfer by
officers.

A prohibition against fully-paid shares issued to an officer of the company being dealt with for a term of years is for the protection of the company, and does not invalidate a transfer made with the company's consent (s).

Limit on
number of
shares.

Where a limited number of shares only can be held by a shareholder, a transfer to a person already holding the prescribed

(h) *Borland's Trustee v. Steel Brothers & Co., Ltd.*, [1901] 1 Ch. 279, 289.

(i) *Re Royal British Bank etc., Nicol's Case* (1859), 3 De G. & J. 387, C. A.; *Roots v. Williamson* (1888), 38 Ch. D. 485; *Re Dublin North City Milling Co.*, [1909] 1 I. R. 179. The secretary has no authority to pass transfers (*Chida Mines, Ltd. v. Anderson* (1905), 22 T. L. R. 27).

(j) *Re Royal British Bank, Ex parte Walton, Ex parte Hue* (1857), 26 L. J. (CH.) 545; *Re Branksea Island Co., Ex parte Bentinck* (No. 2) (1888), 1 Meg. 23, C. A.

(k) *Re Vale of Neath and South Wales Brewery Co., Walter's Case* (1850), 3 De G. & Sm. 149.

(l) *Ibid.*; *Witham v. Vane* (1883), Challis on Real Property, 2nd ed., Appendix V., p. 401, H. L.; *Walsh v. Secretary of State for India* (1863), 10 H. L. Cas. 367.

(m) *Borland's Trustee v. Steel Brothers & Co., Ltd.*, *supra*.

(n) *Gustard's Case* (1869), L. R. 8 Eq. 438.

(o) *Bennett's Case* (1854), 5 De G. M. & G. 284; *Re Mitre Assurance Co., Eyre's Case* (1862), 31 Beav. 177.

(p) *Taft v. Harrison* (1853), 10 Hare, 489.

(q) *Harrison's Case* (1871), 6 Ch. App. 286, 292. A transfer is not invalidated by the fact that they could have refused to register it, but did not, unless they have been misled by the transferor (*Re Discoverers' Finance Corporation, Ltd.*, [1910] 1 Ch. 312, C. A.).

(r) *Payne's Case* (1869), L. R. 9 Eq. 223; *Williams' Case* (1869), L. R. 9 Eq. 225, n. As to false description, see further *Masters' Case* (1872), 7 Ch. App. 292; *Re Financial Insurance Co., Bishop's Case* (1869), 7 Ch. App. 296, n.; *Re Smith, Knight & Co., Battie's Case* (1870), 39 L. J. (CH.) 391. As to approving the transfer of a director's shares, see *Bush's Case* (1870), 6 Ch. App. 246; *Murray v. Bush* (1873), L. R. 6 H. L. 37; *Re London and County Assurance Society, Ex parte Jessop* (1858), 2 De G. F. & J. 638, C. A.; *Re Kilbricken Mines Co., Libri's Case* (1857), 30 L. T. (o. s.) 185; *Re Crawley & Co.* (1889), 42 Ch. D. 209, C. A.; *Re South London Fish Market Co.* (1888), 39 Ch. D. 324, C. A.

(s) *London and Westminster Supply Association, Ltd. v. Griffiths* (1883), Cabb. & El. 15.

number by a person with notice of the fact is invalid. If the transferor is a director, notice is implied (t).

SECT. 10.
Shares.

311. In the absence of express power to do so, directors cannot decline to register transfers of shares because calls on them are in arrear; but if empowered to decline to register a transfer by a member who is indebted to the company, they may refuse to register a transfer made by a shareholder who is indebted to the company on any account whatever (a), and whether solely or jointly with others (b). If directors with such a power register transfers, the transfers are valid, although the directors may be liable to make good any loss thereby caused to the company (c). The power to decline to register for indebtedness is exercisable although the company holds unmatured bills of the shareholder in respect of the debt (d). If a company refuses to register a transfer because of indebtedness where there is no indebtedness, nominal damages are recoverable by the transferor (e).

Refusal to
register
transfer.

Where articles give a discretion to refuse registration of a transfer by a shareholder who is indebted to the company, the time for ascertaining whether he is so indebted is when the transfer is sent to the proper officer for registration, and not when it afterwards comes before a board meeting for registration (f).

Where the company is insolvent, although no winding up has commenced, the directors may and ought to refuse registration of any transfer (g). The mere fact, however, that the company is in difficulties is not a ground for refusing registration (h).

Transfer
after winding
up.

312. The proper person to transfer shares is the registered holder or his attorney (i), or such other person as is by the articles

Persons who
may transfer
shares.

(t) *Re Newcastle-upon-Tyne Marine Insurance Co., Ex parte Brown* (1854), 19 Beav. 97.

(a) *Ex parte Stringer* (1882), 9 Q. B. D. 436.

(b) *Re Bentham Mills Spinning Co.* (1879), 11 Ch. D. 900, C. A. As to the meaning of "indebted," see *Re Stockton Malleable Iron Co.* (1875), 2 Ch. D. 101.

(c) *Re Hoylake Rail. Co., Ex parte Littledale* (1874), 9 Ch. App. 257; compare *Anderson's Case* (1869), L. R. 8 Eq. 509, where the registration of transfers registered in ignorance that calls were in arrear was cancelled.

(d) *Re London, Birmingham and South Staffordshire Banking Co.* (1865), 34 Beav. 332; *Bank of Africa v. Salisbury Gold Mining Co.*, [1892] A. C. 281, P. C.; compare *Holden's (Henry) Case* (1869), L. R. 8 Eq. 444.

(e) *Skinner v. City of London Marine Insurance Corporation* (1885), 14 Q. B. D. 882, C. A. As to the effect of the article on the rights of a trustee in bankruptcy, see *Re Cannock and Rugeley Colliery Co., Ex parte Harrison* (1885), 28 Ch. D. 363, C. A.; *Re Bentham Mills Spinning Co.*, *supra*; *Re Key (W.) & Son, Ltd.*, [1902] 1 Ch. 467; clauses 10 and 13 of Table A to the Companies Act, 1862 (25 & 26 Vict. c. 89), and clauses 20 and 22 of Table A to the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

(f) *Re Cawley & Co.* (1889), 42 Ch. D. 209, C. A.; *R. v. Inns of Court Hotel Co., Ex parte Rudolph* (1863), 11 W. R. 806.

(g) *Mitchell (Nelson) v. City of Glasgow Bank* (1879), 4 App. Cas. 624; *Mitchell's (Alexander) Case* (1879), 4 App. Cas. 567; compare *Chappell's Case* (1871), 6 Ch. App. 902; *Lanckester's Case* (1870), 6 Ch. App. 905, n.; *Allin's Case* (1873), L. R. 16 Eq. 449. As to transfers made after, or not registered before, a winding up, see p. 488, *post*.

(h) *Re Mexican and South American Co., De Pass's Case* (1859), 4 De G. & J. 544, C. A.; *Re Smith, Knight & Co., Battie's Case* (1870), 39 L. J. (OH.) 391; *Nation's Case* (1866), L. R. 3 Eq. 77; *Re Taurine Co.* (1883), 25 Ch. D. 118, C. A.; compare *Re Mexican and South American Co., Hyam's Case* (1859), 1 De G. F. & J. 75, C. A.

(i) See *Chatenay v. Brazilian Submarine Telegraph Co.* (1890), 6 T. L. R. 408.

SECT. 10. Shares.	or by statute empowered to transfer. No notice of any trust, expressed or implied, can be registered (<i>k</i>).
Deceased members.	The legal representatives of a deceased member do not become members unless themselves registered (<i>l</i>), but a transfer of the share or other interest of a deceased member by his personal representative (although the personal representative is not himself a member) is as valid as if he were a member at the time of the execution of the transfer (<i>m</i>).
Lunatics.	Shares or stock registered in the name of a lunatic can only be transferred under an order made in lunacy, by the person or persons named in the order (<i>n</i>).
Infants.	In the case of an infant registered holder a transfer by him is voidable; even if it is registered he may obtain rectification of the register by the re-insertion of his name (<i>o</i>). A transfer to an infant is also voidable (<i>p</i>), and the transferor may remain liable (<i>q</i>), as also may the person putting an infant's name forward as transferee (<i>r</i>).
Married women.	Shares held by a married woman as registered holder, or one of registered joint holders, can be transferred without the concurrence of her husband (<i>s</i>).
Bankrupts.	Any shares or stock belonging to a bankrupt may be transferred by his trustee in bankruptcy (<i>t</i>).

A vesting declaration does not extend to shares or stock only transferable in the books of a company (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 12 (3)).

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 27; see p. 150, *ante*.

(*l*) See p. 168, *ante*.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 29 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 24]; see *Simpson v. Molsons' Bank*, [1895] A. C. 270, 279.

(*n*) See Lunacy Act, 1890 (53 Vict. c. 5), ss. 133, 136—139. As to the transfer of shares to a foreign curator, see *Re Brown (a Lunatic)*, [1895] 2 Ch. 666, O. A.; *Re Chatard's Settlement*, [1899] 1 Ch. 712; *Re Knight (a Lunatic)*, [1898] 1 Ch. 257, O. A.; as to charging orders on a lunatic's fund in court, *Re Brown, Llewellyn v. Brown*, [1900] 1 Ch. 489; and see *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. 15, O. A.; *Thiery v. Chalmers, Guthrie & Co.*, [1900] 1 Ch. 80; *New York Security and Trust Co. v. Keyser*, [1901] 1 Ch. 666.

(*o*) See title INFANTS AND CHILDREN.

(*p*) *Lumsden's Case* (1868), 4 Ch. App. 31; *Gooch's Case* (1872), 8 Ch. App. 266. As to confirmation, see *Baker's Case* (1871) 7 Ch. App. 115 (Infants Relief Act, 1874 (37 & 38 Vict. c. 62)); *Wilson's Case* (1869), L. R. 8 Eq. 240; *Castello's Case* (1869), L. R. 8 Eq. 504; *Mitchell's Case* (1870), L. R. 9 Eq. 363; *Symons' Case* (1870), 5 Ch. App. 298; *Re Ottoman Financial Association, Cheetham's Case*, [1869] W. N. 201.

(*q*) *Capper's Case* (1868), 3 Ch. App. 458; *Edwards' (Miss) Case*, [1869] W. N. 211; *Munn's Case* (1867), 3 Ch. App. 459, n.; *Re Electric Telegraph Co. of Ireland, Reid's Case* (1857), 24 Beav. 318; *Re St. George's Steam Packet Co., Litchfield's Case* (1850), 3 De G. & Sm. 141; *Re Barned's Banking Co., Ex parte Delmar* (1868), 38 L. J. (CH.) 85; *Re Financial Corporation, Sassoon's Case* (1869), 20 L. T. 161, 424, O. A.; *Parsons' Case* (1869), L. R. 8 Eq. 656; *Re National Bank of Wales, Ltd., Massey and Giffin's Case*, [1907] 1 Ch. 582.

(*r*) *Weston's Case* (1870), 5 Ch. App. 614; *Richardson's Case* (1875), L. R. 19 Eq. 588; *Curtis's Case* (1868), L. R. 6 Eq. 455. As to the liability of the purchaser to indemnify the transferor, see *Nickalls v. Furneaux*, [1869] W. N. 118; *Re National Provincial Marine Insurance Co., Mailland's Case* (1869), 38 L. J. (CH.) 554; *Edwards' (Miss) Case*, *supra*.

(*s*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 9; see *Re London, Bombay and Mediterranean Bank* (1881), 18 Ch. D. 581; and title HUSBAND AND WIFE.

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 32), s. 50 (3); see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 188.

313. The instrument of transfer must be in accordance with the articles of association, and be executed in the manner thereby prescribed (*u*).

SECT. 10.
Shares.

Form and
execution of
transfer.

Articles of association usually require that shares shall be transferred in a form set out or in any usual or common form (*a*). As a rule the transfer is required to be executed or signed by the transferor and transferee (*b*), and is not required to be under seal (*c*). When the articles require the common form, registration of a transfer cannot be refused because it omits particulars which would be found in the common form but are in the circumstances immaterial (*d*). Irregularities in the form of transfer have been often condoned on such grounds as the usage of the company, lapse of time, and the acceptance of the transfer as valid (*e*).

314. Where shares are only transferable by deed, a blank transfer, although executed by the shareholder, gives no security to an equitable mortgagee, because the filling in of the transferee's name would be a material alteration rendering the instrument void (*f*). The same principle is applied where blank spaces are left for the purchaser's name (*g*), the consideration and name of the transferee (*h*), and the names of the transferees and attesting witnesses (*i*). Where, however, transfers are not required to be made by deed, an equitable mortgagee has an implied authority to complete the blank transfer for the purpose of protecting his security,

Transfer in
blank.

(*u*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 22 (1). Where the mode of transfer is not prescribed a transfer by mere delivery of share certificates seems to be ineffectual; compare *Reuss (Princess) v. Bos* (1871), L. R. 5 H. L. 176; *McEuen v. West London Wharves and Warehouses Co.* (1871), 6 Ch. App. 655.

(*a*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 19. The provision as to the common form is inserted to comply with Stock Exchange requirements when a quotation is desired.

(*b*) See *ibid.*, clause 18. The addition of a seal is in such cases immaterial (*Ortigosa v. Brown, Junson & Co.* (1878), 38 L. T. 145).

(*c*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 19.

(*d*) *Re Letheby and Christopher, Ltd.*, [1904] 1 Ch. 815, where the transferor's address and the denoting number of the share were omitted.

(*e*) *Bargate v. Shortridge* (1855), 5 H. L. Cas. 297; *Straffon's Executors' Case* (1852), 1 De G. M. & G. 576; *Burnes v. Pennell* (1849), 2 H. L. Cas. 497; *Barrow Mutual Ship Insurance Co. v. Ashburner* (1885), 54 L. J. (Q. B.) 377, C. A.; *Ind's Case* (1872), 7 Ch. App. 485 (wrong denoting number); *Feiling and Rimington's Case* (1867), 2 Ch. App. 714; *Murray v. Bush* (1873), L. R. 6 H. L. 37; *Re General Floating Dock Co.* (1867), 15 L. T. 526; *Re Taurine Co.* (1883), 25 Ch. D. 118, C. A. As to errors in the dates of the transfers as entered on the register, see *Weikersheim's Case* (1873), 8 Ch. App. 831.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 28 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 26]; *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20; *France v. Clark* (1884), 26 Ch. D. 257, C. A.; *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555, C. A. Registration does not validate the transfer (*Hare v. London and North Western Rail. Co.* (1860), John. 722); compare *Tayler v. Great Indian Peninsular Rail. Co.* (1859), 4 De G. & J. 559.

(*g*) *Hibblewhite v. M'Morine* (1840), 6 M. & W. 200. As to the priority of the equitable owner of the shares, see *Ireland v. Hart*, [1902] 1 Ch. 522.

(*h*) *Tayler v. Great Indian Peninsular Rail. Co.*, *supra*; *Société Générale de Paris v. Walker*, *supra*; *France v. Clark*, *supra*; *Powell v. London and Provincial Bank*, *supra*.

(*i*) *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175, Ex. Ch. As to the signature of documents in blank, see generally *Lloyd's Bank v. Cooke*, [1907] 1 K. B. 794, C. A.; *Smith v. Prosser*, [1907] 2 K. B. 735, C. A.

SECT. 10.
Shares.

the secretary, notifies on the transfer or transfers that the certificate has been lodged. This practice, called "certification of transfers," is to meet the difficulty felt by members of the Stock Exchange in settling their accounts as buyers and sellers of shares where the seller's certificate does not accompany his transfer. To be of use it must amount to a representation that the transferor has produced to the company's officer such documents as show the transferor's *primâ facie* title to transfer; but there is no warranty of title (*m*). In dealings in shares not under the rules of the Stock Exchange certification is out of place; and in no case is a company bound to certify transfers, nor is it estopped by the certification of its secretary where no transfer has been lodged with him, and it is not liable for his fraud (*n*). The certification does not bind it to recognise the transferee's title or to issue the corresponding share certificate. If in error, or by the secretary's mistake, it returns to the transferor the share certificate lodged with it, and the transferor is thereby enabled to obtain money on another transfer of the shares, the company is not liable to the second transferee, as it has no duty to the public with regard to the custody of the certificate (*o*).

Production
of share
certificate.

318. Articles of association generally require a transfer of shares left for registration to be accompanied by the certificate of such shares. They generally also provide for the granting of a new certificate on proof of the loss or destruction of the old certificate, or upon a satisfactory indemnity being given (*p*). Where the articles provide that transfers shall be registered on presentation of the transfer accompanied with such evidence as the company may require of the transferor's title, the directors may refuse to register if the certificate is not produced (*q*). Whether a transfer can or cannot be registered without production of the certificate is a matter within the discretion of the directors (*r*).

Stamp on
transfers.

319. Directors may refuse to register a transfer which is not properly stamped, although the stamp it bears is in accordance with the consideration incorrectly stated in the transfer (*s*).

Forged
transfers.

320. Where a forged transfer is registered the transferee cannot compel the company to acknowledge him as the holder of the shares (*t*), registration only giving complete effect to a prior valid transfer (*a*); and the shareholder whose title has been displaced

(*m*) *Bishop v. Balkis Consolidated Co.* (1890), 25 Q. B. D. 512, 519, 520, C. A.

(*n*) *Whitechurch (George), Ltd. v. Cavanagh*, [1902] A. C. 117; compare *McKay's Case*, [1896] 2 Ch. 757.

(*o*) *Longman v. Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 646, C. A.

(*p*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clauses 7, 20.

Re East Wheal Martha Mining Co. (1863), 33 Beav. 119.

(*r*) *Shropshire Union Railways and Canal Co. v. R.* (1875), L. R. 7 H. L. 496; see p. 184, *ante*.

(*s*) *Maynard v. Consolidated Kent Collieries Corporation*, [1903] 2 K. B. 121, C. A. A transfer must be stamped *ad valorem* as a conveyance; see Stamp Act, 1891 (54 & 55 Vict. 39), ss. 54, 55. As to the stamp duties payable, see Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 76; and title REVENUE.

(*t*) *Simm v. Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, C. A.

(*a*) *France v. Clark* (1884), 26 Ch. D. 257, C. A.; *Burton v. London and North Western Rail. Co.* (1888), 38 Ch. D. 144, 149, C. A.

may compel the company to give him an equivalent number of shares and to pay the interim dividends, or he may have his own shares replaced (b). Where, however, a share certificate is issued by the authority of the company to the transferee, and he transfers the shares for value to a person without notice of the forgery, the company is estopped from denying the latter's title (c), as, for instance, where, after registration of the transfer, the true owner of the shares obtains rectification of the register of shareholders by striking out the name of the third person and restoring his own (d). But if the certificate is forged by the secretary of the company, the company is not estopped from disputing the title of the person named in it (e).

SECT. 10.
Shares.
—

The person who, innocently and even without negligence, brings about the transfer is bound to indemnify the company against any liability to the owner of shares who has been displaced by a forged transfer (f).

321. A company may impose such reasonable restrictions on the transfer of its shares, stock, or securities, or with respect to powers of attorney for the transfer thereof, as it may consider requisite for guarding against losses arising from forgery. Out of its funds it may grant compensation for losses caused by forged transfers or transfers under forged powers of attorney, and may, if it thinks fit, charge a fee at a rate not exceeding 1s. on every £100, with a minimum charge equal to that for £25 transferred, to provide for such compensation, and may borrow on the security of its property to meet claims therefor. Where the company pays compensation it is subrogated to the rights of the person compensated against the person liable for the loss (g).

Forged
Transfers
Acts.

322. When a transfer has been duly registered the transferor ceases to be a member of the company. Thereupon he becomes a "past member" of the company, and in case of a winding up is liable to contribute towards the payment of its debts and liabilities, where it appears to the court that the existing members are

Transferor's
liability after
transfer.

(b) *Barton v. London and North Western Rail. Co.* (1888), 38 Ch. D. 144, C. A.; *Sheffield Corporation v. Barclay*, [1905] A. C. 392.

(c) *Ruben v. Great Fingall Consolidated*, [1906] A. C. 439; see *A.-G. v. Odell*, [1906] W. N. 84, C. A., and p. 183, *ante*.

(d) *Re Bahia and San Francisco Rail. Co.* (1868), L. R. 3 Q. B. 585; *Hart v. Frontino etc. Gold Mining Co.* (1870), L. R. 5 Exch. 111; *Ottos Kopje Diamond Mines, Ltd.*, [1893] 1 Ch. 618, C. A.; *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396.

(e) *Ruben v. Great Fingall Consolidated*, *supra* (overruling *Shaw v. Port Philip Gold Mining Co.* (1884), 13 Q. B. D. 103); *British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A.; *Thorne v. Heard and Marsh*, [1895] A. C. 495.

(f) *Sheffield Corporation v. Barclay*, *supra*. As to the liability of a stock-broker who, without fraud on his part, by acting on a forged transfer or by identification of a forger brings about a transfer, see *Starkey v. Bank of England*, [1903] A. C. 114; *Bank of England v. Outler*, [1908] 2 K. B. 208, C. A.

(g) Forged Transfers Acts, 1891 and 1892 (54 & 55 Vict. c. 43; 55 & 56 Vict. c. 36), which apply to all companies incorporated by or in pursuance of any Act of Parliament or by royal charter or amalgamated with such a company.

SECT. 10.
Shares.

unable to satisfy the contributions statutorily required (*h*), unless the debt or liability was contracted after he has ceased to be a member, or unless he has ceased to be a member for a year or upwards before the commencement of the winding up (*h*).

(iv.) *Transmission.*

Transmission
of shares on
death etc.

323. In Table A, and in articles of association generally, the word "transmission" is used in contradistinction to the word "transfer"; the former means transmission by devolution of law, including devolution by death or bankruptcy (*i*), and the latter a transfer by the act of a member (*k*). Unless the articles otherwise provide, the survivors or survivor of registered joint holders of shares are alone entitled to and liable upon such shares (*l*), even where one of the joint holders is a corporation (*m*).

Upon the death of the sole holder of shares, the title to his shares devolves upon his legal personal representatives, who may, subject to any provisions in the articles of association, transfer his shares without being registered as shareholders (*n*). Until they are registered as members, with their consent, they are only liable for calls in their representative capacity; but after registration they become personally liable (*o*). It is the duty of the representatives to give notice of the member's death as soon as possible (*p*). Where executors claim under the articles to be registered as members, the company cannot state on the register that they are executors (*q*). If, on the death of a shareholder domiciled abroad who has no personal representatives in England, the company transfers the shares and pays dividends to the foreign executors, it becomes an executor *de son tort*, and is liable to penalties and to pay duty (*r*).

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38]. As to his liability for calls already made, see note (*a*), p. 193, *ante*; and p. 488, *post*.

(*i*) *Barton v. London and North Western Rail. Co.* (1889), 24 Q. B. D. 77, 88, C. A.

(*k*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, headings to clauses 18—23; *Re Bentham Mills Spinning Co.* (1879), 11 Ch. D. 900, 904, C. A. The wording of clause 22 is different from that of clause 13 of Table A of the Companies Act, 1862 (25 & 26 Vict. c. 89), as to which see *Re Key (W.) & Son, Ltd.*, [1902] 1 Ch. 467.

(*l*) *Maxwell's Case, Hill's Case* (1875), L. R. 20 Eq. 585. It is usually so provided in the articles; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 21.

(*m*) Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), passed in consequence of *Law Guarantee and Trust Society v. Bank of England (Governor & Company)* (1890), 24 Q. B. D. 406; and see *Re Thompson's Settlement Trusts, Thompson v. Alexander*, [1905] 1 Ch. 229. As to the Bank of England, see National Debt (Stockholders Relief) Act, 1892 (55 & 56 Vict. c. 39), s. 6.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 29; see p. 168, *ante*; and *ibid.*, Sched. I., Table A, clauses 21—23. As to the effect of assent to a legacy of shares, see *Keene's Executors' Case* (1853), 3 De G. M. & G. 272.

(*o*) *Duff's Executors' Case* (1886), 32 Ch. D. 301, C. A.; *Buchan's Case* (1879), 4 App. Cas. 549. As to the personal representatives being put on the list of contributories, see p. 490, *post*.

(*p*) *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622, 632, C. A.

(*q*) *Re Saunders (T. H.) & Co., Ltd.* [1908] 1 Ch. 415.

(*r*) *New York Breweries Co. v. A.-G.*, [1899] A. C. 62.

Where new shares are offered to the members while the name of a deceased member is on the register, the executors may claim their testator's proportion(s). They can, however, take them only in their individual, and not in their representative, capacity(t), though they may have a right of indemnity against the estate(a).

On a registered member being adjudicated a bankrupt his shares vest in his trustee in bankruptcy (b).

SECT. 10.
Shares.

(v.) Mortgages.

324. A security may be given on shares by a legal mortgage, in which case a transfer to the mortgagee is executed and registered (c), or by an equitable mortgage by deposit of the share certificate, with or without a transfer in full or in blank, executed by the mortgagor (d).

Mortgages
of shares.

325. The security of an equitable mortgage of shares is not prejudiced by the mortgagor's bankruptcy, although the shares remain registered in his name and notice of the mortgage has not been given to the company, because the shares, being choses in action, are excepted from the doctrine of reputed ownership (e).

Equitable
mortgage.

The principle as to the effect of notice applied in determining the priority of equitable rights (f) is inapplicable to shares which are only transferable by entry in the register of members (g). By giving notice to the company, however, an equitable mortgagee will prevent a subsequent equitable claimant obtaining priority by lodging a duly executed and stamped transfer with the company

(s) *James v. Buena Ventura Nitrate Grounds Syndicate, Ltd.*, [1896] 1 Ch. 457, C. A.

(t) *Fearnside and Dean's Case*, *Dobson's Case* (1865), 1 Ch. App. 231; *Duff's Executors' Case* (1885), 32 Ch. D. 301, C. A.

(a) *Duff's Executors' Case*, *supra*, at pp. 309, 310.

(b) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 20 (1), 54; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 87, 188, 191. As to the transfer by the executor of a bankrupt shareholder giving a good title, see *Re London and Provincial Telegraph Co.* (1870), L. R. 9 Eq. 653. As to the right of the trustee where transfers of the shares have been executed as security, see *Re Cunnoch and Rugeley Colliery Co., Ex parte Harrison* (1885), 28 Ch. D. 363, C. A.

(c) In this case the mortgagee becomes a member of the company and is liable for calls if the shares are not fully paid up, but if his mortgage is under seal he has a statutory power of sale (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 19, 20; *Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579, C. A.; *Re Harrison and Ingram, Ex parte Whinney*, [1905] W. N. 143).

(d) Where a share certificate is deposited, without any memorandum, the remedy of the lender is an order for transfer and foreclosure (*Harrold v. Plenty*, [1901] 2 Ch. 314), although the debt itself is statute-barred (*London and Midland Bank v. Mitchell*, [1899] 2 Ch. 161). As to the effect of a transfer in blank, see p. 191, *ante*. Even where the certificate is deposited the equitable mortgagee is not in a safe position, as the mortgagor may obtain a fresh certificate and enable another mortgagee to obtain registration of a transfer, or may subject the shares to a lien having priority over the equitable mortgage (*Bradford Banking Co. v. Briggs* (1886), 12 App. Cas. 29). The shares, if not fully paid, may also become liable to be forfeited. As to equitable mortgages by trustees holding shares, see *Shropshire Union Railways and Canal Co. v. R.* (1875), L. R. 7 H. L. 496.

(e) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.); *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426.

(f) *Deurle v. Hall* (1828), 3 Russ. 1.

(g) *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20.

SECT. 10.
Shares.

and otherwise complying with all its regulations as regards obtaining registration (h); and he can prevent the company from subsequently acquiring a lien on the shares having priority over his mortgage (i). When several persons claim shares registered in the name of another person, the equitable title which is prior in time prevails, unless a claimant under a subsequent equitable title has, as between him and the company, acquired an absolute and unconditional right to be registered as the owner before the company received notice of the other claim (k).

**Notice of
equitable
claims.**

Although under the Act (l) no notice of a trust is to be taken by a company, yet, if directors know of circumstances rendering it wrong to accept a transfer, they may be personally liable (m). Where a board of directors has actual knowledge of an equitable claim by a person to shares as to which a transfer to another person has been lodged for registration, registration should be delayed to give notice of the proposed transfer to such person, if his claim is, to their knowledge, inconsistent with the proposed transfer (n).

**Distringas
notice.**

326. An equitable claimant to shares or stock of a company can prevent the same being transferred, or dividends being paid thereon without notice to him, by filing an affidavit by the claimant or his solicitor, with a notice addressed to the company specifying the stock or shares. The affidavit states that the claimant claims to be interested in the shares or stock, and the notice states that it is intended to stop the transfer and the payment of dividends or the transfer only. After service on the company of an office copy of the affidavit and a sealed duplicate of the notice, the company ought not to register a transfer or pay a dividend, if the notice so requires, without previous notice to the claimant. If, however, the registered holder requires the company to register the transfer or pay the dividend, then, unless the claimant as plaintiff in an action in which the company and such holder are defendants obtains an order restraining such transfer or payment, the company cannot, for more than eight days after such request, refuse to register the transfer or make such payment (o).

SUB-SECT. 5.—Surrender of Shares.

**Surrender of
shares.**

327. Directors are not empowered by Table A to accept surrenders of shares (p), nor is there any reference to the surrender of shares in

(h) *Roots v. Williamson* (1888), 38 Ch. D. 485.

(i) *Bradford Banking Co. v. Briggs* (1886), 12 App. Cas. 29.

(k) *Moore v. North Western Bank*, [1891] 2 Ch. 599.

(l) *Companies (Consolidation) Act*, 1908 (8 Edw. 7, c. 69), s. 27; see p. 150, *ante*. The section does not apply to Scotland.

(m) *Société Générale de Paris v. Tramways Union Co.* (1884), 14 Q. B. D. 424, C. A., *per* COTTON and LINDLEY, L.JJ., at pp. 445, 453; affirmed without reference to this point *sub nom. Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20.

(n) *Bradford Banking Co. v. Briggs*, *supra*; *Re Cadogan and Hans Place Estate Co.*, *Ex parte Holt*, [1876] W. N. 91.

(o) R. S. C., Ord. 46, rr. 3, 11; *Re Blaksley's Trusts* (1883), 23 Ch. D. 549; *Re Prynn* (1885), 53 L. T. 465; *Société Générale de Paris v. Tramways Union Co.*, *ante*, at p. 453; see further title EXECUTION.

(p) *Trevor v. Whitworth* (1887), 12 App. Cas. 409; compare *Re Dronfield Silkstone Coal Co.* (1880), 17 Ch. D. 76, C. A.; and see p. 104 *ante*.

SECT. 10.
Shares.

the Act of 1908. They are, however, sometimes empowered by the articles of association to accept from any member, on such terms and conditions as shall be agreed, a surrender of his shares. Where the company is limited by shares, such a power does not justify them in accepting a surrender for any valuable consideration paid by the company out of its assets, as the transaction is a purchase by the company of its own shares (*q*), or in repaying to the member the amount paid on his shares (*r*). Every surrender of shares, whether fully paid, or partly paid, or unpaid, is a reduction of its capital (*s*) which cannot be effected without confirmation by the court (*t*), except as a short cut to forfeiture where there is express power of forfeiting shares (*u*); and, perhaps, by way of compromise of a *bonâ fide* dispute as to whether the shares have been legally issued (*v*), or of a *bonâ fide* claim for rectification of the register for misrepresentation (*x*). A surrender by transfer to a nominee of shares is ineffectual (*y*).

An unlimited company which has power so to do under its articles may accept a surrender of shares on the terms of the member receiving back the amount paid up on them (*a*). Unlimited company.

(*q*) *Trevor v. Whitworth* (1887), 12 App. Cas. 409, 438.

(*r*) *Re Companies Guardian Society, Wallscourt's (Lord) Case* (1899), 7 Mans. 235; *Re Walker and Hacking* (1887), 57 L. T. 763. As to purchase with money other than capital, see *British and American Trustee and Finance Corporation v. Couper*, [1894] A. C. 399, 414.

(*s*) *Hope v. International Financial Society* (1876), 4 Ch. D. 327, C. A.; *Bellerby v. Rowland and Marwood's Steamship Co., Ltd.*, [1902] 2 Ch. 14, 32, C. A. (overruling *Eichbaum v. City of Chicago Grain Elevators, Ltd.*, [1891] 3 Ch. 459). *Teasdale's Case* (1873), 9 Ch. App. 54, was apparently overruled in *Trevor v. Whitworth*, *supra*. A gratuitous surrender of fully-paid shares where the shares are not cancelled might be valid in some cases (*Re Denver Hotel Co.*, [1893] 1 Ch. 495, 505, C. A., as to which case see, however, *British and American Trustee and Finance Corporation v. Couper*, *supra*, at p. 414); compare *Bellerby v. Rowland and Marwood's Steamship Co., Ltd.*, *supra*, at p. 32.

(*t*) See p. 103, *ante*.

(*u*) *Bellerby v. Rowland and Marwood's Steamship Co., Ltd.*, *supra*.

(*w*) *Bath's Case* (1878), 8 Ch. D. 334, C. A.

(*x*) *Re Life Association of England, Blake's Case* (1865), 34 Beav. 639; *Fox's Case* (1868), L. R. 5 Eq. 118; *Wright's Case* (1871), 7 Ch. App. 55; *Anderson's Case* (1881), 17 Ch. D. 373; approved in *Re Scottish Petroleum Co.* (1882), 23 Ch. D. 413, C. A.; and see *Re Macdonald, Sons & Co.*, [1894] 1 Ch. 89, C. A. It cannot be laid down now that the surrender is good where it does not reduce the paid-up capital or the liability on issued shares; see *Bellerby v. Rowland and Marwood's Steamship Co., Ltd.*, *supra*; compare *Teasdale's Case*, *supra*; *Sheffield Nickel Co. v. Unwin* (1877), 2 Q. B. D. 214; *Thomson v. Trustees, Executors, and Securities Insurance Corporation*, [1895] 2 Ch. 454. Cases pointing to the validity of surrenders, if made for the company's benefit, such as *Re Vale of Neath and South Wales Brewery Co.*, *Morgan's Case* (1849), 1 De G. & Sm. 750; *Lewis's Case* (1852), 1 De G. M. & G. 421; *Bennet's Case* (1854), 5 De G. M. & G. 284, C. A., cannot be supported in the face of *Trevor v. Whitworth*, *supra*, and *Bellerby v. Rowland and Marwood's Steamship Co., Ltd.*, *supra*; nor cases depending on whether the articles purported to give power to accept surrenders, such as *Marshall v. Glamorgan Iron and Coal Co.* (1868), L. R. 7 Eq. 129; *Snell's Case* (1869), 5 Ch. App. 22; *Hall's Case* (1870), 5 Ch. App. 707; *Re London and Provincial Consolidated Coal Co.* (1877), 5 Ch. D. 525. As to surrenders by way of compromise, see *Mother Lode Consolidated Gold Mines, Ltd.* (1903), 19 T. L. R. 341.

(*y*) *Addison's Case* (1870), 5 Ch. App. 291; *Oree v. Somervail* (1879), 4 App. Cas. 648.

(*a*) *Re Borough Commercial and Building Society*, [1893] 2 Ch. 242.

SECT. 10.

Shares.

Cancellation
of shares.

328. Cancellation of shares also effects a reduction of capital and requires the confirmation of the court (*b*), unless it is by way of forfeiture (*c*), or is of shares not taken or agreed to be taken by any person (*d*), or is by way of *bonâ fide* compromise of a dispute whether shares have been agreed to be taken, as where the contract to take shares is obtained by misrepresentation (*e*).

SUB-SECT. 6.—*Forfeiture of Shares.*Forfeiture
of shares.

329. The forfeiture of shares causes, until they are re-issued, if not a reduction of the capital of the company, a suspension of membership in respect of the forfeited shares; but the operation, whether it is or is not reduction, has statutory authority (*f*), and does not require the confirmation by the court required in most cases of reduction (*g*). The statutorily recognised power, however, to reduce capital by forfeiting shares is confined to the case where calls on, or other amounts due in respect of, the shares are not paid (*h*). If the ground of forfeiture is contrary to the policy of the law the power is invalid. Thus, a power to forfeit the shares of a member who commences litigation against the company is void, although the article containing it also provides that the market value of the forfeited shares shall be paid to the shareholder (*i*).

Exercise of
power of
forfeiture.

330. A forfeiture of shares under a valid power to forfeit is void unless it is for the company's benefit (*k*). When by the articles forfeiture is to take place *ipso facto* on default in payment of calls, the shareholder in default cannot insist on the clause being acted

(*b*) See p. 104, *ante*. A company cannot purchase its own shares (*Trevor v. Whitworth* (1887), 12 App. Cas. 409).

(*c*) See p. 101, *ante*.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 41 (1) (*e*) (4).

(*e*) See p. 127, *ante*. The question whether the cancellation is for the benefit of the company seems immaterial; see *Bellerby v. Rowland and Murwood's Steamship Co., Ltd.*, [1902] 2 Ch. 14, C. A.; compare *Richmond's Case and Painter's Case* (1858), 4 K. & J. 305; *Re London and County Assurance Co., Ex parte Jones* (1858), 27 L. J. (CH.) 666; *Re Esparto Trading Co., Finch and Goddard's Cases* (1879), 48 L. J. (CH.) 573; and see *Re Esparto Trading Co.* (1879), 12 Ch. D. 191.

(*f*) See Table A to the Companies Act, 1862 (25 & 26 Vict. c. 89), clauses 17–22; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clauses 24–30.

(*g*) See p. 101, *ante*.

(*h*) *Re Dronfield Silkstone Coal Co.* (1880), 17 Ch. D. 76, C. A.; *Trevor v. Whitworth*, *supra*; *Clarke and Chapman v. Hart* (1858), 6 H. L. Cas. 633; *Re National Patent Steam Fuel Co., Burton's Case* (1859), 4 De G. & J. 46, C. A. As to cases of forfeiture of shares of companies under the Companies Act, 1884 (7 & 8 Vict. c. 110), see *Evans v. Smallcombe* (1868), L. R. 3 H. L. 249, C. A.; *Re Agriculturists' Insurance Co., Brotherhood's Case* (1862), 31 Beav. 365; affirmed 31 L. J. (CH.) 861, C. A.; *Belhaven's (Lord) Case* (1865), 3 De G. J. & Sm. 41, C. A.; *Dixon v. Evans* (1872), L. R. 5 H. L. 606; *Spackman v. Evans* (1868), L. R. 3 H. L. 171; *Stanhope's Case* (1865) 1 Ch. App. 161; *Stewart's Case* (1866), 1 Ch. App. 511; *Houlsworth v. Evans* (1868), L. R. 3 H. L. 263; *Re Midland Railway Carriage and Wagon Co.* (1907), 23 T. L. R. 661.

(*i*) *Hope v. International Financial Society* (1876), 4 Ch. D. 327, C. A.

(*k*) *Harris v. North Devon Rail. Co.* (1855), 20 Beav. 384. As to forfeiture being void when made to relieve a shareholder from liability, see *Re London and County Assurance Co., Ex parte Jones*, *supra*; *Re Esparto Trading Co., Finch and Goddard's Cases*, *supra*; *European Assurance Society Arbitration* (1873), 17 Sol. Jo. 745; *Stanhope's Case* (1866), 1 Ch. App. 161, 169. As to forfeiture on the ground of misrepresentation by the company, not followed by rectification of the register, see *Gowers' Case* (1868), L. R. 6 Eq. 77.

upon (l). Table A to the Act of 1908 gives directors power by resolution to forfeit shares of a company limited by shares, after notice to the shareholder, for default in payment of a call, or instalment of a call, or a premium payable by the terms of issue (m); and it further provides that forfeited shares may be sold or disposed of, that before sale or disposition the forfeiture may be cancelled, and that on forfeiture the holder of the shares ceases to be a member, but remains liable to pay money due on the shares at the time of forfeiture (n). Similar provisions may be inserted in articles of association which exclude Table A (n), and the power may be given or extended by altering the articles (o). In either case a valid forfeiture holds good against the liquidator in a subsequent liquidation (p), and directors elected in a voluntary winding up may be authorised to exercise the forfeiture clauses in the articles (q). The power to forfeit is not lost by the uncalled capital being charged in favour of debenture-holders (r).

SECT. 10.
Shares.
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When notice of intended forfeiture for non-payment of a call is given, and the shareholder commences an action for rescission for misrepresentation, the court will restrain the company from forfeiting on the shareholder giving an undertaking in damages and paying into court the amount of the call with interest (s).

Restraining
forfeiture.

331. As against the company the shareholder can insist that conditions precedent to forfeiture must have been strictly complied with (t); but he may rely on a forfeiture as against the company although some formalities have not been complied with (u). Laches

Conditions.

(l) *Bigg's Case* (1865), L. R. 1 Eq. 309; compare *Harris v. North Devon Rail. Co.* (1855), 20 Beav. 384 (enforcement of contract to forfeit on terms).

(m) See clauses 24—30.

(n) *Trevor v. Whitworth* (1887), 12 App. Cas. 403; *Bellerby v. Rowland and Marwood's Steamship Co., Ltd.*, [1902] 2 Ch. 14, C. A.

(o) *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, C. A.

(p) *Dawes' Case* (1868), L. R. 6 Eq. 232.

(q) *Ladd's Case*, [1893] 3 Ch. 450.

(r) *Re Agency Land and Finance Co. of Australia, Bosanquet v. Agency Land and Finance Co. of Australia* (1903), 20 T. L. R. 41.

(s) *Lamb v. Sumbas Rubber and Gutta Percha Co., Ltd.*, [1908] 1 Ch. 845.

(t) *Johnson v. Lyttle's Iron Agency* (1877), 5 Ch. D. 687, C. A. (time from which interest is demanded); *Stubbs v. Lister* (1841), 1 Y. & C. Ch. Cas. 81 (undervalue when forfeiture was empowered to satisfy a lien); *Garden Gully United Quartz Mining Co. v. McLister* (1875), 1 App. Cas. 39, P. C.; *Bottomley's Case* (1880), 16 Ch. D. 681 (invalid call); *Van Diemen's Land Co. v. Cockerell* (1857), 1 C. B. (N. S.) 732, Ex. Ch.; *Re New Chile Gold Mining Co.* (1890), 45 Ch. D. 598; *Watson v. Eales* (1856), 23 Beav. 294 (absence of, and irregularities in, or as regards service of, any notice required); and see *Goulton v. London Architectural Brick and Tile Co.*, [1877] W. N. 141; compare *Graham v. Van Diemen's Land Co.* (1856), 1 H. & N. 541, Ex. Ch. (notices to a bankrupt shareholder); *Case, Pahlen's (Count) Case* (1869), L. R. 9 Eq. 107; *Sparks v. Liverpool Water-works Co.* (1807), 13 Ves. 428 (absence of giving or receiving notice). As to tenders to prevent forfeiture, see *Re New Quebrada Co.*, *Clarke's Case* (1873), 27 L. T. 843; *Sweny v. Smith* (1869), L. R. 7 Eq. 324, where the proceeding was on behalf of the plaintiff and all other shareholders. Where the power to forfeit is only the alternative to recovering calls by action, it cannot be exercised after action begun (*Giles v. Hutt* (1848), 3 Exch. 18).

(u) *Knight's Case* (1867), 2 Ch. App. 321 (non-entry of resolution in books); *Re Phosphate of Lime Co. (Austin's Case)* (1871), 21 L. T. 932 (absence or insufficiency of notice); *Lyster's Case* (1867), L. R. 4 Eq. 233; *Re Asiatic Banking Corporation, Ex parte Collum* (1869), L. R. 9 Eq. 236; *Re Home Counties etc. Assurance Co.*, *Woolaston's Case* (1850), 4 D. & L. 127.

SECT. 10.
Shares.

on the part of the shareholder may bar the right to relief, even when the forfeiture is irregular (*w*), but not when it is wholly void (*x*). A forfeiture is not made invalid by the fact that no notice is sent, even where the articles provide that notice of forfeiture shall be given to the shareholder (*y*).

Irregularity.

332. Articles may provide that on irregularity in forfeiture the member's remedy, after the shares are disposed of, shall be in damages only (*z*). They may also provide that forfeiture shall not bar the company's right to recover calls then owing (*a*), in which case calls made before, but payable after, a forfeiture may be recovered (*b*). Interest is not recoverable, unless expressly provided for (*c*). Forfeiture does not exempt the holder of shares from liability as a past member (*d*).

**Liability
for calls.**

Reinstatement.

Where, as is usual, the articles empower directors to annul the forfeiture, the company cannot, unless he consent, reinstate the former holder with the liabilities of a shareholder (*e*).

**Disclaimer in
bankruptcy.**

333. When any part of a bankrupt's property consists of shares or stock in companies his trustee may disclaim the property (*f*). This discharges the trustee from all liability as from the date when the property vested in him, but, except so far as necessary to release the bankrupt and his property from liability, does not affect the rights or liabilities of any other person (*g*). The disclaimer amounts to a forfeiture of the shares (*h*). The validity of the forfeiture

Moore v. Rawlins (1859), 6 C. B. (N. S.) 289; *Re State Fire Insurance Co., Webster's Case* (1862), 32 L. J. (CH.) 135 (non-rectification of the register); *King's Case* (1867), 2 Ch. App. 714 (after illegal conversion of shares). A prospective resolution for forfeiture if a notice is not complied with may be good (*Re Home Counties etc. Assurance Co., Woollaston's Case, supra*; *Painter v. Ford*, [1866] W. N. 77; *Knight's Case* (1867), 2 Ch. App. 321).

(*w*) *Rule v. Jewell* (1881), 18 Ch. D. 660; *Prendergast v. Turton* (1841), 1 Y. & C. Ch. Cas. 98; compare *Garden Gully United Quartz Mining Co. v. McLister* (1875), 1 App. Cas. 39, P. C. As to the effect of acquiescence by the company in a forfeiture collusive between the directors and the shareholder, see *Spackman v. Evans* (1868), L. R. 3 H. L. 171; *Re Agriculturists' Insurance Co., Brotherhood's Case* (1862), 31 Beav. 365.

(*x*) *Bellerby v. Rowland and Marwood's Steamship Co., Ltd.*, [1902] 2 Ch. 14, C. A.

(*y*) *Knight's Case, supra*; *Re Home Counties etc. Assurance Co., Woollaston's Case, supra*; *Re State Fire Insurance Co., Webster's Case* (1862), 32 L. J. (CH.) 135; *Kell's Case, Count Pahlen's Case* (1869), L. R. 9 Eq. 107, 117.

(*z*) *Re New Chile Gold Mining Co.* (1890), 45 Ch. D. 598.

(*a*) *Stocken's Case* (1868), 3 Ch. App. 412. As to interest on calls, see *ibid.*; *Ladies' Dress Association v. Pullbrook*, [1900] 2 Q. B. 376, C. A. Without express provision, there would probably be no liability for calls (*Stocken's Case, supra*, at p. 415). As to the liability of the purchaser of forfeited shares, see p. 167, *ante*; p. 203, *post*.

(*b*) *Faure Electric Accumulator Co. v. Phillipart* (1888), 58 L. T. 525; *Re China Steamship Co., Dawes' Case* (1869), 38 L. J. (CH.) 512.

(*c*) *Stocken's Case, supra*. If the words of the article are "with interest if any thereon," interest is recoverable from the date when the call was payable till forfeiture (*Faure Electric Accumulator Co. v. Phillipart, supra*).

(*d*) *Bridger's Case and Neill's Case* (1869), 4 Ch. App. 266; *Greyke's Case* (1869), 5 Ch. App. 63.

(*e*) *Larkworthy's Case*, [1903] 1 Ch. 711.

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 191 *et seq.*

(*g*) *Ibid.*

(*h*) *Ibid.* As to the damages provable in case of disclaimer and where there

cannot be disputed in the bankruptcy, but must be tried in a separate proceeding (i).

SECT. 10. Shares.

334. Where shares have been forfeited by the company, it may on re-allotting them give credit for money already received in respect of them. As re-allotment is not an issue of shares, this is not contrary to the principle that shares cannot be issued at a discount (j). But where, for instance, two-thirds of the nominal amount of the shares having been paid up, a forfeiture is subsequently made on a call for the remaining one-third, and the company then sells the shares, allots them to a purchaser, and issues to him a certificate stating that the one-third has been called and is payable by the former holders, and that the purchaser is to be deemed the holder discharged from all calls due at the date of the certificate, the purchaser is, nevertheless, liable for future calls made on him for the remaining one-third (k). In such a case the liability of the original holder is as a debtor and not as a shareholder (l); but if, in respect of the debt, any sum is recovered from the original holder, the purchaser is entitled to be credited with the amount as against any call made on him for the one-third (m).

Re-allotting
forfeited
shares.

SUB-SECT. 7.—Changes in Shares.

335. Shares may be consolidated and divided into shares of larger amount (n) or sub-divided into shares of smaller amount (o); or, when fully paid up, may be converted into stock which may be re-converted into shares (p); or, if unissued, may be cancelled. These operations may take place without application to the court (q). When issued they may be reduced in amount or as regards liability or wiped out altogether with the court's confirmation (r). They may be reorganised (s) or, under certain conditions, surrendered (t) or forfeited (u). The shares for the

Changes in
shares.

is no disclaimer, see *Re West of England Bank, Ex parte Budden and Roberts* (1879), 12 Ch. D. 288; *Re Hooley, Ex parte United Ordnance and Engineering Co.*, [1899] 2 Q. B. 579; compare *Re Hallett, Ex parte National Insurance Corporation* (1894), 1 Mans. 380. As to amending the proof, see *Re Rowe, Ex parte West Coast Gold Fields, Ltd.*, [1904] 2 K. B. 489. Dividends received by a company in respect of a larger sum due in respect of the balance of liability on shares do not make the shares fully paid up so as to rank as such in the distribution of a company's surplus assets in winding up (*Re West Coast Gold Fields, Ltd., Rowe's Trustee's Claim*, [1906] 1 Ch. 1, C. A.).

(i) *Re Andrew, Ex parte Rippon* (1869), 4 Ch. App. 639; see *Sweny v. Smith* (1869), L. R. 7 Eq. 324.

(j) *Morrison v. Trustees, Executors, and Securities Insurance Corporation* (1898), 68 L. J. (CH.) 11, C. A.; *Re Exchange Banking Co., Ramwell's Case* (1881), 50 L. J. (CH.) 827.

(k) *New Balkis Eersteling, Ltd. v. Randt Gold Mining Co.*, [1904] A. C. 165.

(l) See *Ladies' Dress Association v. Pulbrook*, [1900] 2 Q. B. 376, C. A.

(m) *Re Randt Gold Mining Co.*, [1904] 2 Ch. 468. The purchaser is not ordinarily entitled to vote whilst calls are payable by the original holder of the shares (*Randt Gold Mining Co. v. Wainwright*, [1901] 1 Ch. 184).

(n) See p. 98, ante.

(o) See p. 99, ante.

(p) See p. 99, ante.

(q) See pp. 98, 99, ante.

(r) See p. 103, ante.

(s) See p. 116, ante.

(t) See p. 198, ante.

(u) See p. 200, ante.

SECT. 10. time being of a company may be increased in number (*w*) and, if
Shares. fully paid up in a company limited by shares, may be held by share
 — warrant holders (*x*).

SECT. 11.—*Regulation and Management.*

SUB-SECT. 1.—*In General.*

(i.) *Under Table A.*

Table A.

336. Table A in the First Schedule to the Act of 1908 contains a model set of regulations for the management of a company limited by shares (*a*); and in the case of such a company registered after March 31, 1909 (*b*), if articles are not registered with the memorandum of association or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A, those regulations are, so far as applicable, the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles (*c*).

A company limited by guarantee, or which is unlimited, may by its articles adopt all or any part of Table A; but except as expressly so adopted Table A does not apply to those companies (*d*). Where a company is registered under Part VII. of the Act of 1908 the

(*w*) See p. 95, *ante*.

(*x*) See p. 185, *ante*.

(*a*) It consists of 114 clauses, which are placed under the following headings, namely: Preliminary (clause 1); Business (clause 2); Shares (clauses 3—8); Lien (clauses 9—11); Calls on Shares (clauses 12—17); Transfer and Transmission of Shares (clauses 18—23); Forfeiture of Shares (clauses 24—30); Conversion of Shares into Stock (clauses 31—34); Share Warrants (clauses 35—40); Alteration of Capital (clauses 41—44); General Meetings (clauses 45—48); Proceedings at General Meetings (clauses 49—59); Votes of Members (clauses 60—67); Directors (clauses 68—70); Powers and Duties of Directors (clauses 71—75); The Seal (clause 76); Disqualification of Directors (clause 77); Rotation of Directors (clauses 78—86); Proceedings of Directors (clauses 87—94); Dividends and Reserve (clauses 95—102); Accounts (clauses 103—108); Audit (clause 109); Notices (clauses 110—114).

(*b*) The repealing provision of the Act of 1908 does not affect Table A in the First Schedule to the Companies Act, 1862 (25 & 26 Vict. c. 89), or any part thereof (either as originally contained in that schedule or as altered in 1906) so far as the same applies to any company existing on April 1, 1909 (see p. 34, *ante*); nor does it affect Table B in the schedule annexed to the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), or any part thereof, so far as the same applies to any company existing at the same date. Table B to the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), was a model form of articles applying to companies registered under that Act without articles. The effect is that companies registered under the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), and governed by Table B to that Act, and companies registered under the Companies Act, 1862 (25 & 26 Vict. c. 89), and governed by Table A to that Act, or the new Table A substituted for it, are still governed by their former tables, and not by the Table A to the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 11 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 15]. As to the term "articles" as used in the Act of 1908, including the regulations contained in Table A, see *ibid.*, s. 285; and p. 35, *ante*. As to the necessity of excluding Table A by clear words, see *Fisher v. Black and White Publishing Co.*, [1901] 1 Ch. 174, O. A.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 10 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 14].

regulations in Table A do not apply unless adopted by special resolution (e).

337. Table A has statutory authority, and provisions contained in it, or copied from it into special articles, are valid although apparently inconsistent with the express provisions of the Act to which it is scheduled (f), and regard to its contents may be had in order to ascertain the intentions of the legislature in such Act (g).

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Statutory
authority.

338. The Board of Trade has power to alter Table A, so that it does not increase the amount of fees payable to the registrar. Any such alteration is to be published in the *London Gazette*, and thenceforth will have the same force as if it were included in one of the schedules to the Act; but no alteration in Table A is to affect any company registered before the alteration, or repeal, as respects that company, any portion of that table (h).

Power to
alter Table A.

(ii.) *Under Special Articles.*

339. Special articles must in the case of a company limited by guarantee or unlimited, and may in the case of a company limited by shares, be registered with the memorandum of association, and any company may adopt all or any of the regulations contained in Table A (i).

Special
articles of
association.

Where special articles are registered on the incorporation of a company they form a very lengthy document (k). They are as a rule more or less based on the Table A for the time being in use, but are

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 263 (ii.) (a). As to registration under Part VII., see p. 61, *ante*.

(f) *Lock v. Queensland Investment and Land Mortgage Co.*, [1896] A. C. 461.

(g) *Re Barnard's Banking Co., Ex parte Contract Corporation* (1867), 3 Ch. App. 105; *Re Pyle Works* (1890), 44 Ch. D. 534, 571, C. A.

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 118 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 71]. Under the power given by the Act of 1862 the Board of Trade in 1906 made orders substituting for the Table A under that Act a new Table A, which was substantially the same as Table A to the Act of 1908. The present table is defective, inasmuch as it is not drafted to meet the changes made by the Companies Act, 1907 (7 Edw. 7, c. 50), which are re-enacted in the Act of 1908. Long before its alteration in 1906 Table A to the Companies Act, 1862 (25 & 26 Vict. c. 89), had become quite inadequate for modern requirements, and except in cases where time did not permit of alterations it was seldom adopted *in toto* as the regulations of a company limited by shares, but in the case of small companies it was often only partially excluded, by the registered articles, from operation. As a rule, on the registration of a company there was filed with the memorandum of association a full set of special articles one of which expressly excluded Table A altogether. Although the new Table A is much fuller, a similar practice will probably prevail in the case of companies registered under the Act of 1908 (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69)). See *Encyclopædia of Forms*, Vol. IV., pp. 364 *et seq.*

(i) For the meaning of "articles" in the Act of 1908, see p. 35, *ante*. As to the printing, division into paragraphs, stamping, signature, and registration of the articles, see p. 66, *ante*; and as to the supply of copies to members, see p. 69, *ante*. Table A is unsuitable for a company without a share capital, and the statutory form of articles in such a case does not adopt any part of Table A; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. III., Form B. But where a company limited by guarantee, or unlimited, has a share capital, the statutory forms adopt Table A; see *ibid.*, Sched. III., Forms C and D, and s. 10 (2).

(k) See forms in *Encyclopædia of Forms*, Vol. IV., pp. 364 *et seq.*

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ment.
—
Contents.

supplemented by provisions suggested by deeds of settlement, the Companies Clauses Consolidation Act, 1845 (*l*), and inconveniences which have resulted from the unqualified adoption of Table A (*n*).

340. The contents of the articles depend to a great extent on the sort of company to which they apply (*n*), and many powers of the company are by statute required to be taken, if at all, by the articles as distinguished from the memorandum of association—for instance, powers to increase or reduce capital, consolidate shares into shares of larger amount, or impose unlimited liability on directors (*o*).

Invalid
articles.

341. Articles are not valid which purport to restrict the rights of members as conferred by statute or the memorandum of association, or to negative the provisions of an Act of Parliament (*a*). Although articles may explain ambiguities if contemporaneous with the memorandum, they cannot alter the words of it. Thus, a power to borrow in the memorandum cannot be enlarged by the articles into a power to issue irredeemable debenture stock which contemplates not a repaying of a debt, but a perpetual annuity (*b*); and if the memorandum defines the rights of the respective classes of shareholders these cannot be altered by the articles (*c*).

(*l*) 8 & 9 Vict. c. 16.

(*m*) As to the validity of articles which contain provisions similar to those contained in Table A, see note (*f*), p. 100, *ante*.

(*n*) As to the effect of articles generally, see p. 80, *ante*. As to articles of companies limited by shares, see p. 70, *ante*; of companies limited by guarantee, see p. 76, *ante*; of unlimited companies, see p. 79, *ante*. As to the necessity of stating the amount of share capital (if any) in the case of guarantee and unlimited companies, see pp. 77, 79, *ante*.

(*o*) See pp. 89—100, *ante*. As to the special provisions required in articles of a private company, see *ibid*.

(*a*) As, for instance, an article (1) restricting the right to alter the articles (*Malleson v. National Insurance and Guarantee Corporation*, [1894] 1 Ch. 200; *Walker v. London Tramways Co.* (1879), 12 Ch. D. 705) by requiring a different majority of voters (*Ayre v. Skelsey's Adamant Cement Co.* (1904), 20 T. L. R. 587); (2) restricting an individual shareholder's right to petition for the winding up of the company (*Re Peveril Gold Mines, Ltd.*, [1898] 1 Ch. 122), or to take advantage of s. 192 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) [s. 161 of the Companies Act, 1862 (25 & 26 Vict. c. 89)] as a dissentient shareholder (*Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate*, [1899] 2 Ch. 80, C. A.; *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308; *Re Canning-Jurrah Timber Co. (Western Australia), Ltd.*, *ibid.* 708, C. A.; approved in *Bisgood v. Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 743, C. A.); or to retain his properly-acquired shares (*Re Walker and Hacking, Ltd.* (1887), 57 L. T. 763); or to have full information about the reserve fund and other accounts (*Newton v. Birmingham Small Arms, Ltd.*, [1906] 2 Ch. 378). The value of shares as fixed by an article providing for pre-emption is not the value to be taken for the purpose of estate duty (*A.-G. v. Jameson*, [1905] 1 I. R. 218, C. A.). Articles cannot validly authorise any *ultra vires* act (*Ashbury Railway Carriage and Iron Co. v. Rich* (1875), L. R. 7 H. L. 653, 671; *Welton v. Saffery*, [1897] A. C. 229, 315); or vary the plain rights conferred by the memorandum (*Ashbury v. Watson* (1885), 30 Ch. D. 376, C. A.). Articles may impose compulsory transfer on certain events happening (*Borland's Trustee v. Steel Brothers & Co.*, [1901] 1 Ch. 279). As to classes of shareholders, see *Re Southern Brazilian Rio Grande do Sul Rail. Co., Ltd.*, [1905] 2 Ch. 78; and as to the power of borrowing, *Re Phoenix Bessemer Steel Co.* (1875), 44 L. J. (CH.) 683.

(*b*) *Re Southern Brazilian Rio Grande do Sul. Rail. Co., Ltd.*, *supra*.

(*c*) *Ashbury v. Watson*, *supra*; see *Collins v. Birmingham Breweries Ltd.* (1899), 15 T. L. R. 180, C. A. As to altering the memorandum, see p. 328, *post*. As to the alteration of rights of shareholders given by the memorandum of association, see p. 159, *ante*.

If a transaction is within the powers of a company as expressed in the articles, though outside the powers of the directors, the sanction of a general meeting is sufficient (*d*) provided that the shareholders have had sufficient notice of the intention of the directors to seek ratification; otherwise any one shareholder may object (*e*). If, however, the transaction is within the objects of the memorandum, but not within the powers of the articles, the articles must first be altered by special resolution (*f*). Ratification may be inferred from other circumstances showing full knowledge of the shareholders and their consequent acts (*g*).

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acts.

(iii.) *Alteration of Articles.*

342. Subject to the provisions of the Act of 1908 and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles; and any alteration or addition so made is as valid as if originally contained in the articles, and is subject in like manner to alteration by special resolution (*h*). In the case of an unlimited company formed and registered under the Joint Stock Companies Acts this power of altering articles extends to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum (*i*).

How effected

The above power of alteration, which is statutory, cannot be modified by an article requiring a special resolution to be carried by a different majority; for it is imperative, and not directory (*k*). Nor can a company contract itself out of the power to alter its articles (*l*), even by the express terms of the articles (*m*).

Directors cannot by resolution alter the articles even so as to affect one of themselves adversely, as by imposing a liability to take shares as a qualification (*n*).

Where, however, articles have not been validly altered they may still form, as intended to be altered, the basis of a contract, and so be valid as between the contracting parties (*o*).

Rectification
of mistake.

(*d*) *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366, P. C.; *Grant v. United Kingdom Switchback Railways Co.* (1888), 40 Ch. D. 135, C.A.; compare *Kent v. Jackson* (1852), 2 De G. M. & G. 49, C. A.

(*e*) *Evans v. Smallcombe* (1868), L. R. 3 H. L. 249.

(*f*) *Boschoek Proprietary Co., Ltd. v. Fuke*, [1906] 1 Ch. 148; applying *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (1882), 23 Ch. D. 1, C. A.

(*g*) *Evans v. Smallcombe*, *supra*; *Phosphate of Lime Co. v. Green* (1871), L. R. 7 C. P. 43; *Re Magdalena Steam Navigation Co.* (1860), John. 690; *Richmond's Case* (1858), 4 K. & J. 305 (increase of capital); see *Re Dronfield Silkstone Coal Co.* (1880), 17 Ch. D. 76, 97, C. A.; but the mere appearance of a payment in a balance-sheet is not enough, unless it appear in such a way as to attract the attention of persons of ordinary care; if as part of a larger item, this is not enough (*Re Railway and General Light Improvement Co., Marzetti's Case* (1880), 42 L. T. 206, C. A.).

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 13 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 50].

(*i*) *Ibid.*, s. 13 (2).

(*k*) *Ayre v. Skelsey's Adamant Cement Co.* (1904), 20 T. L. R. 587.

(*l*) *Malleson v. National Insurance and Guarantee Corporation*, [1894] 1 Ch. 200; *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361, C. A.; and see note (*f*), p. 209, *post*.

(*m*) *Walker v. London Tramways Co.* (1879), 12 Ch. D. 705.

(*n*) *De Ruigne's Case* (1877), 5 Ch. D. 306, C. A.

(*o*) *Muirhead v. Forth and North Sea Steamboat Mutual Insurance Association*,

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ment.

A mistake in the articles can only be rectified by altering the articles by special resolution pursuant to the Act; the court will not rectify the mistake in an action (*p*). The passing of a special resolution inconsistent with an existing article is not effective unless a special resolution has been passed at previous meetings altering that article (*q*). Where, as in cases of reduction of capital and sub-division of shares (*r*), the Act requires the articles to give the necessary power, the resolution purporting to exercise the power is of no avail unless the power is already in the articles or has been added by special resolution (*a*).

How far
articles may
be altered.

343. The articles must be altered in good faith, and not so as to give an unfair advantage to a majority of the shareholders (*b*). This is the only limitation on the power to alter articles mentioned in the Act, and articles may be altered by a company, if acting in good faith, so as to affect the rights of a member as between himself and the company by retrospective operation, since the shares are held subject to the power of alteration in the articles (*c*) and in the statute (*d*). Where the

[1894] A. C. 72; compare *Re Miller's Dale and Ashwood Dale Lime Co.* (1885), 31 Ch. D. 211. The statutory mode of altering articles is only machinery, and the alteration may be effected by acquiescence (*Ilo Tung v. Man on Insurance Co.*, [1902] A. C. 232, P. C.).

(*p*) *Evans v. Chapman* (1902), 86 L. T. 381.

(*q*) *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (1882), 23 Ch. D. 1, C. A.; *Re Patent Invert Sugar Co.* (1885), 31 Ch. D. 166, C. A.

(*r*) See pp. 99, 100, ante.

(*a*) *James v. Buena Ventura Nitrate Grounds Syndicate, Ltd.*, [1896] 1 Ch. 456, 463, C. A.; *Harben v. Phillips* (1883), 23 Ch. D. 14, C. A.; *Boschoek Proprietary Co., Ltd. v. Fuke*, [1906] 1 Ch. 148, 163; but this is not the case if the passing of the special resolution completes the transaction as far as is necessary for the company to act, the directors being able to do the rest under their general powers, as, for instance, to issue new capital (*Campbell's Case* (1873), 9 Ch. App. 1, 7, 22; followed in *Taylor v. Pilsen Joel and General Electric Light Co.* (1884), 27 Ch. D. 268); or if sanction is given to what the company already has power to do (*ibid.*; *James v. Buena Ventura Nitrate Grounds Syndicate, Ltd.*, *supra*).

(*b*) *Menier v. Hooper's Telegraph Works* (1874), 9 Ch. App. 350; *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] 1 Ch. 491.

(*c*) *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, C. A. Although the fully-paid shares affected by the extension to them of the company's lien in respect of an existing debt were known by the company to be held by the shareholder as nominee for the vendor, and the alteration was intended to affect this individual member; see *Doman's Case* (1876), 3 Ch. D. 21, C. A.; *Re Argus Life Assurance Co.* (1888), 39 Ch. D. 571 (both cases of life assurance companies with special powers of alteration of constitution); distinguish *Re Piercy, Whitham v. Piercy*, [1907] 1 Ch. 289. Preference shares may be issued without a power in the memorandum (*Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361, C. A.; compare *Pepe v. City and Suburban Permanent Building Society*, [1893] 2 Ch. 311; *Botten v. City and Suburban Permanent Building Society*, [1895] 2 Ch. 441; *James v. Buena Ventura Nitrate Grounds Syndicate, Ltd.*, *supra*; *Swalby v. Port Darwin Gold Mining Co.* (1889), 1 Meg. 385, C. A.). The Stock Exchange Committee will not grant a quotation to the shares of a company, where the company claims a lien on paid-up shares. In *M'Arthur, Ltd. (Liquidator) v. Gulf Line, Ltd.*, [1909] S. C. 732, it was held that the rights of a transferee could not be prejudiced by an alteration in the articles made after the lodgment of the transfer, following the *ratio decidendi* in *Le Cavelly & Co.* (1889), 42 Ch. D. 209, 227, C. A.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 13.

memorandum allows a modification of rights the court may sanction a scheme by which ordinary shareholders benefit at the expense of preference shareholders (e). If a contract is so drawn as by its terms or implication to prohibit the company altering its articles to the prejudice of the other contracting party, any alteration cannot justify a breach of contract with him (f).

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and
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ment.

SUB-SECT. 2.—*Directors.*

(i.) *Appointment.*

344. The affairs of a company are usually conducted by directors (g), either under that or some other name, such as "trustees," "members of the council," or "governors." The articles may, however, empower a single director to govern; and in that case a limited company may be appointed to perform the duties and powers usually performed by individuals appointed as directors (h).

Directors.

345. The first directors are often named in the articles, which usually prescribe their number (i). Except in the case of a private company (j), a person is not capable of being appointed director of a company by the articles unless, before the registration thereof, he has by himself or by his agent authorised in writing signed and filed with the registrar a consent in writing to act as such director (k) and complied with the requirements of the Act of 1908 as to his qualification (if any) (l). On the application for registration of the memorandum and articles of a company the applicant must deliver to the registrar a list of the persons who have

First
directors,
where
appointed
by articles.

(e) *Re Welsbach Incandescent Gas Light Co., Ltd.*, [1904] 1 Ch. 87, C. A.; and alteration of voting rights may be allowed; see *Re Colmer (James), Ltd.*, [1897] 1 Ch. 524.

(f) *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, 673, 676, C. A.; *Griffith v. Paget* (1877), 5 Ch. D. 894, where the company had paid for property by preference shares and attempted to issue pre-preference shares. But it was held in *Punt v. Symons & Co.*, [1903] 2 Ch. 506, that a company could not contract itself out of its statutory powers of altering its articles as against an outside contractor; see *Re Barrow Hematite Steel Co.* (1888), 39 Ch. D. 582. This decision was itself disapproved in *Baily v. British Equitable Assurance Co.*, [1904] 1 Ch. 374, C. A.; reversed, without affecting this criticism, *sub nom. British Equitable Assurance Co. v. Baily*, [1906] A. C. 35, on the ground that the contract in question was expressly made subject to the powers of alteration of the regulations of the company.

(g) For the definition of "director," see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285; and p. 36, *ante*. The clause directing vacation of office on bankruptcy does not prevent the original appointment of a bankrupt (*Dawson v. African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6, C. A.). A clergyman who performs ecclesiastical duties may not act as director to any company formed to carry on trade or business for profit, but he may be a shareholder (Pluralities Act, 1838 (1 & 2 Vict. c. 106), ss. 29, 31; Trading Partnerships Act, 1841 (4 & 5 Vict. c. 14)); see title ECCLESIASTICAL LAW, Vol. XI., p. 557.

(h) *Re Bulawayo Market and Offices Co.*, [1907] 2 Ch. 458; and see *Bank of Ireland v. Cogry Spinning Co.*, [1900] 1 I. R. 219.

(i) As to their responsibility with regard to share qualification, see p. 219, *post*. By Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) Sched. I., Table A, clause 68, "The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association."

(j) See p. 73, *ante*.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 72.

(l) See p. 213, *post*.

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ment.

Where not
appointed by
articles.

consented to be directors of the company; if this list contains the name of any person who has not so consented, the applicant is liable to a fine not exceeding £50 (*m*).

In the absence of articles appointing directors the subscribers to the memorandum elect the first directors, but cannot themselves act as directors unless power is given them by the articles (*n*), in which case they may have as full powers as appointed directors (*o*).

In the absence of a provision enabling a majority of subscribers to appoint directors in writing, all the subscribers must sign (*p*). If a meeting is held for the purpose a majority of the whole subscribers may act (*q*). Reasonable notice of the meeting (*r*) and of its object should be given to each subscriber; but a meeting is not necessary (*s*).

Defect in
appointment.

346. Until the contrary is proved, all appointments of directors or managers are deemed to be valid (*t*). Their acts are valid notwithstanding any defects that may afterwards be discovered in their appointment or qualification (*a*).

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 72 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 2; Companies Act, 1907 (7 Edw. 7, c. 50), s. 1].

(*n*) *Morley (John) Building Co. v. Barras*, [1891] 2 Ch. 386, 393. They are not *functi officio* until they have appointed directors (*ibid.*). Subscribers acting as directors without powers may be presumed to have had authority to bind the company by contract (*Totterdell v. Fareham Brick Co.* (1866), L. R. 1 C. P. 674); and they are themselves liable to actions, as, for instance, where they register the company with a name calculated to deceive (*Société Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Co.*, [1901] 2 Ch. 513).

(*o*) *Eales v. Cumberland Black Lead Mine Co.* (1861), 6 H. & N. 481, where the subscribers appointed one of themselves paid manager. If they so act they are bound to qualify by acquiring so many shares as with the subscribed shares equal the qualification number (*Re Great Northern and Midland Coal Co.*, *Currie's Case* (1863), 3 De G. J. & Sm. 367, C. A.; compare *Sidney's Case* (1871), L. R. 13 Eq. 228), unless the articles exonerate them or the time for imperative qualification has not yet arrived (*Salisbury-Jones and Dale's Case*, [1894] 3 Ch. 356, C. A.; see p. 214, *post*). In the present Table A no powers to act are given to the subscribers beyond the power to appoint the directors; see Table A, clause 68; *Woolf v. East Nigel Gold Mining Co.* (1905), 21 T. L. R. 660.

(*p*) *Morley (John) Building Co. v. Barras*, *supra*.

(*q*) *Howbeach Coal Co. v. Teague* (1860), 5 H. & N. 151; *York Tramways Co. v. Willows* (1882), 8 Q. B. D. 685, C. A. An article fixing the quorum of directors does not apply to subscribers (*Re London and Southern Counties Freehold Land Co.* (1885), 31 Ch. D. 223).

(*r*) Two days may be sufficient (*Morley (John) Building Co. v. Barras supra*; *Re Great Northern Salt and Chemical Works, Ex parte Kennedy* (1890), 44 Ch. D. 472).

(*s*) *Ex parte Kennedy* (1890), 44 Ch. D. 480.

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 71 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67]. A subsequent meeting can effectually ratify and confirm the acts of an irregularly constituted meeting (*Re Portuguese Consolidated Copper Mines, Ltd.*, *Ex parte Badman*, *Ex parte Bosanquet* (1890), 45 Ch. D. 16, C. A.); but a person having notice that there is an irregularity or invalidity cannot avail himself of this provision (*Re Staffordshire Gas and Coke Co.*, *Ex parte Nicholson* (1892), 66 L. T. 413; *Re Brilport Old Brewery Co.* (1867), 2 Ch. App. 194; *Woolf v. East Nigel Gold Mining Co.*, *supra*). A director need not be appointed at the company's office (*Smith v. Parings Mines, Ltd.*, [1906] 2 Ch. 193).

(*u*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 74 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67]. Their liabilities are also as great as if they had been properly appointed (*Western Bank of Scotland v. Baird's*

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ment.

An article validating the acts of persons acting as directors, though it is afterwards discovered that there was a defect in their appointment or qualification (b), operates not only as between the company and outsiders, but also as between the company and its members (c). So *de facto* directors may make a valid call (d), summon meetings of the company (e), and elect other directors (f). A *de facto* director may be ordered to furnish a statement of affairs in a winding up (g). Directors, however, cannot take advantage of any informality in their proceedings in which they have themselves participated; they are estopped as between themselves and the company (h); they are also estopped from saying they have been improperly appointed, if they have acted after their appointment (i). Persons dealing with them who know of the invalidity are likewise estopped (k).

347. The power to appoint directors other than first directors or appoint directors to fill casual vacancies (l) is usually only exercisable by shareholders in general meeting (m); and it is not

Directors not
being the
first directors.

Trustees (1872), 11 Macph. (Ct. of Sess.) 96; see *Briton Medical, General and Life Association v. Jones* (1889), 61 L. T. 384; *Coventry and Dixon's Case* (1880), 14 Ch. D. 660, C. A.; *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617, C. A.). A company which has put forward a resolution as being validly passed cannot, at any rate after lapse of considerable time, repudiate it as invalid (*Montreal and St. Lawrence Light and Power Co. v. Robert*, [1906] A. C. 196, P. C.).

(b) By the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 44, "All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director." The words as to subsequent discovery of a defect mean a discovery that there is a defect, not a discovery of the facts which cause the defect (*British Asbestos Co., Ltd. v. Boyd*, [1903] 2 Ch. 439, 444).

(c) *Jawson v. African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6, C. A., doubting *Howbeach Coal Co. v. Teague* (1860), 5 H. & N. 151.

(d) *Dawson v. African Consolidated Land and Trading Co.*, *supra*; *Briton Medical General and Life Association v. Jones*, *supra*.

(e) *Southern Counties Deposit Bank v. Rider* (1895), 73 L. T. 374, C. A.

(f) *British Asbestos Co., Ltd. v. Boyd*, *supra*; see *Transport, Ltd. v. Schomburg* (1905), 21 T. L. R. 305.

(g) *Re New Par Consols*, [1898] 1 Q. B. 573. As to the criminal liability of *de facto* directors, see note (h), p. 313, *post*.

(h) *Faure Electric Accumulator Co. v. Phillipart* (1888), 58 L. T. 525; *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141; *Murray v. Bush* (1873), L. R. 6 H. L. 37; *Bank of Hindustan v. Allen* (1871), L. R. 6 C. P. 222, Ex. Ch.; compare *Re Miller's Dale and Ashwood Dale Lime Co.* (1885), 31 Ch. D. 211.

(i) *Tyne Mutual Steamship Insurance Association v. Brown* (1896), 74 L. T. 283; *York Tramways Co. v. Williams* (1882), 8 Q. B. D. 685, C. A., following *Harward's Case* (1871), L. R. 13 Eq. 30, and *Fowler's Case* (1872), L. R. 14 Eq. 316, and dissenting on this point from *Howbeach Coal Co. v. Teague*, *supra*.

(k) *Re Staffordshire Gas and Coke Co., Ex parte Nicholson* (1892), 66 L. T. 413; see, however, *Tyne Mutual Steamship Insurance Association v. Brown*, *supra*, where it was held that a member acting with knowledge of the informality was not estopped from denying the authority of the board and reclaiming a call paid under protest.

(l) That is, vacancies occurring otherwise than by retirement in rotation (*Munster v. Cammell Co.* (1882), 21 Ch. D. 183, 187).

(m) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I.,

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ment.

competent for directors to restrict the right of a company to appoint its own directors (*n*).

The power to fill casual vacancies may, however, be vested in the continuing directors, with a provision that the casual director shall only hold office during the natural term of office of the retiring director (*o*). If any such vacancy is not filled up before a general meeting it can be so filled up then, and if not, the power in the continuing directors remains (*p*).

The first board of directors or any subsequent board remains in office until superseded, even if the company does not proceed to the business for which it was incorporated (*q*), and even if the period for which the directors were appointed has expired. Where, however, a meeting has been duly held and has, although invalidly, appointed new directors, this necessarily involves the retirement of the directors intended to be superseded (*r*).

Register and
notification
of change.

348. Every company must keep at its registered office a register containing the names and addresses and the occupations of its directors or managers. It must also send to the registrar a copy thereof, and from time to time notify him of any change among its directors or managers. If default is made in compliance with this provision the company is liable to a fine not exceeding £5 for every day during which the default continues; and every director and manager of the company who knowingly and wilfully authorises or permits the default is liable to the like penalty (*s*).

Table A, clause 81. *Ibid.*, clause 82, which provides for a failure on the part of the meeting to appoint, means that if no directors are appointed at either the first or the adjourned meeting the vacating directors continue in office, even when no adjourned meeting is held (*Re Great Northern Salt and Chemical Works, Ex parte Kennedy* (1890), 44 Ch. D. 472, 482). The article does not apply to *de facto* directors (*Morley (John) Building Co. v. Barras*, [1891] 2 Ch. 386). As to special facilities for election of those "recommended by the directors," see *Transport, Ltd. v. Schonburg* (1905), 21 T. L. R. 305.

(*n*) *James v. Eve* (1873), L. R. 6 H. L. 335; compare *Stace and Worth's Case* (1869), 4 Ch. App. 682.

(*o*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 84.

(*p*) *Munster v. Cammell Co.* (1882), 21 Ch. D. 183, 187; *Bennett Brothers (Birmingham) v. Lewis* (1903), 20 T. L. R. 1, C. A., where it was held that the power of filling a vacancy remaining to the continuing directors after a general meeting prevented the operation of a clause providing that the number of directors was not to be less than a fixed number unless it should be determined at a general meeting to reduce the number. If the number of directors is reduced below a quorum the proper method is to summon a general meeting to elect fresh directors for the vacancies. S. 74 (see p. 210, *ante*) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), would not seem to apply; see *York Tramways Co. v. Willows* (1881), 8 Q. B. D. 685, C. A.; *Newhaven Local Board v. Newhaven School Board* (1885), 30 Ch. D. 350, C. A.; *Owen and Ashworth's Claim, Whitworth's Claim*, [1901] 1 Ch. 115, C. A. Appointments may be made in an informal manner (*Smith v. Parings Mines, Ltd.*, [1906] 2 Ch. 193).

(*q*) *Muir v. Forman's Trustees* (1903), 5 F. (Ot. of Sess.) 546, 566; compare *Morley (John) Building Co. v. Barras*, *supra*, at p. 394; but see *Tyne Mutual Steamship Insurance Association v. Brown* (1896), 74 L. T. 283.

(*r*) *Garden Gully United Quartz Mining Co. v. McLister* (1875), 1 App. Cas. 39, P. C.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 75 [Companies

(ii.) *Qualification.*SECT. 11.
Regulation
and
Manage-
ment.Qualification
of directors.

349. In the case of a company other than a private company, a person is not capable of being appointed director by the articles, and is not to be named as a director or proposed director in any prospectus issued by or on behalf of the company or in any statement in lieu of prospectus filed by it or on its behalf (unless the issue takes place more than a year after it is entitled to commence business) except upon the following conditions. He must before the registration of the articles or the publication of the prospectus or the filing of the statement in lieu of prospectus, as the case may be, either by himself or his agent authorised in writing, not only have signed and filed the consent above mentioned, but also have either signed the memorandum of association for a number of shares not less than his qualification (if any), or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any) (*t*). Apart from this provision, it depends on the form of the articles whether the qualification clause applies to directors named in the articles (*u*).

The bearer of a share warrant is not qualified in respect of the shares or stock specified in the warrant for being a director or manager of a company in cases where a qualification of the amount of shares or stock so specified is required by the articles (*a*).

350. Without prejudice to the above restrictions, it is the duty of every director who is by the regulations of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the regulations of the company. His office of director is vacated if he does not within such time obtain his qualification, or if he afterwards ceases at any time to hold his qualification. A person so vacating

Duty to
qualify.

Act, 1862 (25 & 26 Vict. c. 89), ss. 45, 46, as amended by Companies Act, 1900 (63 & 64 Vict. c. 48), s. 20].

(*t*) Companies (Consolidation) Act, 1908 (7 Edw. 7, c. 69), s. 72 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 2, as amended by Companies Act, 1907 (7 Edw. 7, c. 50), s. 2, and Sched. II.]; and see *Pearson's Case* (1877), 5 Ch. D. 336, C. A. The registration of the articles is not a sufficient filing of a contract (*Crickmer's Case* (1875), 10 Ch. App. 614; *Pritchard's Case* (1873), 8 Ch. App. 956). A contract with a trustee for an intended company is not enforceable in other cases (*Elsner's and McArthur's Case*, [1895] 2 Ch. 759). Apart from this section, the mere statement in a prospectus that directors will take certain shares does not constitute a contract to that effect (*Re Moore Brothers & Co., Ltd.*, [1899] 1 Ch. 627, C. A.). An extraordinary resolution fixing the future qualification does not apply to the existing directors (*Hamilton's (Lord Claud) Case* (1873), 8 Ch. App. 548).

Table A of the Act of 1908, by clause 70, provides as follows: "The qualification of a director shall be the holding of at least one share in the company, and it shall be his duty to comply with the provisions of s. 73 of the Companies (Consolidation) Act, 1908."

(*u*) *Dent's Case*, *Forbes' Case* (1873), 8 Ch. App. 768, 775, where the article referred to eligibility and did not apply; *Re Esparto Trading Co.* (1879), 12 Ch. D. 191, 203, where it was said that generally it did apply; *Miller's Case* (1877), 5 Ch. D. 70, C. A.; compare *Portal v. Emmens* (1876), 1 C. P. D. 664, C. A.; *Kinaid's Case* (1870), L. R. 11 Eq. 192; *Forbes' Case* (1875), L. R. 19 Eq. 353 (cases under private Acts).

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 37 (4) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 30].

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office is incapable of being re-appointed director until he has obtained his qualification, and if after the expiration of the required time any unqualified person acts as a director, he is liable to a fine not exceeding £100 for every day between the expiration of such time and the last day on which it is proved that he acted as a director (b). But the acts of a director or manager are valid notwithstanding any defect that may afterwards be discovered in his qualification (c).

The holding of shares as one of several joint holders constitutes a good qualification (d).

If directors can exercise the full powers of the company they may reduce the requirements of the qualification clause (e).

Liability for
qualification
shares.

351. If a director resigns before the time fixed as the date after which, unless already qualified, he is under the articles to be deemed to have agreed to take his qualification shares from the company, he is not liable in respect of the shares to the company although he acted as director without qualification (f). If, however, he does not resign till after that date, he is liable, although he has never acted after accepting office (g).

A director who agrees by the articles merely to acquire a qualification and does not agree to take the shares or to be deemed to have agreed to take them from the company, is under no obligation to take the shares from the company (h), at any rate where it is

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 73 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 3; Companies Act, 1907 (7 Edw. 7, c. 50), s. 34]. Apart from the articles there is no obligation on a director to hold any qualification at all, nor is a resolution of directors sufficient to constitute a contract to take shares (*De Ruvigne's Case* (1877), 5 Ch. D. 306, 321, C. A.).

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 74 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67].

(d) *Dunster's Case*, [1894] 3 Ch. 473, 480, C. A.; *Grundy v. Briggs*, [1910] 1 Ch. 444.

(e) *Re International Cable Co., Ex parte Official Liquidator* (1892), 66 L. T. 253.

(f) *Re Pandora Theatre Co.* (1884), 28 Sol. Jo. 238; *Karuth's Case* (1875), L. R. 20 Eq. 506; *Green's Case* (1874), L. R. 18 Eq. 428; *Re Self-Acting Sewing Machine Co.* (1886), 34 W. R. 758, where the conduct of the director was held equivalent to refusal to act or to resign; *Austin's Case* (1866), L. R. 2 Eq. 435; *Re Imperial Land Credit Corporation* (1868), 16 W. R. 1191; *Salisbury-Jones and Dale's Case*, [1894] 3 Ch. 356, C. A.

(g) *Re Hercynia Copper Co.*, [1894] 2 Ch. 403, C. A.; *Isaacs' Case*, [1892] 2 Ch. 158, C. A.

(h) *Re Printing Telegraph and Construction Co. of the Agence Havas, Ex parte Cammell*, [1894] 2 Ch. 392, C. A., where shares were allotted to a director without his knowledge before his resignation, and registered afterwards; *Re Wheel Buller Consols* (1888), 38 Ch. D. 42, C. A.; *Brown's Case* (1873), 9 Ch. App. 102, 105; *Green's Case*, *supra*; *Austin's Case*, *supra*; *Karuth's Case*, *supra*, at p. 511; *Re Columbia Chemical Factory, Manure and Phosphate Works, Hewitt's Case, Brett's Case* (1883), 25 Ch. D. 283, C. A., where the business of the company was "inchoate," but the reasonable time was held not to have expired in four and a half months. But see *Harward's Case* (1871), L. R. 13 Eq. 30; *Re Esparto Trading Co.* (1879), 12 Ch. D. 191. In *Re Bread Supply Association, Konrath's Case* (1893), 62 L. J. (CH.) 376, *KEKEWICH, J.*, held that the mere acting as director obliged him to qualify, and to do so by buying shares from the company, if he did not buy them elsewhere within a reasonable time, following, it was said, *Isaacs' Case*, *supra*, which case, however, is clearly distinguishable as the clause ran "he shall be deemed to have agreed to take his qualification shares from the company." *Re Bread Supply Association, Konrath's Case*, *supra*,

possible for him to acquire his shares elsewhere (i), and where a reasonable time in which to acquire them has not expired (j).

Where a director applies for his qualification shares, but no allotment is made and the company does not undertake the business for which it was incorporated, or any other business, within the period during which he is to qualify or else be deemed bound, he cannot be put on the list of contributories (k). Again, if his appointment as director is void, and the only agreement to take shares as qualification shares consists in acting as director and the registration of shares in his name, the acting director is not liable on them (l).

If shares are actually allotted to and registered in the name of a director before his resignation, even without his knowledge, he will, unless he has qualified otherwise within a reasonable time, be liable to pay for them; for as director he must be taken to know the contents of the register and therefore that the shares have been registered in his name (m). If a director, bound to qualify

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When not
liable.

is apparently not consistent with *Re Medical Attendance Association, Onslow's Case* (1887), 57 L. J. (CH.) 338, C. A., and *Re Wheal Buller Consols* (1888), 38 Ch. D. 42, C. A.

(i) As to the case where he cannot obtain them elsewhere, see *Hamley's Case* (1877), 5 Ch. D. 705, 707.

(j) See *Miller's Case* (1877), 5 Ch. D. 70, C. A.

(k) *Re Youde's Billposting, Ltd., Clayton's Case* (1902), 18 T. L. R. 656, 731, C. A., and see *Chapman's Case* (1866), L. R. 2 Eq. 567, where an allotment of a qualification was refused; *Tothill's Case* (1865), 1 Ch. App. 85, where a smaller number was allotted; *Re Medical Attendance Association, Onslow's Case, supra*, where a smaller number of shares than the original qualification applied for was allotted, the company shortly afterwards reducing the required number to the same figure.

(l) *Stace and Worth's Case* (1869), 4 Ch. App. 682; *Re Wheal Buller Consols, supra*; and see *Hamley's Case, supra*, and the other cases cited in note (a), p. 217, *post*. Acting as a director without qualification is not a misfeasance under Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 215 [Companies (Winding up) Act, 1890 (63 & 64 Vict. c. 48), s. 10] (*Coventry and Dixon's Case* (1880), 14 Ch. D. 660, C. A.).

(m) *Re Portuguese Consolidated Copper Mines, Ltd., Ex parte Inchiquin (Lord)*, [1891] 3 Ch. 28, C. A., where about three months was held to exceed a "reasonable time"; *Leeke's Case* (1871), 6 Ch. App. 469, where "he had authorised that registration not in fact but in law"; *Re Esparto Trading Co.* (1879), 12 Ch. D. 191, 203, where the shares were not registered, but the calls were debited and the director was held to have assented to the entries; *Harward's Case* (1871), L. R. 13 Eq. 30, where the allotment committee were said to be the agents of the director to make an allotment to him; compare *Fowler's Case* (1872), L. R. 14 Eq. 316, where a director applied for further shares in ignorance that the qualifying number had been allotted to him. *Molincaux v. London, Birmingham, and Manchester Insurance Co.*, [1902] 2 K. B. 589, C. A., following *Re Portuguese Consolidated Copper Mines, Ltd., Ex parte Inchiquin (Lord)*, *supra*, decides (1) that a person who accepts appointment as director, and so acts, contracts with the company that he will within a reasonable time obtain the requisite shares either by transfer from existing shareholders or directly from the company; (2) that if he has not obtained them within a reasonable time the company are authorised to put him on the register in respect of the shares; (3) that if his name is not put on the register his position would be different; but (4) that under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 24, the conditions are satisfied if a reasonable time has elapsed and if it can be shown that he has agreed to become a member in respect of the shares registered in his name. In this there was an increase in the required qualification and a simultaneous

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within a reasonable time, acts without so qualifying, he is estopped from denying that he has the shares in respect of which he is actually registered; for having agreed to become a member he is deemed to be a member in respect of those registered shares (n). If, however, he is not put on the register before winding up, he is under no liability (o), unless under the articles he is to be deemed to have agreed to take the qualification shares (p).

A transfer of qualification shares with a view to avoid liability may be void as fraudulent (q).

Qualification
shares held
as a trustee
etc.

352. A director who is not bound to buy his qualification shares from the company is properly qualified if he holds in his name shares of which he is trustee (r), or which he receives as a present from the promoter by transfer or allotment (s). In the latter case,

issue of new shares in respect of which the plaintiff, as director, signed the prospectus as required by s. 80 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). The shares were registered in the plaintiff's name, without his knowledge, by the manager and secretary; but this, it was held, was ratified by the board by their making a subsequent call on the new shares (*Re Portuguese Consolidated Copper Mines, Ltd., Ex parte Badman, Ex parte Bosanquet* (1890), 45 Ch. D. 16, C. A.), it being of no moment that the plaintiff did not know his name was so registered. As regards "reasonable time," it was held that in the case of an established company the qualification ought to be obtained before acting under the new conditions as to capital. As to the effect of a director applying for shares as qualification in the place of other shares for which he had signed the memorandum, or when other shares had already been allotted to him, see *Duke's Case* (1876), 1 Ch. D. 620, doubting *Fowler's Case* (1872), L. R. 14 Eq. 316; and see *Re British and American Telegraph Co., Colquhoun's Case*, [1874] W. N. 49.

(n) *Molineaux v. London, Birmingham, and Manchester Insurance Co.*, [1902] 2 K. B. 589, C. A.; *Re Portuguese Consolidated Copper Mines, Ltd., Ex parte Inchiquin (Lord)*, [1891] 3 Ch. 28, C. A.; *Re Columbia Chemical Factory, Manure and Phosphate Works, Hewitt's Case, Brett's Case* (1883), 25 Ch. D. 283, C. A.; *Murray v. Bush* (1873), L. R. 6 H. L. 37; Companies Act, 1862 (25 & 26 Vict. c. 89), s. 23; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 24. As to the register being *prima facie* evidence, see p. 151, ante.

(o) *Hutchinson's Case*, [1895] 1 Ch. 226; compare *Re National Insurance etc. Association, Abercorn's (Lord) Case* (1862), 4 De G. F. & J. 78, C. A.

(p) *Issacs' Case*, [1892] 2 Ch. 158, C. A.; *Re Hercynia Copper Co.*, [1894] 2 Ch. 403; compare *Salton v. New Beeston Cycle Co.*, [1899] 1 Ch. 775.

(q) *Gilbert's Case* (1870), 5 Ch. App. 559; *Re South London Fish Market Co.* (1888), 39 Ch. D. 324, 331, C. A.

(r) *Pulbrook v. Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610; *Cooper v. Griffin*, [1892] 1 Q. B. 740, C. A.; *Howard v. Sadler*, [1893] 1 Q. B. 1; compare *Bainbridge v. Smith* (1889), 41 Ch. D. 462, 472, C. A.; *Re Bainbridge, Reeves v. Bainbridge*, [1889] W. N. 228. But if they are allotted to him on his own application he is liable, although the *cestui que trust* upon the application pays the deposit (*Levitt's Case* (1867), 3 Ch. App. 36), and the allotment to him of fully-paid vendors' shares will not absolve him from his liability as signatory of the memorandum (*Forbes and Judd's Case* (1870), 5 Ch. App. 270; *Hay's Case* (1875), 10 Ch. App. 593, where the shares were paid for out of money owing by the company to the vendor).

(s) *Brown's Case* (1873), 9 Ch. App. 102; *Carling, Hespeler and Walsh's Case* (1875), 1 Ch. D. 115, C. A. He may, however, be liable for misfeasance (*Nant-y-Glo and Blaenau Ironworks Co. v. Grave* (1878), 12 Ch. D. 738; and see *Miller's Case* (1877), 5 Ch. D. 70, C. A., where by the articles the qualification was to be provided by the company, and was forfeited on retirement, and the director was held not liable as shareholder). And if shares are allotted and paid for out of money of the company fraudulently obtained by a promoter,

however, he may be liable for undisclosed profit (t), and may be ordered to pay to the company the value of the shares.

Although holding shares as trustee fulfils the requirement of holding shares "in his own right," in spite of the beneficial interest being elsewhere, it is not sufficient if they are held by the director in a representative character, as where he is registered as trustee in bankruptcy or as executor or as liquidator (u). Nor is it sufficient where he is bankrupt and his shares therefore have vested in his trustee, after which the company can no longer deal with the shares as the director's own (w).

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353. If the holding of shares is a condition precedent to becoming a director, the election of an unqualified director is void, and he by acting may incur liabilities (a); but where it is not a condition precedent he may act before he qualifies (b).

Condition
precedent
to holding
office.

(iii.) *Remuneration.*

354. Directors are not, in the absence of a clause in the memorandum or articles of association providing for their being paid for their services, entitled to be paid any remuneration (c). Where express provision for remuneration is made they cannot legally resolve to pay

Remuneration
of directors.

they will be treated as unpaid although the director is innocent (*Leeke's Case* (1871), 6 Ch. App. 469; *Hay's Case* (1875), 10 Ch. App. 593); and see p. 54, *ante*.

(t) *De Ruvigne's Case* (1877), 5 Ch. D. 306, C. A.; *Pearson's Case* (1877), *ibid.*, p. 336, C. A.; *Re Great Northern and Midland Coal Co.*, *Currie's Case* (1863), 3 De G. J. & Sm. 367, C. A.; see p. 50, *ante*. If unpaid shares are allotted by mistake, this may be rectified by the company (*Hartley's Case* (1875), 10 Ch. App. 157).

(u) *Boschoek Proprietary Co., Ltd. v. Fuke*, [1906] 1 Ch. 148, in which instances the company could not deal with the shares as those of the registered holder. The articles may, however, contemplate that a man may be a director in a representative capacity (*Grundy v. Briggs*, [1910] 1 Ch. 444, *per* EVE, J., at p. 451).

(w) *Sutton v. English and Colonial Produce Co.*, [1902] 2 Ch. 502, where registration of subsequently acquired shares was enforced, the trustee not objecting. The words "in his own right" have not the same meaning in the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14; but under s. 27 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 30], notice on the register in any form of a trust is wrong (*Re Saunders (T. H.) & Co.* (1908), 24 T. L. R. 263); see p. 150, *ante*.

(a) *Hamley's Case* (1877), 5 Ch. D. 705; *Re Elham Valley Rail. Co.*, *Biron's Case* (1878), 26 W. R. 606; *Barber's Case* (1877), 5 Ch. D. 963, C. A.; *Jenner's Case* (1877), 7 Ch. D. 132, C. A.; compare *Stace and Worth's Case* (1869), 4 Ch. App. 682. Where the condition is the holding of shares "in his own right," it is sufficient if he holds them in such a way as that the company can deal with them as his (*Bainbridge v. Smith* (1889), 41 Ch. D. 463, C. A.; *Cumming v. Prescott* (1837), 2 Y. & C. (ex.) 488), or that they may have been mortgaged by an unregistered transfer (*Pulbrook v. Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610; compare *Re Bainbridge*, *Reeves v. Bainbridge*, [1889] W. N. 228). As regards creditors the shares are those of the beneficial owner (*Cooper v. Griffin*, [1892] 1 Q. B. 740, C. A.; *Howard v. Sadler*, [1893] 1 Q. B. 1).

(b) Compare *Re International Cable Co.* (1892), 8 T. L. R. 316; *Re Portuguese Consolidated Copper Mines, Ltd.* (1889), 42 Ch. D. 160, 164, C. A.

(c) *Dunston v. Imperial Gas Light Co.* (1832), 3 B. & Ad. 125; *Young v. Naval and Military and Civil Service Co-operative Society of South Africa*, [1905] 1 K. B. 687, where travelling and hotel expenses were disallowed; and see *York and North Midland Rail. Co. v. Hudson* (1853), 16 Beav. 485; but see *Marmor, Ltd. v. Alexander* (1907), 45 So. L. R. 100; *Re Whitehall Court* (1887), 3 T. L. R. 402; *Re Liverpool Household Stores Association* (1890), 59 L. J. (CH.) 616.

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themselves further sums as remuneration for their services without the sanction of a general meeting (d); nor can they recover anything on a *quantum meruit* (e). Sums improperly received as remuneration may be recovered in an action, or, in a winding up, by misfeasance summons (f). The remuneration of a director being a payment for services rendered, a director who holds his qualification shares as a trustee need not account for it to his *cestui que trust* (g).

How fixed
and payable.

355. The remuneration of directors is usually fixed by the articles (h), subject, of course, to alteration by special resolution (i), or to ratification, if increased, by ordinary resolution (j). Any such article must be stated in every prospectus issued within a year after the date at which the company is entitled to commence business (k).

When a qualification is required the date when remuneration commences depends on whether the director was empowered to act before acquiring the qualification (l). When once fixed in general meeting the remuneration runs from that time, unless the resolution is otherwise expressed; a reference in the subsequent balance-sheet to a sum charged from an earlier date will not bind the company (m).

Unless otherwise stated, the remuneration is payable although no profits are made (n). A fixed remuneration may be sued for, or

(d) *Evans v. Coventry* (1857), 8 De G. M. & G. 835, C. A.; *Re Newman (George) & Co.*, [1895] 1 Ch. 674, C. A., where all the shareholders agreed, but not at a meeting. If the shareholders are asked to sanction any extra remuneration the notice of any meeting must point out the matter very clearly to them (*Normandy v. Ind, Coope & Co., Ltd.*, [1908] 1 Ch. 84); and see *Burland v. Earle*, [1902] A. C. 83, P. O.; *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276; *Re London Gigantic Wheel Co.* (1908), 24 T. L. R. 618, C. A.

(e) *Hutton v. West Cork Rail. Co.* (1883), 23 Ch. D. 654, 671, C. A.; *Re Newman (George) & Co.*, *supra*; *Re Bodega Co., Ltd.*, *supra*, where a director continued to act as such after his office was vacated.

(f) *Re Newman (George) & Co.*, *supra*; *Re Bodega Co., Ltd.*, *supra*; *Re Orford Benefit Building and Investment Society* (1886), 35 Ch. D. 502. They will be ordered jointly and severally to repay with 5 per cent. interest as on a breach of trust (*Re Orford Benefit Building and Investment Society*, *supra*; *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787, C. A., where remuneration was only payable if a dividend had been paid); and compare *Re Whitehall Court* (1887), 56 L. T. 280, 281.

(g) *Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65, C. A.

(h) The articles are looked at to see the terms of the contract of service, though not forming the actual contract (*Re Peruvian Guano Co., Ex parte Kemp*, [1891] 3 Ch. 690, 701); see p. 81, *ante*. By the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. L, Table A, clause 69, "the remuneration of the directors shall from time to time be determined by the company in general meeting." The company cannot refuse to pay on the ground that the fees stated in the articles are excessive (*Re Anglo-Greek Steam Co.* (1866), L. R. 2 Eq. 1).

(i) *Boschoek Proprietary Co., Ltd. v. Fuke*, [1906] 1 Ch. 148.

(j) *Grant v. United Kingdom Switchback Railways Co.* (1893), 40 Ch. D. 135, C. A.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 81 (1) (b), (7), (8) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 10]; see p. 122, *ante*.

(l) *Re International Cable Co.* (1892), 68 L. T. 253; *Salton v. New Beeston Cycle Co.*, [1899] 1 Ch. 775; *Ex parte European Central Rail. Co., Walford's Case* (1869), 20 L. T. 74.

(m) *Re London Gigantic Wheel Co.*, *supra*.

(n) *Lewis's (Harvey) Case* (1872), 26 L. T. 673, C. A. There is no general

proved for in a winding up, although there is no resolution of the board that it should be paid (o).

If the remuneration is earned by the year, the amount is not apportionable, so that service for less than a whole year will not entitle a director to any fees (p). It is otherwise if the remuneration is payable "at the rate of" a fixed sum per annum (q).

A special resolution of the company altering directors' remuneration cannot be made retroactive against the wish of the directors (a) as regards remuneration actually earned.

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356. The remuneration is not due to the director in his character of member of the company. It may therefore be proved as a debt on winding up in competition with ordinary creditors (b); and this will be in addition to remuneration earned in any other capacity, such as receiver and manager in a debenture-holders' action (c).

Proof in
winding up.

Directors who are paid by a percentage of the dividend may prove for this in the winding up after creditors have been paid, if it was not unreasonable at the time to propose such dividend (d). If, however, they are paid by a percentage on "net profits," this refers to the company as a going concern and does not entitle them to a proportion of its assets on a sale of the undertaking (e).

presumption to the contrary (*Nell v. Atlanta Gold and Silver Consolidated Mines* (1895), 11 T. L. R. 407, C. A.). As to a resolution to forego remuneration, see *Kempf v. Offin River Gold Estates, Ltd.* (1908), *Times*, April 10, 1908.

(a) *Re New British Iron Co., Ex parte Beckwith*, [1898] 1 Ch. 324; *Nell v. Atlanta Gold and Silver Consolidated Mines, supra*. But no mandamus will lie by a director against the other directors to compel them to declare and allot remuneration (*Dashwood v. Cornish* (1897), 13 T. L. R. 337, C. A.); nor can an action be brought where the directors do not fix the time for payment, if that is left to their discretion (*Caridad Copper Mining Co. v. Swallow*, [1902] 2 K. B. 44, C. A.; see *McConnell's Claim*, [1901] 1 Ch. 728). Continuing directors with power to apportion remuneration among the directors may entirely deprive a retiring director (*Gilman v. Gülcher Electric Light Co.* (1886), 3 T. L. R. 133, C. A.).

(p) *McConnell's Claim, supra*; *Inman v. Ackroyd and Best, Ltd.*, [1901], 1 K. B. 613, C. A.; *Salton v. New Beeston Cycle Co.*, [1899] 1 Ch. 775; compare *Boschoek Proprietary Co., Ltd. v. Fuke*, [1906] 1 Ch. 148; *Re Central De Kaap Gold Mines* (1899), 69 L. J. (OH.) 18; *Kempf v. Offin River Gold Estates, Ltd., supra*; distinguish *Swabey v. Port Darwin Gold Mining Co.* (1889), 1 Meg. 385, C. A., where the company broke the contract of service in the course of a year; see *Re London and Northern Bank, Mack's Claim*, [1900] W. N. 114; *Re Shaws, Bryant & Co.*, [1901] W. N. 124.

(q) *Gilman v. Gülcher Electric Light Co., supra*; *Re Wood's Ships' Woodite Protection Co.* (1890), 62 L. T. 760; *Swabey v. Port Darwin Gold Mining Co., supra*; and see title RENTCHARGES AND ANNUITIES.

(a) *Swabey v. Port Darwin Gold Mining Co., supra*.

(b) *Re New British Iron Co., Ex parte Beckwith*, [1898] 1 Ch. 324; *Re Dale and Plant, Ltd.* (1889), 43 Ch. D. 255; *Re Commercial Life Assurance Association, Ex parte Johnson* (1857), 27 L. J. (OH.) 803; *Re Lundy Granite Co.* (1872), 20 W. R. 519, C. A.; *Re A1 Biscuit Co.*, [1899] W. N. 115; *Re Leicester Club and County Racecourse Co., Ex parte Cannon* (1885), 30 Ch. D. 629, cannot now be regarded as law.

(c) *Re South Western of Venezuela (Barguissimeto) Railway*, [1902] 1 Ch. 701.

(d) *Re Peruvian Guano Co., Ex parte Kemp*, [1894] 3 Ch. 690; *Stringer's Case* (1869), 4 Ch. App. 475.

(e) *Frames v. Bultfontein Mining Co.*, [1891] 1 Ch. 140; as to "realised profits," see *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502.

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Liability to
company.

The exercise by the directors of discretionary powers will not be interfered with in the absence of bad faith (*d*), but they must act reasonably, as, for instance, in the matter of approving transfers (*e*).

361. Directors acting as such within such of the powers of the company as are confided to them and without gross negligence, incur no personal liability except in the very rare case of those companies in which by the memorandum the liability of directors is unlimited (*f*). Where, however, they expend the property of the company in a manner which is *ultra vires* of the company, as in buying its own shares (*g*), or in paying a dividend out of capital (*h*), there is a liability on them, which is only limited by the obligation to recoup the loss, and, if they occasion damage to the company by gross negligence, by the amount of the damage caused. In the case of such *ultra vires* acts any shareholder can take action (*i*); but in the case of gross negligence, the company may, if there is no fraud, ratify the act or omission (*k*).

Liability to
creditors.

362. Directors are not trustees for the creditors of the company (*l*). The latter, therefore, except as holders of security on any property of the company, and for the purpose of realising their security, have no right of interference with the company or its affairs, and have no remedy against a director for negligence in the conduct of its business (*m*) or for breach of contract by the company (*n*). Nor can a creditor obtain an injunction against either the company or its directors in respect of *ultra vires* acts (*o*). On

2 Ch. 506; compare *Abbotsford Hotel, Ltd. v. Kingham* (1910), 102 L. T. 118; or draw bills for other purposes (*Balfour v. Ernest* (1859), 5 C. B. (N. S.) 601); or summon a company meeting at such a date as to prevent shareholders voting (*Cannon v. Trask* (1875), L. R. 20 Eq. 669), or on misleading notice (*Alexander v. Simpson* (1889), 43 Ch. D. 139, C. A.; *Jackson v. Munster Bank* (1884), 13 L. R. Ir. 118); or prevent a properly-elected director acting (*Pulbrook v. Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610; *Munster v. Cammell Co.* (1882), 21 Ch. D. 183; *Kyshe v. Alturas Gold Co.* (1888), 36 W. R. 496; *Harben v. Phillips* (1883), 23 Ch. D. 14, C. A.).

(*d*) As, for instance, in making calls (*Dailey v. Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (1849), 12 Beav. 433); compare *Turquand v. Marshall* (1867), 4 Ch. App. 376, 386; *Cannon v. Trask* (1875), L. R. 20 Eq. 669.

(*e*) *Robinson v. Chartered Bank* (1865), L. R. 1 Eq. 32; in the absence of evidence to the contrary the court will take it for granted that they have acted reasonably and in good faith (*Re Gresham Life Assurance Society, Ex parte Penney* (1872), 8 Ch. App. 446); see note (*f*), p. 187, *ante*. As to the liability of directors on contracts made in their own names, see p. 295, *post*.

(*f*) See p. 70, *ante*.

(*g*) See p. 104.

(*h*) *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, C. A., at p. 166.

(*i*) See p. 289, *post*.

(*k*) *Ibid*.

(*l*) *Poole, Jackson and White's Case* (1878), 9 Ch. D. 322, C. A., where directors paid up their shares in full, whereby a creditor was preferred in obtaining payment and they themselves were relieved from liability as guarantors; *Re Wood's Ships' Woodite Protection Co.* (1890), 2 Meg. 164. The test is that no action at law would lie (*Sturt v. Mellish* (1743), 2 Atk. 610).

(*m*) *Wilson v. Bury (Lord)* (1880), 5 Q. B. D. 518, C. A.

(*n*) *Ferguson v. Wilson* (1866), 2 Ch. App. 77, where an action was founded on a resolution of the board to allot shares to plaintiff.

(*o*) *Mills v. Northern Rail. of Buenos Ayres Co.* (1870), 5 Ch. App. 621.

the other hand, the rule making the directors liable for *ultra vires* acts operates to preserve or replace capital of the company which should be available for payment of creditors (*p*), whose interests are further specially guarded in case the company seeks to reduce its capital with the sanction of the court (*q*).

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363. Articles of association generally give directors very large powers as to the control and management of the company and its affairs (*r*). The powers given by Table A are often amplified by special articles which expressly place the control of the company in the hands of the directors.

Power to
control
company.

Directors who have the full powers of the company subject to such regulations, not inconsistent with the articles, as may be made by extraordinary resolution of the company, cannot be controlled by an ordinary resolution of the majority of the shareholders in general meeting (*s*). An agreement subsequently made by the company inconsistent with the powers of the directors, as for instance with a manager of one department, will not give him a right of action (*t*). Where no power is reserved to the company to control the action of the directors when acting within the powers conferred on them by the articles, the articles must be altered by special resolution, so as to give the company the power (*u*). But if the powers of the directors are expressed to be "subject to such regulations, not inconsistent with the articles, as may be prescribed by the company in general meeting," a simple majority of members at a meeting may be able to control the actions of the directors (*w*), unless the resolution passed is inconsistent with some article (*a*).

How far
controllable
by members.

364. Directors may do whatever is fairly incidental to the exercise of their powers in carrying out the objects of the company (*b*).

General
powers.

(*p*) See p. 478, *post*.

(*q*) See p. 110, *ante*.

(*r*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 71: "The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the said Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made." See also *Encyclopædia of Forms*, Vol IV., p. 380.

(*s*) *Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cuninghame*, [1906] 2 Ch. 34, O. A.

(*t*) *Horn v. Faulder (Henry) & Co., Ltd.* (1908), 99 L. T. 524.

(*u*) *Quin and Axtens, Ltd. v. Salmon*, [1909] A. C. 442; and see *Gramophone and Typewriter, Ltd. v. Stanley*, [1908] 2 K. B. 89, 105, O. A. This is the proper method of altering articles; see p. 207, *ante*.

(*w*) *Quin and Axtens, Ltd. v. Salmon*, *supra*.

(*a*) *Marshall's Valve Gear Co., Ltd. v. Manning, Wardle & Co., Ltd.*, [1909] 1 Ch. 267.

(*b*) *Hutton v. West Cork Rail. Co.* (1883), 23 Ch. D. 654, O. A. They may bring an action in the name of the company (*La Compagnie de Mayville v. Whitley*, [1896] 1 Ch. 788, 803, O. A.), or petition in bankruptcy (*Re*

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ment.

The question of the limitation of the powers of directors has often arisen in connection with powers of borrowing and mortgaging. Where they have a power to mortgage they may exercise it to secure a past debt(c), provided that this does not constitute a fraudulent preference, or to secure sums owing upon a bill of exchange given by directors for a debt of the company(d), or to secure a guarantee or by way of indemnity(e). They may issue debentures to satisfy the creditors of a purchased business or in payment of the vendor(f).

Delegation of
powers.

365. Directors cannot, without special authority to do so, delegate their duties or powers(g), nor can they exclude a member or members of the board and so form a committee of themselves to the exclusion of one or more of their number(h).

Articles of association, however, generally confer authority on

& Co., [1901] 1 K. B. 476, C. A.); give gratuities to the servants (*Hampson v. Price's Patent Candle Co.* (1876), 45 L. J. (CH.) 437), without interference by the company itself in meeting, issue negotiable instruments, if the company has that power (*Re Peruvian Railways Co.*, *Peruvian Railways Co. v. Thames and Mersey Marine Insurance Co.* (1867), 2 Ch. App. 617); if directors of an insurance company, they may pay losses beyond those insured against (*Taunton v. Royal Insurance Co.* (1864), 2 Hem. & M. 135); they may grant pensions to the family of a manager (*Henderson v. Bank of Australasia* (1888), 40 Ch. D. 170), or to old retired servants or officers (*Cyclists' Touring Club v. Hopkinson*, [1910] 1 Ch. 179); may borrow and give security (*Gibbs and West's Case* (1870), L. R. 10 Eq. 312; *Re Pyle Works* (No. 2), [1891] 1 Ch. 173, 186; *General Auction Estate and Monetary Co. v. Smith*, [1891] 3 Ch. 432); and give security for an antecedent debt (*Re Patent File Co.*, *Ex parte Birmingham Banking Co.* (1870), 6 Ch. App. 83; *Owen and Ashworth's Claim*, *Whitworth's Claim*, [1901] 1 Ch. 115, C. A.; *Pegge v. Neath and District Tramways Co., Ltd.*, [1898] 1 Ch. 183); issue debentures at a discount (*Re Anglo-Danubian Steam Navigation and Colliery Co.* (1875), L. R. 20 Eq. 339, 341); and without special authorisation, and subject to any reservation contained in the articles, directors may make calls (*Ambergate, Nottingham and Boston and Eastern Junction Rail. Co. v. Mitchell* (1849), 4 Exch. 540); enter into a compromise (*Bath's Case* (1878), 8 Ch. D. 334, C. A.); and maintain a servant of the company in litigation arising out of his service (*Elborough v. Ayres* (1870), L. R. 10 Eq. 367). Directors may pay reasonable brokerage on the issue of shares (*Metropolitan Coal Consumers' Association v. Scrimgeour*, [1895] 2 Q. B. 604, C. A.). As to paying promotion expenses, see p. 56, ante. In *London Financial Association v. Kelk* (1884), 26 Ch. D. 107, C. A., directors with very extensive powers were held justified in acquiring an estate for another company to build the Alexandra Palace and in promoting a subsidiary company, and in *Sheffield and South Yorkshire Permanent Building Society v. Aizlewood* (1889), 44 Ch. D. 412, in advancing on speculative buildings etc.; and see *Butler v. Northern Territories Mines of Australia, Ltd.* (1906), 96 L. T. 41.

(c) *Shears v. Jacob* (1866), L. R. 1 C. P. 513; *Re Inns of Court Hotel Co.* (1868), L. R. 6 Eq. 82; *Re Patent File Co.*, *Ex parte Birmingham Banking Co.*, *supra*; *Australian Auxiliary Steam Clipper Co. v. Mounsey* (1858), 4 K. & G. 733.

(d) *Scott v. Colburn* (1858), 26 Beav. 270.

(e) *Re Pyle Works* (No. 2), *supra*.

(f) *Salomon v. Salomon & Co.*, [1897] A. C. 22.

(g) *Howard's Case* (1866), 1 Ch. App. 561 (allotment of shares); *Southampton Dock Co. v. Richards* (1840), 1 Mar. & G. 448 (making call). Where there is a power, a stranger contracting with the company is protected although it has not been properly exercised (*Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.); and see p. 301, post. Compare *Premier Industrial Bank, Ltd. v. Carlton Manufacturing Co., Ltd.*, and *Crabtree, Ltd.*, [1909] 1 K. B. 106. As to parting with the right to control the business, see *Horn v. Faulder (Henry) & Co.* (1908), 99 L. T. 524.

(h) *Kyshe v. Alturas Gold, Ltd.* (1888), 4 T. L. R. 331,

the directors to delegate their powers to committees and managing directors (*i*). Where they have sufficient powers of delegation they may delegate the whole of their powers to a single director (*k*), but must use such ordinary prudence as a man would use in his own case.

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Where powers are properly delegated the directors are absolved from liability for reliance on the delegates (*l*).

Where powers are delegated to a committee and there is no provision for a quorum, the whole of a committee must meet and then act by a majority, and the committee have no power to add to their number or supply a vacancy (*m*). Any excess in the exercise of their powers may be ratified by the directors (*n*), who do not in fact divest themselves of power by delegation (*o*), or, if need be, by the company. Business informally transacted may, generally speaking, be ratified by a subsequent meeting (*p*).

(v.) *Liabilities.*

366. Directors may incur liability to persons who subscribe for the company's shares or debentures in reliance upon a prospectus which contains material misrepresentations of fact (*q*). False statements.

(*i*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 91: "The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on them by the directors" (see p. 236, *post*); and clause 72: "The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors; but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined" (see *Harben v. Phillips* (1883), 23 Ch. D. 14, 39, C. A.; compare *Bainbridge v. Smith* (1889), 41 Ch. D. 462, 474, C. A.; *Horn v. Faulder (Henry) & Co., Ltd.* (1908), 99 L. T. 524). Even without this clause a managing director vacates that office on ceasing to be a director (*Bluett v. Stutchbury's, Ltd.* (1908), 24 T. L. R. 469, C. A.; *Re Alexander's Timber Co.* (1901), 70 L. J. (CH.) 767). Directors have no power to delegate to a general manager powers which they would not themselves possess unless expressly given to them (*Cartmell's Case* (1874), 9 Ch. App. 691; compare *Gibson v. Barton* (1875), L. R. 10 Q. B. 329, 336); nor have they in fact any general power to appoint a managing director (*Boschoek Proprietary Co., Ltd. v. Fuks*, [1906] 1 Ch. 148, 159). A managing director is an ordinary director invested with special powers (*Re Newspaper Proprietary Syndicate, Ltd., Hopkinson v. Newspaper Proprietary Syndicate, Ltd.*, [1900] 2 Ch. 349, 350). As to presuming delegation, see *Totterdell v. Farcham Brick Co.* (1866), L. R. 1 C. P. 674.

(*k*) *Re Taurine Co.* (1883), 25 Ch. D. 118, C. A.; *MacLagan's Case* (1882), 51 L. J. (CH.) 841; *Harris' Case* (1872), 7 Ch. App. 587 (committee for allotment).

(*l*) *Weir v. Bell* (1878), 3 Ex. D. 238, C. A.; see note (*l*), p. 236, *post*.

(*m*) *Re Liverpool Household Stores Association* (1890), 59 L. J. (CH.) 616.

(*n*) *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295, C. A.; *Re Portuguese Consolidated Copper Mines, Ltd., Ex parte Badman, Ex parte Bosanquet* (1890), 45 Ch. D. 16; *Hooper v. Kerr, Stuart & Co., Ltd.* (1900), 83 L. T. 729.

(*o*) *Huth v. Clarke* (1890), 25 Q. B. D. 391.

(*p*) *Re Phosphate of Lime Co., Austin's Case* (1871), 24 L. T. 932.

(*q*) See p. 136, *ante*.

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How far
directors are
trustees of
the company's
property.

They may also incur liability by reason of false reports made by them to the company with the intention of attracting investors, and acted on by a subsequent investor to his damage (*r*), but not by reason of a false report to the Stock Exchange Committee by which a quotation of the company's shares has been obtained (*s*).

367. Directors are trustees of the property of the company in their hands or under their control (*t*), and must account to the company for all such property, subject to any right of set-off or counter-claim (*a*). But they may nevertheless purchase from a creditor of the company securities which owing to an irregularity would have been invalid if issued directly to them (*b*), unless they have been issued in fraud of the company (*c*). They are not trustees for individual shareholders (*d*) or for the creditors of the company (*e*).

Unless so directed by the articles, directors are not bound to invest the funds, such as, for instance, reserve funds of the company, only in securities which a trustee may invest in, but may purchase such securities as they consider to be most beneficial for the company (*f*). They may invest in the name of a sole trustee (*f*), and lend on securities of a speculative nature (*g*). But they are liable in respect of an investment made contrary to a resolution of the company directing a different investment (*h*).

A director who has misapplied, or retained, or become liable or accountable for any money or property of the company, or who has been guilty of any breach of trust in relation to the company, must, at any rate in the absence of ratification, make restoration or compensate the company for the loss (*i*). Where the money of the company has been applied for purposes which the company cannot sanction, the directors must replace it, however honestly they may have acted (*j*).

(*r*) *Scott v. Dixon* (1859), 29 L. J. (EX.) 62, n.

(*s*) *Peck v. Gurney* (1873), L. R. 6 H. L. 377, 397, overruling *Bedford v. Bagshaw* (1859), 4 H. & N. 538.

(*t*) *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141; *Flitcroft's Case* (1882), 21 Ch. D. 519, C. A.; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, C. A.; *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502, 509; *Great Eastern Rail. Co. v. Turner* (1872), 8 Ch. App. 149, 152.

(*a*) *Cramer v. Bird* (1868), L. R. 6 Eq. 143; *Re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450; *Re Lands Allotment Co.*, [1894] 1 Ch. 616, 631, C. A.

(*b*) *Owen and Ashworth's Claim, Whitworth's Claim*, [1901] 1 Ch. 115, C. A.

(*c*) *Re Imperial Land Co. of Marseilles, Ex parte Larking* (1877), 4 Ch. D. 566, C. A.

(*d*) They may therefore purchase shares without disclosing advantageous prospects of the company (*Percival v. Wright*, [1902] 2 Ch. 421; *Gilbert's Case* (1870), 5 Ch. App. 559).

(*e*) See p. 222, *ante*.

(*f*) *Burland v. Earle*, [1902] A. C. 83, 97, P. C.

(*g*) Compare *Sheffield and South Yorkshire Permanent Building Society v. Aislewood* (1889), 44 Ch. D. 412.

(*h*) *Re British Guardian Life Assurance Co.* (1880), 14 Ch. D. 335.

(*i*) *Land Credit Co. of Ireland v. Fermoy (Lord)* (1870), 5 Ch. App. 763 (company's money used for purchasing its shares); *Joint Stock Discount Co. v. Brown* (1869), L. R. 8 Eq. 381 (buying shares in another company). Proceedings are generally taken in the winding up of the company; see p. 478, *post*.

(*j*) *Re Sharpe, Re Bennett Masonic and General Life Assurance Co. v. Sharpe*,

368. A director is liable for the acts of his co-directors, if, knowing that they intend to commit a breach of trust, he does not, by applying for an injunction or otherwise (*k*), prevent it. A managing director is equally responsible although required "to act under the orders and directions of the board" (*l*). But a director is not so liable where he does not know of the breach of trust before or at its occurrence, and does not expressly or tacitly concur in its continuance (*m*). Merely attending a directors' meeting which confirms the illegal acts of a past meeting is not sufficient to fix responsibility (*n*).

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Acts of
co-directors.

A director who *bonâ fide* accepts and acts upon the report of a finance committee is not liable for a wrongful payment made in pursuance of it (*o*). Where not
liable.

A director who has in fact retired is not liable for subsequent statements or acts, although he may know that his name is appearing on a report which is impugned (*p*).

A director is not liable for the misapplication of a cheque properly drawn (*q*), or for omitting to claim a debt to the company, or to enforce a liability incurred to his knowledge before he joined the board (*r*).

If money wrongfully paid has been replaced before litigation either specifically or by *contra* accounts, the directors cannot be ordered to pay the costs of misfeasance proceedings (*s*).

Directors may not use the funds of the company in payment of their own costs (*t*), although these would not have been incurred if they had not been directors.

[1892] 1 Ch. 154, 165, C. A.; *Cullerne v. London and Suburban General Permanent Building Society* (1890), 25 Q. B. D. 485, 490, C. A., overruling *Pickering v. Stephenson* (1872), L. R. 14 Eq. 322; see *Peel v. London and North Western Railway*, [1907] 1 Ch. 5, 20, C. A.; *London Trust Co. v. Mackenzie* (1893), 62 L. J. (CH.) 870; *contra, Re Kingston Cotton Mill Co. (No. 2)*, [1896] 1 Ch. 331, 346, reversed on one point, [1896] 2 Ch. 279, C. A.

(*k*) *Re Lands Allotment Co.*, [1894] 1 Ch. 616, C. A.; compare *Coats (J. & P.) v. Crossland* (1904), 20 T. L. R. 800. A protest is not sufficient (*Jackson v. Munster Bank* (1885), 15 L. R. Ir. 356; *Joint Stock Discount Co. v. Brown*, (1869), L. R. 8 Eq. 381); see *Ramskill v. Edwards* (1885), 31 Ch. D. 100, 111; *Land Credit Co. of Ireland v. Fermoy (Lord)* (1870), 5 Ch. App. 763; *London Trust Co. v. Mackenzie, supra*. Acquiescence is not to be too readily inferred (*Ashurst v. Mason* (1875), L. R. 20 Eq. 225; *Jones v. Smith* (1841), 1 Hare, 43).

(*l*) *Ramskill v. Edwards, supra*.

(*m*) *Cargill v. Bower* (1878), 10 Ch. D. 502; *Caledonian Heritable Security Co. (Liquidator) v. Curror's Trustees* (1892), 9 R. (Ct. of Sess.) 1115 (loan without security); *Re Denham & Co.* (1883), 25 Ch. D. 752 (dividends paid out of capital).

(*n*) *Re Montrotier Asphalte Co., Perry's Case* (1876), 34 L. T. 716; *Ashurst v. Mason, supra*.

(*o*) *Re Railway and General Light Improvement Co., Marzetti's Case* (1880), 42 L. T. 206, C. A.; compare *Land Credit Co. of Ireland v. Fermoy (Lord)*, *supra*.

(*p*) *Dovey v. Cory*, [1901] A. C. 477.

(*q*) *Re Montrotier Asphalte Co., Perry's Case, supra*. But he may be liable if he signs without inquiry a cheque improperly drawn (*Joint Stock Discount Co. v. Brown* (1869), L. R. 8 Eq. 381, 404; compare *Ramskill v. Edwards, supra*).

(*r*) *Re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450.

(*s*) *Re Ireland & Co.*, [1905] 1 I. R. 133, C. A.

(*t*) *Pickering v. Stephenson* (1872), L. R. 14 Eq. 322 (costs of prosecution for libel on themselves); *Studdert v. Grosvenor* (1886), 33 Ch. D. 528. These they

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Fiduciary
position.

369. A director is liable to the company for any unauthorised profits made by him in virtue of his office (*u*). If, however, he is acting in the interest of the company, he is not liable merely because he is also promoting his own interest (*a*).

In all cases in which a director becomes entitled to profits in fraud of the company the latter can recover from the promisor the bribe or so much of it as is still in his hands as money received to its use (*b*). The fact that the payer and the director have agreed subsequently to accept a smaller sum in prompt settlement and that this has been recovered from the director in full satisfaction of all claims against him is no defence to the promisor for the balance (*b*). The company can also recover against the person who pays the bribe damages for any loss sustained through entering on a disadvantageous contract (*c*), or it can rescind the contract (*d*). The contract can be enforced by the company against the director if he has contracted as principal, deducting the amount of the secret profit (*e*).

The director is liable as debtor only, and the company cannot follow the profit or bribe as trust property (*f*).

Where a director sells property to his company, without disclosing his interest, the latter may, on discovery, either rescind the sale, if that is still practicable, or affirm the sale and sue for the profits (*g*), in which case it must prove non-disclosure and unfairness of

must repay (*Cullerne v. London and Suburban General Permanent Building Society* (1890), 25 Q. B. D. 485, 490, C. A.; *Re Liverpool Household Stores Association* (1890), 59 L. J. (CH.) 616); but costs of a prosecution for libel on the company itself, if properly incurred, must be paid by the company (*Studdert v. Grosvenor* (1886), 33 Ch. D. 528; but see *Kernaghan v. Williams* (1868), L. R. 6 Eq. 228). Directors cannot charge the company with the costs of an unsuccessful petition to wind up, presented by themselves, or of an unsuccessful appeal (*Smith v. Manchester (Duke)* (1883), 24 Ch. D. 611), although authorised by the articles to take proceedings etc.

(*u*) *Parker v. McKenna* (1874), 10 Ch. App. 96, where directors had to account for profits made in dealings with new capital. This applies to a person who has agreed to become a director (*Henderson v. Huntingdon Copper and Sulphur Co.* (1878), 5 B. (Ct. of Sess.) 1, H. L.; *Albion Steel and Wire Co. v. Martin* (1875), 1 Ch. D. 580), and to persons entering into contracts on behalf of an intended company (*Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394, C. A.), and to a *de facto* director; see generally p. 226, *ante*; p. 229, *post*.

(*a*) *Hirsche v. Sims*, [1894] A. C. 654, 660, C. A.

(*b*) *Grant v. Gold Exploration and Development Syndicate*, [1900] 1 Q. B. 233, C. A. The principle that a person in a fiduciary position must not make secret profits is not based on actual fraud, but on motives of public policy (*Bray v. Ford*, [1896] A. C. 44; *Harrington v. Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549, C. A., where it was held that although the person to whom the bribe is payable has not in fact been perverted, he cannot recover the bribe in an action). As to bribery of agents generally, see title AGENCY, Vol. I., p. 189.

(*c*) *Salford Corporation v. Lever*, [1891] 1 Q. B. 168, C. A.; see *Grant v. Gold Exploration and Development Syndicate*, *supra*, at p. 244.

(*d*) *Panama and South Pacific Telegraph Co. v. India Rubber, Gutta Percha and Telegraph Works Co.* (1875), 10 Ch. App. 515.

(*e*) *Whaley Bridge Printing Co. v. Green* (1879), 5 Q. B. D. 109.

(*f*) *Re Thorpe, Vipont v. Radcliffe*, [1891] 2 Ch. 360; *Lister & Co. v. Stubbs* (1890), 45 Ch. D. 1, C. A.

(*g*) *Benson v. Henthorn* (1842), 1 Y. & C. Ch. Cas. 326; see *Cavendish-Bentinck v. Fenn* (1887), 12 App. Cas. 652, 658.

price (h). If he acquired his interest in the property before he became a director, he can only be compelled to make good any profits which are in excess of the market value (i), though he ought to disclose the fact that he is interested (j), and the amount of the profit which he is making (k).

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370. A contract between a company and a director or his firm (l) is voidable at the option of the company, unless sanctioned by its constitution expressly or by necessary implication (m) and made in conformity therewith (n). The contract being voidable, and not void, can be affirmed by the company when in possession of full information (o).

Contract
between
company and
its directors.

In order that the director may retain profit which he has made on a contract with the company, it is not enough that he should reveal the existence of his interest without specifying exactly what it is. No ratification can take place in the absence of full disclosure (p); but if this is given on full notice convening the meeting, the company may by ordinary resolution confirm the contract (q).

If the company objects after obtaining full information, it is immaterial that the terms are advantageous to it (r). A director cannot act on its behalf as regards such a contract, and must make full disclosure of his interest therein, otherwise the contract will not be specifically enforced (s), and the director cannot retain the

(h) *Cavendish-Bentinck v. Fenn* (1887), 12 App. Cas. 652, 658; *Ladywell Mining Co. v. Brookes* (1886), 34 Ch. D. 398; see p. 52, *ante*; and p. 296, *post*.

(i) *Cavendish-Bentinck v. Fenn*, *supra*.

(j) *Ibid*.

(k) *Re Lady Forrest (Murchison) Gold Mine, Ltd.*, [1901] 1 Ch. 582

(l) *Flanagan v. Great Western Rail. Co.* (1868), L. R. 7 Eq. 116.

(m) As, for instance, such a provision as clause 77 of Table A of the Act of 1908 (*Costa Rica Railroad Co., Ltd. v. Forwood*, [1900] 1 Ch. 756). That clause provides that the office of a director shall be vacated if he "is concerned or participates in the profits of any contract with the company: Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is director: but a director shall not vote in respect of any such contract or work, and if he does so vote his vote shall not be counted."

(n) *Aberdeen Rail. Co. v. Blakie Brothers* (1853), 1 Macq. 461, H. L.; *Ernest v. Nicholls* (1857), 6 H. L. Cas. 401; *Ridley v. Plymouth Grinding and Baking Co.* (1848), 2 Exch. 711; *Albion Steel and Wire Co. v. Martin* (1875), 1 Ch. D. 580. A contract is made with a director if he is elected an honorary director until completion and an ordinary director afterwards (*Stears v. South Essex Gas-light and Coke Co.* (1860), 9 C. B. (N. S.) 180; and see *Re British America Corporation* (1903), 19 T. L. R. 662; *Exploring Land and Minerals Co. v. Kolckmann* (1905), 94 L. T. 234, C. A.).

(o) *North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 598, P. C.; *Grant v. United Kingdom Switchback Railways Co.* (1888), 40 Ch. D. 135, C. A.; *Murray's Executors' Case* (1854), 5 De G. M. & G. 746, C. A.

(p) *Imperial Mercantile Credit Association (Liquidators) v. Coleman* (1873), L. R. 6 H. L. 189, where the articles required the director to vacate his seat if he did not "declare his interest" in any contract; and see *Dunne v. English* (1874), L. R. 18 Eq. 524.

(q) See *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358, C. A.

(r) *Aberdeen Rail. Co. v. Blakie Brothers*, *supra*.

(s) *Flanagan v. Great Western Rail. Co.*, *supra*; *Imperial Mercantile Credit Association (Liquidators) v. Coleman*, *supra*.

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profits, except on running trade contracts taken over by the company on the acquisition of the business (t). The fact that as between himself and his co-directors the whole matter was above-board is not sufficient in the case of a public company (u).

A company may by apt words in its articles waive its right to full disclosure (w).

The identity of the vendors to a company with the directors of the company is notice to the company that the board is not independent and is probably making a profit (a).

Remunera-
tion of
nominee
director.

A company owning shares in a second company, which are transferred to one of its own directors in order to qualify him as director of the second company to represent its interests is not entitled to claim from such director his remuneration as director of the second company (b).

Voting as
shareholder.

Although a director may not as such vote in respect of his contract with the company, he may vote as a shareholder (c).

Insolvent
company.

371. Directors of an insolvent company cannot use their powers to benefit themselves in view of an approaching winding up (d).

A director to whom a debt is owing by the company is not in such a good position as an outside creditor, and where he is cognisant that the company is insolvent he cannot by pressure obtain a valid security for his debt (e).

Imprudence
etc.

372. Facts which may show imprudence in the exercise of powers clearly conferred upon directors will not subject them to personal responsibility unless the imprudence amounts to *crassa negligentia*, which must be distinctly charged (f). If they act within their powers they are not liable for loss to the company occasioned by mere imprudence or error of judgment (g), and,

(t) *Albion Steel and Wire Co. v. Martin* (1875), 1 Ch. D. 580.

(u) *Ibid.*; compare *Bray v. Ford*, [1896] A. C. 44. As to disclosing his interest in the prospectus, see p. 124, *ante*.

(w) *Imperial Mercantile Credit Association v. Coleman* (1871), 6 Ch. App. 558, reversed without affecting this point (1873), L. R. 6 H. L. 189; *Costa Rica Rail. Co., Ltd. v. Forwood*, [1901] 1 Ch. 746, 760, C. A.

(a) *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, C. A.; *Re Lady Forrest (Murchison) Gold Mine, Ltd.*, [1901] 1 Ch. 582.

(b) *Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65, C. A.

(c) *East Pant Du United Lead Mining Co., Ltd. v. Merryweather* (1864), 2 Hem. & M. 254; see *North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 598, P. C.

(d) *Sykes' Case* (1872), L. R. 13 Eq. 255.

(e) *Gaslight Improvement Co. v. Terrell* (1870), L. R. 10 Eq. 168; as to fraudulent preference in a winding up, see p. 544, *post*.

(f) *Overend and Gurney Co. v. Gibb* (1872), L. R. 5 H. L. 480, 487, 495; *Ashurst v. Mason* (1875), L. R. 20 Eq. 225; *Lagunas Nitrate Co. v. Lagunas Syndicate*, *supra*, at p. 435; *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, C. A.

(g) *Charitable Corporation v. Sutton* (1742), 2 Atk. 400, 405. As, for instance, making loans (*Dovey v. Cory*, [1901] A. C. 477, affirming *Re National Bank of Wales, Ltd.*, *supra*) on the security of the directors' shares (*Re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577); without security, but for authorised promotion purposes (*Lainford v. Keith (James) and Blackman Co., Ltd.*, [1903] 2 Ch. 147, C. A.); to a confidential servant (*Turquand*

especially in matters of investment, they need not act with the care of trustees (*h*).

A director is not liable for untrue representations made to the shareholders if he honestly believed the representations to be true, and had reasonable grounds for his belief (*i*). Where a company is formed to take over an existing business which turns out to be ruinous, the directors will not be responsible for making the purchase unless the ruinous nature of the business is obvious, on the same principle that protects an agent purchasing by authority of his principal (*k*).

Where an alleged misfeasance consists of an act which is not *ultra vires* of the company and not fraudulent or dishonest, the directors are not liable unless it can be shown that they did not really exercise their discretion and judgment as such directors, and that the omission to do so resulted in loss or damage to the company (*l*).

They are not guilty of negligence if they act in reliance on the officers of the company whom they are entitled to trust and whose reports and statements have misled them (*m*). Nor are they bound to know the contents of the company's books (*n*), and

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Negligence.

v. Marshall (1869), 4 Ch. App. 376; *Grimwade v. Mutual Society* (1885), 52 L. T. 409; *Re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577; approving transfer of partly-paid shares (*Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141; but see *Re Hoylake Rail. Co.*, *Ex parte Littledale* (1874), 9 Ch. App. 257, where calls were due); including bad debts as good in balance-sheet (*Re Railway and General Light Improvement Co.*, *Marzetti's Case* (1880), 28 W. R. 541, C. A.; *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, C. A.); or allowing calls to remain unpaid (*Re Liverpool Household Stores Association* (1890), 59 L. J. (CH.) 616), or not suing for a debt (*Re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450; see *London Financial Association v. Kelk* (1884), 26 Ch. D. 107); but they may be ordered, though successful, to pay the costs (*Re Ireland & Co.*, [1905] 1 I. R. 133, C. A.). As to improper payment of dividends, see p. 275, *post*.

(*h*) *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787, 798; *Sheffield and South Yorkshire Permanent Building Society v. Aizlewood* (1889), 44 Ch. D. 454, 459.

(*i*) *Dovey v. Cory*, [1901] A. C. 477. As to liability for misrepresentation in a prospectus, see p. 136, *ante*.

(*k*) *Overend and Gurney Co. v. Gibb* (1872), L. R. 5 H. L. 480, 487, 495.

(*l*) *Re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577; *Re Anglo-French Co-operative Society, Ex parte Pelly* (1882), 21 Ch. D. 492, C. A., where they were held liable for paying an excessive amount for preliminary expenses without investigation; compare *Re Englefield Colliery Co.* (1878), 8 Ch. D. 388, C. A.; *Re Faure Electric Accumulators Co.*, *supra*.

(*m*) *Dovey v. Cory*, *supra*, affirming *Re National Bank of Wales, Ltd.*, *supra*; *Prefontaine v. Grenier*, [1907] A. C. 101, P. O. As to directors being trustees, see *Re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450; and p. 226, *ante*. A paid director is in a worse position than a gratuitous trustee (*Re Railway and General Light Improvement Co.*, *Marzetti's Case*, *supra*). As to signing cheques, see *Joint Stock Discount Co. v. Brown* (1869), L. R. 8 Eq. 381, 404; and p. 227, *ante*.

(*n*) *Hallmark's Case* (1878), 9 Ch. D. 329, C. A., where there was no obligation on the director to take shares, and knowledge that his name was on the share register was not imputed to him; *Re Printing Telegraph and Construction Co. of the Agence Havas, Ex parte Cammell*, [1894] 1 Ch. 529, where the director retired at the end of the time required to qualify; *Dovey v. Cory*, *supra*, at p. 492 (knowledge of the financial state of the company and reliance on statement of officers), following *Re Denham & Co.* (1883), 25 Ch. D. 752; *Cartmell's Case* (1874), 9 Ch. App. 691 (knowledge of the contents of the share register and

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they are not therefore negligent if they act in ignorance of their contents.

On the other hand, if they appear to the court not to have acted as men with any ordinary degree of prudence would have acted on their own behalf, they have been guilty of such negligence and misconduct as to make them liable to the company (o).

Estoppel of
company.

The company may by its subsequent acts become estopped from claiming from a director any damages for negligence, as where it adopts the same course of dealing or takes advantage of transactions initiated by him (p).

Inert and
absent
directors.

A director is liable if, knowing of an intended breach of trust, he takes no steps to prevent it (q). It has been suggested, but not decided, that absent directors are liable for wrongful acts committed by their co-directors which would not have been committed if the absent directors had attended certain meetings (r).

Relief against
liability.

In any proceeding against a director or person occupying the position of director for negligence or breach of trust the court is now empowered to give the relief which it may give in the case of a trustee (s).

Joint and
several
liability.

The liability of directors participating in breaches of trust and in respect of secret profits is joint and several (t).

The estate of a deceased director is liable for his breaches of trust (u), but not for his acts of negligence (x) or perhaps for his misrepresentations in a prospectus (a).

entries in other books showing purchase of company's shares); see *Turquand v. Marshall* (1868), L. R. 6 Eq. 112; *Re British Provident etc. Assurance Co., Lane's Case* (1863), 1 De G. J. & Sm. 504.

(o) *Merchants' Fire Office v. Armstrong* (1901), 17 T. L. R. 709, C. A., where directors paid to a *de facto* director for alleged services rendered in floating the company greatly in excess of the actual expenditure and without any inquiry.

(p) *Western Bank v. Baird's Trustees* (1872), 11 Macph. (Ct. of Sess.) 96; and see p. 296, *post*.

(q) *Re Lands Allotment Co.*, [1894] 1 Ch. 616, C. A. A protest is not enough (*Jackson v. Munster Bank* (1885), 15 L. R. Ir. 356).

(r) Compare *Re Denham & Co.* (1883), 25 Ch. D. 752; *Bute's (Marquis) Case*, [1892] 2 Ch. 101; *Charitable Corporation v. Sutton* (1742), 2 Atk. 400; *Re Montrotier Asphalte Co., Perry's Case* (1876), 34 L. T. 716; *Turquand v. Marshall* (1869), 4 Ch. App. 376; *Land Credit Co. of Ireland v. Fermoy (Lord)* (1870), 5 Ch. App. 763.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 279 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 32]; see p. 483, *post*.

(t) *Re Carriage Co-operative Supply Association* (1884), 27 Ch. D. 322; *Re Englefield Colliery Co.* (1878), 8 Ch. D. 388, C. A.; *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502; *Leeds Estate, Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787; *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141; compare *General Exchange Bank v. Horner* (1870), L. R. 9 Eq. 480; *Gluckstein v. Barnes*, [1900] A. C. 240, 255; *Benson v. Heathorn* (1842), 1 Y. & C. Ch. Cas. 326; and see p. 478, *post*.

(u) *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, C. A.; *Joint Stock Discount Co. v. Brown* (1869), L. R. 8 Eq. 381; *Ramskill v. Edwards* (1885), 31 Ch. D. 100; compare *Shepherd v. Bray*, [1906] 2 Ch. 235.

(x) *Overend, Gurney & Co. v. Gurney* (1869), 4 Ch. App. 701.

(a) *Peek v. Gurney* (1873), L. R. 6 H. L. 377; *Re Duncan*, [1899] 1 Ch. 337; *Davoreno v. Wootton*, [1900] 1 L. R. 273, C. A. Compare *Shepherd v. Bray*, *supra*; reversed by consent, and doubted, [1907] 2 Ch. 571, ~

Directors may also be liable to third persons for breach of warranty of authority to act on behalf of the company (b).

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373. For all debts, expenses, and liabilities incurred in the ordinary course of business, and for money borrowed and applied for those purposes, directors are entitled to be indemnified by the company (c) with simple interest, in the case of an actual expenditure, at the rate of £5 per cent. per annum (d). If they guarantee a secured loan they have, on paying off the loan, the usual right of a surety to subrogation (e).

Right to
indemnity

They are not entitled, in the absence of special provision to the contrary, to their expenses in travelling to and from board meetings (f).

If they are holders of unpaid shares on behalf of the company which it has power to hold they are entitled to be indemnified (g). If, however, there is no such power, as where, for instance, the shares are in the same company, they are liable for calls without any right of indemnity, even when all the shareholders have consented to the purchase (h); but they are not liable if the shares, being held as security only, are not transferred into their names (i) under an express agreement with the company.

(b) *Firbank's Executors v. Humphreys* (1886), 18 Q. B. D. 54, C. A.; *Elkington & Co. v. Hürter*, [1892] 2 Ch. 452; *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A. (acceptance of bills); and see p. 295, *post*. If the misrepresentation is as to law, they will not be liable (*Rashdall v. Ford* (1866), L. R. 2 Eq. 750; *Beattie v. Ebury* (Lord) (1874), L. R. 7 H. L. 102; see, further, title AGENCY, Vol. I., pp. 221—223).

(c) As, for instance, in respect of holding as lessees (*Re Pooley Hall Colliery Co.* (1869), 18 W. R. 201); or as shareholders in other companies (*Re Financial Corporation, Goodson's Claim* (1880), 28 W. R. 760; *Re National Financial Co., Ex parte Oriental Commercial Bank* (1868), 3 Ch. App. 791; *James v. May* (1873), L. R. 6 H. L. 328; *Chapman and Barker's Case* (1867), L. R. 3 Eq. 361; *Hardoon v. Belittos*, [1901] A. C. 118, 123, P. C.); or in respect of contracts for the benefit of the company (*Gleadow v. Hull Glass Co.* (1849), 19 L. J. (CH.) 44; *Poole, Jackson, and Whyte's Case* (1878), 9 Ch. D. 323, C. A.; *Gray v. Seckham* (1872), 7 Ch. App. 680); or money advanced (*Re International Life Assurance Society, Ex parte Certain Directors* (1870), 39 L. J. (CH.) 271; *Re Court Grange Silver-Lead Mining Co., Ex parte Sedgwick* (1856), 2 Jur. (N. S.) 949; *Lowndes v. Garnett and Moseley Gold-Mining Co. of America* (1864), 33 L. J. (CH.) 418; *Baker's Case* (1860), 1 Drew. & Sm. 55). And see *Re German Mining Co., Ex parte Chippendale* (1853), 4 De G. M. & G. 19, C. A.; *Re Norwich Yarn Co., Ex parte Bignold* (1856), 22 Beav. 143; *Troup's Case* (1860), 29 Beav. 353; *Re Electric Telegraph Co. of Ireland, Hoare's Case* (1861), 30 Beav. 225. As to dividends paid out of capital with the knowledge of the shareholders, see *Towers v. African Tug Co.*, [1904] 1 Ch. 558, C. A.; as to the directors' right of indemnity against them in such a case, see *Moxham v. Grant*, [1900] 1 Q. B. 88, C. A.

(d) *Re Norwich Yarn Co., Ex parte Bignold*, *supra*.

(e) *Gibbs and West's Case* (1870), L. R. 10 Eq. 312; compare *Owen and Ashworth's Claim, Whitworth's Claim*, [1901] 1 Ch. 115, C. A. It is a proper proceeding to give a charge on future calls in order to indemnify directors (*Re Pyle Works* (No. 2), [1891] 1 Ch. 173). As to subrogation, see, generally, title GUARANTEE.

(f) *Marmor, Ltd. v. Alexander*, [1908] S. C. 78; *Young v. Naval, Military, and Civil Service Co-operative Society of South Africa*, [1905] 1 K. B. 687.

(g) *Re Financial Corporation, Goodson's Claim*, *supra*.

(h) *Cree v. Somervail* (1879), 4 App. Cas. 648.

(i) *Gray's Case* (1876), 1 Ch. D. 664; and see *Re Waterloo Life etc. Assurance*

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and
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ment.

Right to
contribution.

If, although acting in the ordinary course of business, the directors exceed their borrowing powers, they cannot claim an indemnity from the company unless the borrowing is within the powers of the company and is ratified (*k*).

374. A director is entitled to contribution from such of his co-directors as have concurred in the *ultra vires* transaction in respect of which moneys have been recovered from him (*l*). This is an equitable right quite apart from contract (*m*), and is available against the estate of a deceased contributor (*m*).

The rule that there is no contribution between tortfeasors only applies in transactions actually illegal or void or fraudulent and where these qualities appear as the basis of the claim (*n*). As between two trustees *in pari delicto* there is a right of contribution (*o*), and the shareholders who receive illegal payments knowingly, being constructive trustees for the company, must indemnify the directors if they are called upon to repay, or themselves repay, if sued directly (*p*). Creditors who, being shareholders, are privy to the payment, must repay what they have received (*q*).

In an action for contribution the defendant is not estopped from disputing the validity of the judgment in the action against the plaintiff (*r*).

Directors who have concurred in the cancellation of a co-director's shares in pursuance of an *ultra vires* agreement, although they may be liable to the company, are not liable to their co-director for contribution towards his liability for costs (*s*).

Co., Saunders's Case (1864), 2 De G. J. & Sm. 101, C. A., where the shares were held as qualification shares.

(*k*) *Re Worcester Corn Exchange Co.* (1853), 3 De G. M. & G. 180; *Re German Mining Co., Ex parte Chippendale* (1853), 4 De G. M. & G. 19, C. A. This may be in general meeting (*Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366, P. C.), without special resolution (*Grant v. United Kingdom Switchback Railways Co.* (1888), 40 Ch. D. 135, C. A.); or it may be inferred (*Re Magdalena Steam Navigation Co.* (1860), John. 690); and see p. 338, *post*.

(*l*) *Ashurst v. Mason* (1875), L. R. 20 Eq. 225, where he was transferee of unpaid shares to relieve an ex-director; *Ramskill v. Edwards* (1885), 31 Ch. D. 100, where he had afterwards concurred in an unauthorised loan.

(*m*) *Jackson v. Dickinson*, [1903] 1 Ch. 947; *Ramskill v. Edwards*, *supra*, where the defendant died after action brought; *Shepherd v. Bray*, [1906] 2 Ch. 235; see *Wolmershausen v. Gullick*, [1893] 2 Ch. 514. As to contribution in respect of statutory liability with regard to a prospectus, see p. 139, *ante*.

(*n*) *Power v. Hoey* (1871), 19 W. R. 916; *Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807, 820, C. A.; see generally title TORT.

(*o*) *Chillingworth v. Chambers*, [1896] 1 Ch. 685.

(*p*) *Moxham v. Grant*, [1900] 1 Q. B. 88, O. A.; *Re National Funds Assurance Co.* (1878), 10 Ch. D. 118, 129 (cases of dividends paid out of capital).

(*q*) *Re Alexandra Palace Co.*, (1882), 21 Ch. D. 149.

(*r*) See *Parker v. Lewis* (1873), 8 Ch. App. 1056; *Shepherd v. Bray*, *supra*; compromised on appeal, [1907] 2 Ch. 571, O. A.; compare *Printing Telegraph and Construction Co. of the Agence Havas v. Drucker*, [1894] 2 Q. B. 801, O. A.; *Furness, Withy & Co., Ltd. v. Pickering*, [1908] 2 Ch. 224; *Wye Valley Rail. Co. v. Hawes* (1880), 16 Ch. D. 489, C. A.

(*s*) *Walker's (Dr.) Case* (1856), 8 De G. M. & G. 607, C. A.

375. All persons dealing with a director knowing that he is committing a breach of trust in the transaction must repay the loss to the company with interest at 4 per cent. (a).

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ment.

A director who is in partnership is liable as regards his separate estate for the property of a company which has come into the hands of his firm and which is misappropriated by his firm with his concurrence (b).

Breach of
trust.

376. An order of discharge in bankruptcy releases a director from any liability for a breach of trust, unless it is a fraudulent breach of trust (c).

Discharge by
bankruptcy.

377. A director who is charged with breach of trust can plead the Statute of Limitations, except where the claim is founded upon any fraud or fraudulent breach of trust to which he was party or privy, or is to recover trust property or the proceeds thereof still retained (d) by him or previously received by him and converted to his use (e).

Statute of
Limitations.

378. The liability of a director is extinguished by the dissolution of the company, unless it is set aside by the court (f).

Dissolution of
company.

379. In a limited company the liability of the directors or managers, or of the managing director, to the creditors of the company, may, if so provided by the memorandum of association, be unlimited (g). Such a company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors, or managers, or

Unlimited
liability of
directors.

(a) *Gray v. Lewis* (1869), L. R. 8 Eq. 526, where directors paid by agreement to the bank and left there all moneys paid on shares on condition that the bank should advance up to a named amount to enable the guaranteeing company to apply for and take up shares; *Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co.* (1875), 1 Ch. D. 682, where shareholders had to repay capital returned to them; *Lund v. Blanshard* (1844), 4 Hare, 9; compare *Bryson v. Warwick and Birmingham Canal Co.* (1853), 4 De G. M. & G. 711, C. A.; *Re Alexandra Palace Co.* (1882), 21 Ch. D. 149.

(b) *Re Macfadyen, Ex parte Vizianagaram Mining Co., Ltd.*, [1908] 2 K. B. 817, C. A. The proof is for a debt, and not for damages (*ibid.*; *Re Collie, Ex parte Adamson* (1878), 8 Ch. D. 807, 819, C. A.).

(c) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 30, 37 (1); see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 260, 270; *Ramskill v. Edwards* (1885), 31 Ch. D. 100, where a liability to contribute was held to be a liability incurred by means of a breach of trust; *Emma Silver Mining Co. v. Grant* (1880), 17 Ch. D. 122.

(d) At the time of action brought (*Thorne v. Heard*, [1894] 1 Ch. 599, C. A.).

(e) Under the Trustee Act, 1888 (51 & 52 Vict. c. 59), ss. 1, 8; *Re Lands Allotment Co.*, [1894] 1 Ch. 616, C. A.; *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, C. A. As to actions in respect of the statutory liability with regard to prospectuses, see p. 136, *ante*; as to concealed fraud, see *Gibbs v. Guild* (1882), 9 Q. B. D. 59, C. A.; *Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319, C. A.; see also *Lowndes v. Garnett and Moseley Gold-Mining Co. of America* (1864), 33 L. J. (OH.) 418; *Dovey v. Cory*, [1901] A. C. 477, 489.

(f) *Re Pinto Silver Mining Co.* (1878), 8 Ch. D. 273, C. A.; *Re London and Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140, C. A.; *Coxon v. Gorst*, [1891] 2 Ch. 73; and see pp. 567 *et seq.*, *post*. As to directors' powers ceasing on the commencement of a winding up, see p. 420, *post*.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 60 (1) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 4].

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ment.

of any managing director (*h*). Upon the confirmation of any such special resolution the provisions thereof are as valid as if they had been originally contained in the memorandum; and a copy thereof must be embodied in or annexed to every copy of the memorandum issued after the confirmation of the resolution (*i*). In a limited company in which the liability of a director or manager is unlimited, the directors or managers (if any), and the member who proposes a person for election or appointment to the office of director or manager, must add to that proposal a statement that the liability of the person holding that office will be unlimited, and the promoters, directors, managers, and secretary (if any) of the company, or one of them, must, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited (*k*).

(vi.) *Meetings of Directors.*

Meetings of
directors.

380. Articles of association generally contain elaborate provisions as to meetings of directors and committees (*l*). Without

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 61 (1) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 8].

(*i*) *Ibid.*, s. 61 (2) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 8].

(*k*) *Ibid.*, s. 60 (2) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 7].

(*l*) Clauses 87—94 of *ibid.*, Sched. I., Table A, relate to proceedings of directors, and are as follows:—Clause 87: "The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the directors." Clause 88: "The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall (when the number of directors exceeds three) be three." (See *Re Greymouth Point Elizabeth Rail. and Coal Co., Ltd.*, *Yuill v. Greymouth Point Elizabeth Rail. and Coal Co., Ltd.*, [1904] 1 Ch. 32.) Clause 89: "The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose." Clause 90: "The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but, if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting." Clause 91: "The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on them by the directors." (This power must be used *bond fide*, and not for the purpose of excluding a director (*Eray v. Smith* (1908), 124 L. T. Jo. 293).) Clause 92: "A committee may elect a chairman of their meetings: if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting." Clause 93: "A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes the chairman shall have a second or casting vote." Clause 94: "All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid,

express provision to the contrary directors can only validly act when assembled at a board meeting (*m*), except as regards strangers who contract with the company without notice of this defect (*n*).

A meeting of directors is not duly convened unless due notice has been given to all the directors (*o*), and the business put through at a meeting not duly convened is invalid. It is not, however, necessary to give notice of an adjourned meeting (*p*). If no special notice is required, the notice must be fair and reasonable (*q*).

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and
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ment.

Notice of
meeting.

381. Directors may at their properly convened meetings transact all business within their powers though no notice has been given to the members of the board that any special business is to be transacted (*r*).

Business at
meetings.

Business can only be properly conducted by the majority of the directors at a meeting which is duly convened (*s*) and held, and at which there is the prescribed quorum (*t*). A subsequent meeting

or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director." (Compare Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 74; and see *British Asbestos Co. v. Boyd*, [1903] 2 Ch. 439; *Transport, Ltd. v. Schonberg* (1905), 21 T. L. R. 305.) Clause 75: "The directors shall cause minutes to be made in books provided for the purpose—(a) of all appointments of officers made by the directors; (b) of the names of the directors present at each meeting of the directors and of any committee of the directors; (c) of all resolutions and proceedings at all meetings of the company, and of the directors, and of committees of directors, and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose." (See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 71; and p. 239, *post*.) The directors cannot exclude a properly elected director from the board; see p. 224, *ante*.

(*m*) *Re Athenæum Society, Ex parte Eagle Co.* (1858), 4 K. & J. 558; *D'Arcy v. Tamar, Kit Hill, and Callington Rail. Co.* (1867), L. R. 2 Exch. 158; *Rosanquet v. Shortridge* (1850), 4 Exch. 699; *Re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230; see p. 238, *post*. Compare *Re Liverpool Household Stores Association* (1890), 59 L. J. (CH.) 616.

(*n*) *Re Bonelli's Telegraph Co., Collie's claim* (1871), L. R. 12 Eq. 246.

(*o*) *Re Portuguese Consolidated Copper Mines, Ltd.* (1889), 42 Ch. D. 160, C. A.; *Moore v. Hammond* (1827), 6 B. & C. 456; compare *Smyth v. Darley* (1849), 2 H. L. Cas. 789. There is no duty to send notice to a director abroad or to one who is travelling about with no known address (*Halifax Sugar Refining Co. v. Francklyn* (1890), 62 L. T. 563).

(*p*) *Wills v. Murray* (1850), 4 Exch. 843.

(*q*) *Re Homer District Consolidated Gold Mines, Ex parte Smith* (1888), 39 Ch. D. 546; compare *Browne v. La Trinidad* (1887), 37 Ch. D. 1, C. A.

(*r*) *La Compagnie de Mayville v. Whitley*, [1896] 1 Ch. 788, C. A.; *A.-G. v. Davy* (1741), 2 Atk. 212.

(*s*) *Moore v. Hammond* (1827), 6 B. & C. 456.

(*t*) But see *Re Peruvian Railways Co., Ex parte International Contract Co.* (1868), 19 L. T. 803, where the court refused to declare a resolution invalid, which was passed at a meeting of the company called by less than a quorum of directors, the number having been the acting quorum for six years; *Boschoek Proprietary Co., Ltd. v. Fuks*, [1906] 1 Ch. 148, 162, where a meeting called by *de facto* directors was held to be well called and the confirmation there passed was sufficient. An informal meeting may not be sufficient to bind members (*Bottomley's Case* (1880), 16 Ch. D. 681; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, C. A.), apart from such an article as No. 94 in Table A of the Act of 1908. As to delegation of authority to a committee, see p. 224, *ante*.

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Invalidity of
appointment
and irregu-
larity.

can ratify the business done at an informal meeting (*u*), and can ratify an unauthorised act of their agent (*w*).

382. Directors invalidly appointed cannot, in the absence of provision in the articles, bind the shareholders (*a*), unless the defect is unknown at the time (*b*). In the case of irregularity or informality, where a shareholder has changed his position in reliance upon the acts of the directors being regular, the company cannot set up the irregularity of the proceedings to his detriment (*c*); nor can it rely on the absence of a required authority given by general meeting (*d*). On the other hand, there is a well-established rule which applies for the protection of persons dealing with the company, who are protected from the consequences of any internal irregularities if they have acted without notice (*e*).

Quorum.

383. A quorum means a quorum of directors who are not disqualified, and if by the withdrawal of those directors who are disqualified from voting on the ground of interest or otherwise there would be no quorum, no business can be transacted (*f*). Where no quorum is specified in the articles it is not necessary that a majority of the whole directorate should pass the resolutions (*g*), but one director does not form a "meeting" (*h*). Unless so provided by the articles, there cannot be a quorum competent to act where the number of directors is not filled up to the minimum number (*i*). By the articles continuing directors usually have power to fill casual vacancies.

(*u*) *Re Portuguese Consolidated Copper Mines, Ltd., Ex parte Badman, Ex parte Bosanquet* (1890), 45 Ch. D. 16, C. A. (allotment); *Re Phosphate of Lime Co., Austin's Case* (1871), 24 L. T. 932; compare *British Medical General and Life Association v. Jones* (2) (1889), 61 L. T. 384; *Hooper v. Kerr, Stuart & Co., Ltd.* (1900), 83 L. T. 729.

(*w*) *Molineaux v. London, Birmingham, and Manchester Insurance Co.*, [1902] 2 K. B. 589, C. A.

(*a*) *Garden Gully United Quartz Mining Co. v. McLister* (1875), 1 App. Cas. 39, P. C. (making a call and forfeiting shares).

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 74 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67]; see p. 210, *ante*.

(*c*) *Bargate v. Shortridge* (1855), 5 H. L. Cas. 297.

(*d*) *Re British Provident etc. Assurance Society, Grady's Case* (1863), 1 De G. J. & Sm. 488, where shares had been transferred and registered.

(*e*) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327, Ex. Ch.; *Owen and Ashworth's Claim, Whitworth's Claim*, [1901] 1 Ch. 115, C. A.; see further p. 81, *ante*.

(*f*) *Re Greymouth Point Elizabeth Rail. and Coal Co., Ltd., Yuill v. Greymouth Point Elizabeth Rail. and Coal Co., Ltd.*, [1904] 1 Ch. 32.

(*g*) *Lyster's Case* (1867), L. R. 4 Eq. 233, where a forfeiture was good though ordered by a meeting of two out of six directors; and see *Re English etc. Rolling Stock Co., Lyon's Case* (1866), 35 Beav. 646 (allotment); *Re Regent's Canal Iron Co.*, [1867] W. N. 79; *Re Portuguese Consolidated Copper Mines, Ltd.* (1889), 42 Ch. D. 160, C. A.; *York Tramways Co. v. Willows* (1882), 8 Q. B. D. 685, 698, C. A.

(*h*) Compare *Sharp v. Dawes* (1876), 2 Q. B. D. 26, C. A.

(*i*) *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, 431, C. A.; *Faure Electric Accumulator Co. v. Phillipart* (1888), 58 L. T. 525; *Bottomley's Case* (1880), 16 Ch. D. 681; *Kirk v. Bell* (1851) 16 Q. B. 290; but see *Thames-Haven Dock and Rail. Co. v. Rose* (1842), 4 Man. & G. 552; compare *Owen and Ashworth's Claim, Whitworth's Claim*, *supra*.

384. Directors at their meetings can take the items of business in such order as they think proper, and not necessarily in the order on the agenda paper (*k*).

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ment.

385. Every company must cause minutes of all proceedings of its directors or managers to be entered in books kept for that purpose (*l*). Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, is evidence of the proceedings (*m*). Until the contrary is proved, every meeting of directors or managers in respect of whose proceedings minutes have been so made is deemed to have been duly held and convened, and all proceedings had there to have been duly had, and all appointments of directors, managers, or liquidators are deemed to be valid (*n*).

Minutes of
directors'
meetings.

An entry in the minute book, signed by the chairman, of a resolution accepting an agreement is sufficient to satisfy the Statute of Frauds (*o*), and it is not necessary to prove that he was in fact the chairman (*p*). An entry of an allotment of shares to a director then present, who signed the minutes at the next meeting, is sufficient evidence of his agreement to take shares (*q*), but not where he was not present at either meeting and denies all knowledge (*r*).

In the absence of a minute other evidence can be given (*s*). If the books of a company show a record of a transaction, as, for instance, the forfeiture of shares, which would not be valid without a resolution of the directors, the court will presume that such a resolution has been passed (*t*).

(vii.) *Retirement and Removal.*

386. Articles of association usually contain full provisions as to the retirement and removal of directors (*u*). Retirement

(*k*) *Re Cawley & Co.* (1889), 42 Ch. D. 209, C. A.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 71 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67].

(*m*) *Ibid.*, s. 71 (2). But only *prima facie* evidence (*Re Indian Zoedone Co.* (1884), 26 Ch. D. 70, C. A.; *Re Pyle Works* (No. 2), [1891] 1 Ch. 173, 184; *Re Leicester Mortgage Co.*, [1894] W. N. 116).

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, 69), s. 71 (3); see further *ibid.*, Sched. I., Table, A clause 94; and note (*l*), p. 236, *ante*.

(*o*) *Jones v. Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314, C. A.

(*p*) *Sheffield and Manchester Rail. Co. v. Woodcock* (1841), 7 M. & W. 574.

(*q*) *Re Llanharry Hematite Iron Ore Co., Ex parte Stock, Ex parte Roney* (1864), 33 L. J. (CH.) 731, C. A.

(*r*) *Tothill's Case* (1865), 1 Ch. App. 85.

(*s*) *Re Pyle Works* (No. 2), *supra*.

(*t*) *Knight's Case* (1867), 2 Ch. App. 321.

(*u*) Clauses 78 to 86 of Table A of the Act of 1908 relate to the retirement and removal of directors, and are as follows:—Clause 78: "At the first ordinary meeting of the company the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest to one-third, shall retire from office." (This clause does not apply to an extraordinary meeting (*Hamilton's (Lord Claud) Case* (1873), 8 Ch. App. 548), or to signatories of the memorandum (*Morley (John) Building Co. v. Barras*, [1891] 2 Ch. 386). Under a special Act it was held that directors had no power to retire until the first ordinary meeting (*Re South London Fish Market* (1888),

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ment.

Provision is also made for vacation of office if a director (1) fails to acquire or ceases to hold his qualification (*w*); or (2) holds any other office of profit under the company except that of managing director or manager (*x*); or (3) becomes bankrupt (*a*); or (4) is found lunatic or becomes of unsound mind; or (5) is concerned or participates in the profits of any contract with the company (*b*); or (6) continually absents himself for more than the prescribed period from the meetings of the board without leave; or (7) resigns his office (*c*).

39 Ch. D. 324, C. A.) Clause 79: "The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot." Clause 80: "A retiring director shall be eligible for re-election." Clause 81: "The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto." Clause 82: "If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall be deemed to have been re-elected at the adjourned meeting." The result is the same if there is no adjourned meeting held (*Re Great Northern Salt and Chemical Works, Ex parte Kennedy* (1890), 44 Ch. D. 472). The clause does not apply to signatories of the memorandum (*Morley (John) Building Co. v. Barras, supra*; and see *Bennett Brothers (Birmingham), Ltd. v. Lewis* (1904), 20 T. L. R. 1, C. A.). Clause 83: "The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office." Clause 84: "Any casual vacancy occurring in the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director." Clause 85: "The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director." Clause 86: "The company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director."

(*w*) See p. 213, *ante*. If the clause declares the office of director vacated "if he cease to hold the due qualification" it does not apply to a case in which the qualification has never been held (*Salton v. New Beeston Cycle Co.*, [1899] 1 Ch. 775; *Dent's Case, Forbes's Case* (1873), 8 Ch. App. 768, 775); but it is otherwise if the words were "if he does not acquire etc." Nor does the clause apply where the amount of qualification is increased and the larger qualification is not obtained (*Molineaux v. London, Birmingham and Manchester Insurance Co.*, [1902] 2 K. B. 589, C. A.).

(*x*) The holding of the office of unpaid secretary is not holding another office of profit (*Iron Ship Coating Co. v. Blunt* (1868), L. R. 3 C. P. 484); but the paid trusteeship of a debenture trust deed is a place of profit, although it is not, strictly speaking, held under the company (*Astley v. New Tivoli Ltd.*, [1899] 1 Ch. 151).

(*a*) Being already a bankrupt is not becoming bankrupt (*Dawson v. African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6, C. A.).

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 77.

(*c*) See Encyclopædia of Forms, Vol. IV., pp. 362, 379. As to the meaning of absenting himself, see *McConnell's Claim*, [1901] 1 Ch. 789; *Re London and*

The office is automatically vacated by any of the acts specified, and the board of directors cannot waive the vacation (*d*).

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ment.

The usual clause validating any act by any person acting as director notwithstanding disqualification or defect in appointment applies as between a company and its members as well as between the company and outsiders (*e*).

387. If the articles provide for a director being disqualified by being in any way interested in a bargain or contract with the company, his office is vacated by his being a shareholder in another company with which the contract is made (*f*); and if it provides for the vacation of his seat if he enters into a contract with the company without declaring his interest, it is not sufficient to intimate that he has an interest without declaring its specific nature (*g*). If there is merely a prohibition as to voting on such contracts it only applies to voting at a meeting of directors (*h*). A director interested in a contract cannot be counted in a quorum at a directors' meeting (*i*).

Director
interested
in contract,

388. Where by the articles a director has power to resign at any time, his resignation takes effect independently of acceptance by the other directors or the company (*k*).

Casual
vacancies.

Articles usually provide for a casual vacancy on the board of directors being filled up by the directors appointing a person who is

Northern Bank, Mack's Claim, [1900] W. N. 114, which cases show that the absence must be voluntary and not accidental. The absence dates from the first meeting which the director fails to attend (*ibid.*).

(*d*) *Re Bodegu Co., Ltd.*, [1904] 1 Ch. 276.

(*e*) *Dawson v. African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6, C. A.; *British Asbestos Co., Ltd. v. Boyd*, [1903] 2 Ch. 439, where the election of a director was held valid though one of the directors forming the quorum was disqualified; compare *Howbeach Coal Co. v. Teague* (1860), 5 H. & N. 151; and see p. 211, *ante*.

(*f*) *Tidd v. Robinson* (1884), 14 Q. B. D. 739, C. A.

(*g*) *Imperial Mercantile Credit Association (Liquidators) v. Coleman* (1873), L. R. 6 H. L. 189; compare *Turnbull v. West Riding Athletic Club, Leeds, Ltd.* (1894), 70 L. T. 92. In the absence of an agreement the court will not restrain the chairman and director of one company joining the board of another (*London and Mashonaland Exploration Co. v. New Mashonaland Exploration Co.*, [1891] W. N. 165).

(*h*) *East Pont Du United Lead Mining Co., Ltd. v. Merryweather* (1864), 2 Hem. & M. 254; *North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 589, P. C.

(*i*) *Re Greymouth Point Elizabeth Rail. and Coal Co., Ltd.*, *Yuill v. Greymouth Point Elizabeth Rail. and Coal Co., Ltd.*, [1904] 1 Ch. 32. The proviso only applies to contracts in the execution of the company's enterprise. The bankers of the company can still be its directors (*Sheffield and Manchester Rail. Co. v. Woodcock* (1841), 7 M. & W. 574, 582); and a director may lend money to his company at a profit (*Bluck v. Mallalue* (1859), 27 Beav. 398; *Re Cardiff Preserved Coal and Coke Co., Ex parte Hill* (1862), 32 L. J. (CH.) 154, C. A.), if it is without an unusual profit, such as a bonus.

(*k*) *Glossop v. Glossop*, [1906] 2 Ch. 370; *Transport, Ltd. v. Schonberg* (1905), 21 T. L. R. 305, where it was also held that the other directors accepted the resignation; *Re Montrotier Asphalte Co., Perry's Case* (1876), 34 L. T. 716; compare *Municipal Freehold Land Co. v. Pollington* (1890), 59 L. J. (CH.) 734. As to the effect of a resignation which is concealed from the shareholders, see *Dovey v. Cory*, [1901] A. C. 477; *Municipal Freehold Land Co. v. Pollington*, *supra*.

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ment.

Removal
from office.

to be subject to retirement as if he had become a director when the director whom he replaces was last elected a director (*l*).

389. Directors who are appointed for a definite period cannot be removed by the company without special power, either in the original articles or in the articles as altered by special resolution (*m*). The court will not specifically enforce an agreement that a director shall not be removable; but if a company in general meeting resolves that a director should retire, the court will not compel it to allow him to act (*n*), though he may have an action for damages. The removal of a director for "reasonable cause," where allowable, is one of those matters of internal regulation with which the court will not in the absence of fraud interfere (*a*).

SUB-SECT. 3.—Secretary and other Officers.

(i.) *In General.*

Officers of
the company.

390. Any persons who are regularly employed as part of their business or occupation in conducting the affairs of the company may be "officers" of the company. The term includes any director, managing director, manager, and secretary, and any auditor if appointed under the regulations of the company, and any salaried solicitor (*b*); but not bankers (*c*), trustees for the company (*d*) or

(*l*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 84; and p. 212, *ante*; as to appointing an additional temporary director, see *ibid.*, clause 85; and p. 240, *post*. A casual vacancy is any vacancy that does not occur through retirement by rotation, and may be thus filled although a general meeting has subsequently been held (*Munster v. Cummell* (1882), 21 Ch. D. 187; see *Bennett Brothers, Birmingham, Ltd. v. Lewis* (1903), 20 T. L. R. 1, C. A.).

(*m*) *Re Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (1882), 23 Ch. D. 1, C. A., but clause 86 of Table A of the Act of 1908 removes this difficulty. Nor can they resign (*Re South London Fish Market Co.* (1888), 39 Ch. D. 324, C. A.). If the directors can be removed by simple resolution, this may be part of a resolution altering the articles (*Campbell's Case* (1873), 9 Ch. App. 1; *Taylor v. Pilsen Joel and General Electric Light Co.* (1884), 27 Ch. D. 268; compare *Re Patent Invert Sugar Co.* (1885), 31 Ch. D. 166, C. A.; *Inderwick v. Snell* (1850), 2 Mac. & G. 216).

(*n*) *Bainbridge v. Smith* (1889), 41 Ch. D. 462, C. A. (managing director); *Harben v. Phillips* (1883), 23 Ch. D. 14, C. A.; *Broune v. La Trinidad* (1887), 37 Ch. D. 1, C. A.

(*a*) See *Foss v. Harbottle*, and other cases cited on p. 289, *post*; *Inderwick v. Snell*, *supra*; compare *Hayman v. Rugby School (Governors)* (1874), L. R. 18 Eq. 28. A contract for personal service is not specifically enforced by the courts; see title SPECIFIC PERFORMANCE.

(*b*) See p. 246, *post*. A managing director is not a clerk or servant (*Re Newspaper Proprietary Syndicate, Ltd., Hopkinson v. Newspaper Proprietary Syndicate, Ltd.*, [1900] 2 Ch. 349); nor is he, apparently, a person in the employ of the company (*Normandy v. Ind, Coope & Co., Ltd.*, [1908] 1 Ch. 84); and see *Burland v. Earle*, [1902] A. C. 83, 101, P. C.; *Dunston v. Imperial Gas Light Co.* (1832), 3 B. & Ad. 125; *Hutton v. West Cork Rail. Co.* (1883), 23 Ch. D. 654, 672, C. A.; *Iron Ship Coating Co. v. Blunt* (1868), L. R. 3 C. P. 484; *Re Mutual Aid Permanent Benefit Building Society, Ex parte James* (1883), 49 L. T. 530.

(*c*) *Re Imperial Land Co. of Marseilles, Re National Bank* (1870), L. R. 10 Eq. 298; *Re General Provident Assurance Co., Ex parte National Bank* (1872), L. R. 14 Eq. 507; *Re Kingston Cotton Mill Co.*, [1896] 1 Ch. 114.

(*d*) *Cornell v. Hay* (1873), L. R. 8 C. P. 328, 336. But trustees for policy-holders are officers (*Re British Guardian Life Assurance Co.*, [1880] W. N. 63).

for the debenture-holders (e), or accountants temporarily employed to prepare balance sheets (f).

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and
Manage-
ment.
—
Appointment.

391. The first directors and the secretary of a company are usually selected by its promoter, who arranges either that the company shall appoint them, which it can do as soon after its incorporation as it is entitled to commence business, any previous appointment being provisional only (g), or that they shall be nominated by the articles of association (h). The solicitor is also sometimes nominated by the articles; but a mere statement in the articles that a person is to occupy a certain position with regard to it does not constitute a contract between him and the company (i).

The appointment of an officer for a term that is to exceed a year from the making of the agreement must be in writing (j), and the date of the commencement of service must be stated (k).

392. A provision that the remuneration of an officer is to be determined only in general meeting, does not prevent him bringing an action for a *quantum meruit* (l). He has no lien on the books or any other property of the company for money due to him (m).

Remuneration
and lien.

393. The appointment of a receiver and manager operates as a dismissal of the servants of the company (n), and so does the making of a compulsory winding-up order (o). A resolution to wind up voluntarily does not operate as a notice of dismissal (p).

Dismissal by
appointment
of receiver on
winding up.

A continuance of service during arrangements for reconstruction without continuing the business does not make a fresh contract of service (a), which must be clearly proved (b). Servants of the company do not automatically become servants of a receiver or

(e) *Astley v. New Tivoli, Ltd.*, [1899] 1 Ch. 151, 154. As to officers of a company being restrained from carrying on competing business, see *Nordenfeldt v. Maxim Nordenfeldt Guns and Ammunition Co.*, [1894] A. C. 535; *London and Mashonaland Exploration Co. v. New Mashonaland Exploration Co.*, [1891] W. N. 165.

(f) *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 87; and see p. 298, *post*.

(h) Compare *ibid.*, Sched. I., Table A, clause 68, which provides for directors being appointed by a majority of the subscribers of the memorandum of association. As to directors appointing a managing director, see p. 225, *ante*.

(i) *Eley v. Positive Government Security Life Insurance Co.* (1876), 1 Ex. D. 88.

(j) Statute of Frauds (29 Car. 2, c. 3), s. 4; *Smith v. Gold Coast and Ashanti Explorers, Ltd.*, [1903] 1 K. B. 638, C. A.; see title CONTRACT, Vol. VII., pp. 365 *et seq.*

(k) *Re Alexander's Timber Co.* (1901), 70 L. J. (OH.) 767.

(l) *Bill v. Darent Valley Rail. Co.* (1856), 1 H. & N. 305.

(m) *Barnston Hotel Co. v. Cook* (1899), 36 Sc. L. R. 938.

(n) *Reid v. Explosives Co.* (1887), 19 Q. B. D. 264, C. A.

(o) *Chapman's Case* (1866), L. R. 1 Eq. 346; *MacDowall's Case* (1886), 32 Ch. D. 366, distinguishing *Re English Joint Stock Bank, Ex parte Harding* (1867), L. R. 3 Eq. 341. As to proof in such cases, see p. 509, *post*.

(p) *Midland Counties District Bank, Ltd. v. Attwood*, [1905] 1 Ch. 357; distinguishing *Shirreff's Case* (1872), L. R. 14 Eq. 4, 7; see *Re Forster & Co., Ex parte Schumann* (1887), 19 L. R. Ir. 240.

(a) *MacDowall's Case, supra*.

(b) *Re English Joint Stock Bank, Ex parte Harding, supra*.

SECT. 11. manager (c); but fresh service may diminish or cover the damages for wrongful dismissal (d).

Regulation and Management.

(ii.) *Secretary.*

Appointment.

394. The secretary should always be appointed by the company under a written agreement specifying the general conditions of service, including the term of office and notice for its termination. Apart from any written agreement, he holds his office on such conditions of service as may be implied from the articles of association or the practice of the company (e) or of other like companies and subject to reasonable notice on both sides (f).

Responsibility.

395. The secretary, being notoriously an agent only, is not personally responsible for any of his acts or dealings, so long as they are in the usual course of his employment; but if his dealings are such that his company is not bound by them, he may himself be liable, either as principal or on the ground of breach of warranty of authority, if the contractor has been damnified (g). He has not by virtue of his position any authority to make representations to induce persons to contract with the company, his functions being ministerial only; the company is not bound by his representations (h), and a contract made on the faith of them will not be rescinded for fraud (i).

Powers.

He has no power, without the resolution of the directors, to call a meeting of the company (k), nor can he alter the register of members (l); but any such act may be ratified by the directors in proper meeting (m). A company is not estopped by a certification of transfer given by its secretary (n).

General position.

396. A secretary may not make a secret profit in connection with the affairs of the company (o). If he takes a commission from a

(c) *Re Marriage, Neave & Co., North of England Trustee, Debenture and Assets Corporation v. Marriage, Neave & Co.*, [1896] 2 Ch. 663, C. A.

(d) *Reid v. Explosives Co.* (1887), 19 Q. B. D. 264, C. A.

(e) *Burland v. Earle*, [1902] A. C. 83, 101, P. C. But if there is a written agreement the articles cannot be regarded to find out the conditions of service (*Re Alexander's Timber Co.* (1901), 70 L. J. (CH.) 767).

(f) *Green v. Wright* (1876), 1 C. P. D. 691.

(g) *Whitehaven Joint Stock Banking Co. v. Reed* (1886), 54 L. T. 360, C. A.; see, further, p. 295, *post*; and title AGENCY, Vol. I., p. 221.

(h) *Barnett v. South London Tramways Co.* (1887), 18 Q. B. D. 815, 817, C. A.; *Chapleo v. Brunswick Building Society* (1881), 6 Q. B. D. 696, C. A.; *Williams v. Chester and Holyhead Rail. Co.* (1851), 15 Jur. 828; *Gibson v. East India Co.* (1839), 5 Bing. (M. C.) 262.

(i) *Newlands v. National Employers' Accident Association* (1885), 54 L. J. (Q. B.) 428, C. A.

(k) *Re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230; *Re State of Wyoming Syndicate*, [1901] 2 Ch. 431.

(l) *Chida Mines v. Anderson* (1905), 22 T. L. R. 27; *Re Matlock Old Bath Hydropathic Co., Wheatcroft's Case* (1873), 42 L. J. (CH.) 853.

(m) *Molineaux v. London, Birmingham and Manchester Insurance Co.*, [1902] 2 K. B. 589, C. A.

(n) *Whitechurch (George), Ltd. v. Cavanagh*, [1902] A. C. 117; compare *McKay's Case*, [1896] 2 Ch. 757.

(o) *McKay's Case* (1875), 2 Ch. D. 1. But a secretary who before the formation of a company aids the promoter in forming the company (and so is himself a

person contracting with the company this is good ground for dismissal, although it be an isolated act, not known at the time of dismissal, and has happened several months previously (*p*).

A secretary who acts fraudulently and for his own purposes in any transaction does not, in the absence of any facts creating an estoppel, thereby bind his company (*q*).

A secretary may be a clerk or servant so as to be entitled to preferential payment in a winding up (*a*).

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ment.

397. Among the statutory duties of a secretary are signing the annual list and summary when it is not signed by the manager (*b*); filing returns of allotments, and contracts for the allotment of shares paid up otherwise than in cash, when not filed by another officer (*c*); in the case of winding up by the court, assisting in making out the statement of the affairs of the company (*d*); making the statutory declaration required before the commencement of business (*e*); giving notice to any proposed director that his liability is to be unlimited (*f*); issuing certificates of shares, debentures, and debenture stock (*g*); filing particulars of mortgage or charge, when not filed by another officer (*h*); allowing inspection of the debenture register to debenture-holders (*i*).

Statutory
duties.

(iii.) *Manager.*

398. If a general manager commits such a breach of his duty as to cause an immediate loss to the company he is liable in damages (*k*), and a *de facto* manager is also liable to penalties wherever "manager" is mentioned in the Act of 1908 (*l*). A secretary who has in fact acted as manager is liable for negligence in preparing balance-sheets and accounts whereby he has caused dividends to be paid out of

Manager.

promoter), and is paid by him for his services, does not receive this money to the use of the company or as trustee (*Re Sale Hotel and Botanical Gardens, Ex parte Hesketh* (1898), 78 L. T. 368, C. A.).

(*p*) *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339, C. A.; see generally title MASTER AND SERVANT.

(*q*) *Whitechurch (George). Ltd. v. Cavanagh*, [1902] A. C. 117; *Ruben v. Great Fingal Consolidated*, [1906] A. C. 439; and see *British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714. As to cheques forged by a secretary, see *Lewes Sanitary Steam Laundry Co. v. Barclay & Co.* (1906), 95 L. T. 444. As to notice to a secretary, or knowledge acquired in his private capacity, see p. 308, *post*.

(*a*) *Cairney v. Back*, [1906] 2 K. B. 746; see p. 517, *post*.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 26 (4).

(*c*) *Ibid.*, s. 88.

(*d*) See p. 425, *post*.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 87 (1).

(*f*) *Ibid.*, s. 60.

(*g*) *Ibid.*, s. 92.

(*h*) *Ibid.*, s. 99 (1).

(*i*) *Ibid.*, s. 102.

(*k*) *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787, where owing to his fraudulent accounts the directors paid a dividend.

(*l*) *Gibson v. Barton* (1875), L. R. 10 Q. B. 329; *Coventry and Dixon's* (1880), 14 Ch. D. 680, C. A.; and see *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617, C. A.; *R. v. Lawson*, [1905] 1 K. B. 541. The authority of a manager to "take entire charge of the interest of a company" in South

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ment.

capital (*m*). A person contracting with the company may assume that a managing director has all the powers which could be given him under the articles (*n*), but the company is not liable if he in fact acts in his private capacity, though apparently as director (*o*). A managing or other director is not a person in the employment of the company (*p*).

(iv.) *Solicitor.*

Solicitor.

399. There is no such office known to the law as the solicitor, in a general or permanent sense, of an individual (*q*), or, it would seem, of a company. In the case of the bringing out of a particular company, a solicitor is not the agent of the company in bringing it out, but the agent of the promoter, to whom he must look for payment (*r*). If he charges the company for his professional services in the flotation of the company he cannot also charge the vendors on the sale of the business to the company (*s*). An agreement made before the company is formed does not give him any right to employment (*t*), nor does an article (*u*); but the articles may protect a payment by directors to a solicitor (*a*).

A company's solicitor cannot set off his costs against calls made, before his action to recover the costs, in respect of shares held by him in the company, and the company may therefore validly forfeit his shares before paying the costs, unless he first obtains an injunction (*b*).

It is not within the province of the company's solicitor to make any representations to possible investors as to the financial state of the company (*c*).

America does not extend to an unusual transaction, such as a promise to pay a guarantor of the company whose fund has been forfeited (*Re Cunningham & Co., Ltd., Simpson's Claim* (1887), 36 Ch. D. 532; compare *Cartmell's Case* (1874), 9 Ch. App. 691).

(*m*) *Municipal Freehold Land Co., Ltd. v. Pollington* (1890), 63 L. T. 238.

(*n*) *Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.; compare *Bank of New South Wales v. Goulburn Valley Butter Co. Proprietary*, [1902] A. C. 543, P. C.; *Smith v. Hull Glass Co.* (1852), 11 C. B. 897.

(*o*) *McGowan & Co. v. Dyer* (1873), L. R. 8 Q. B. 141.

(*p*) *Normandy v. Ind, Coope & Co., Ltd.*, [1908] 1 Ch. 84; see *Re Newspaper Proprietary Syndicate, Ltd., Hopkinson v. Newspaper Proprietary Syndicate, Ltd.*, [1900] 2 Ch. 349. As to managing directors, see further p. 225, *ante*.

(*q*) *Saffron Walden Second Benefit Building Society v. Rayner* (1880), 14 Ch. D. 406, C. A.; see title SOLICITORS.

(*r*) *Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 103, C. A.; *Re English and Colonial Produce Co., Ltd.*, [1906] 2 Ch. 435, C. A.; *National Motor Mail-Coach Co., Ltd., Clinton's Claim*, [1908] 2 Ch. 515, C. A. Hence he is not a promoter (*Re Great Wheal Polgooth, Ltd.* (1883), 32 W. B. 107). He is a proper person to make the statutory declaration of compliance with the initial requisitions of incorporation (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 17 (2) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 1 (2)]).

(*s*) *Welsh v. Forbes* (1906), 8 F. (Ct. of Sess.) 453.

(*t*) *Re Dale and Plant, Ltd.* (1889), 61 L. T. 206.

(*u*) *Eley v. Positive Government Life Security Assurance Co.* (1876), 1 Ex. 88, C. A.

(*a*) *Melhado v. Porto Alegre Rail. Co.* (1874), L. R. 9 C. P. 503.

(*b*) *Johnson v. Lyttle's Iron Agency* (1877), 5 Ch. D. 687, C. A.

(*c*) *Burnes v. Pennell* (1849), 2 H. L. Cas. 497.

He has not a lien on the share register or minute book, which must be kept at the company's office, but he may have one on documents which the company does not need for the conduct of its business. A winding up will not displace this lien (*d*). He cannot, however, assert such a lien as would prejudice the prosecution of the winding up (*e*). Nor has he a lien for costs incurred in business that he knows to be *ultra vires* (*f*).

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and
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ment.

SUB-SECT. 4.—*Meetings of Members.*

(i.) *Different Kinds.*

400. The general meetings of the company's members are either statutory, ordinary, or extraordinary (*g*). An ordinary meeting is any meeting which by statute or the articles of the company must be held periodically, and generally means the annual general meeting of the company. An extraordinary meeting is any meeting which is not an ordinary meeting and not the statutory meeting (*h*).

Different
kinds of
company
meetings.

Articles of association always contain provisions as to the meetings of the company (*i*).

401. Every company limited by shares and registered on or after January 1, 1901, must within a period of not less than one month nor more than three months from the date at which the

Statutory
meeting.

(*d*) *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

(*e*) *Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, C. A.; *Re Anglo-Maltese Hydraulic Dock Co.* (1885), 54 L. J. (CH.) 730; *Graham (Liquidator of Donaldson & Co.) v. White and Park*, [1908] S. C. 309; *Re Hawkes*, [1898] 2 Ch. 1, C. A.; *Rorie v. Stevenson*, [1908] S. C. 559; *Re South Essex Estuary and Reclamation Co., Ex parte Paine and Layton* (1869), 4 Ch. App. 215; *Re Union Cement and Brick Co., Ex parte Pulbrook* (1869), 4 Ch. App. 627. In a debenture-holder's action the solicitors for a representative plaintiff who has been displaced have no lien on the papers (*Batten v. Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317). But in ordinary cases the lien of the solicitor ranks before the charge of the debenture-holders (*Brunton v. Electrical Engineering Corporation*, [1892] 1 Ch. 434; see *Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.), unless he acts for the trustees in preparing the debenture deed (*Re Mason and Taylor* (1878), 10 Ch. D. 729).

(*f*) *Re Phoenix Life Assurance Co., Howard and Dollman's Case* (1863), 1 Hem. & M. 433.

(*g*) *Hamilton's (Lord Claud) Case* (1873), 8 Ch. App. 548.

(*h*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 47.

(*i*) See *ibid.*, clause 45: "The statutory general meeting of the company shall be held within the period required by section 65 of the Companies (Consolidation) Act, 1908." Clause 46: "A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors." Clause 47: "The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary." (Apart from any special provision, directors cannot

SECT. 11.
Regulation
and
Manage-
ment.

Statutory
report.

How
certified.

company is entitled to commence business (*k*) hold a general meeting of the members of the company which is called the statutory meeting (*a*).

The directors must (except in the case of a private company), at least seven days before the day on which the meeting is held, forward a report (called "the statutory report") to every member of the company and to every other person entitled under the Act of 1908 to receive it (*b*).

The statutory report must be certified by not less than two directors of the company, or, where there are less than two directors, by the sole director and manager, and must state : (1) The total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted ; (2) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid ; (3) an abstract of the receipts of the company on account of its capital, whether from shares or debentures, and of the payments made thereout, up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company ; (4) the names, addresses, and descriptions of the directors, auditors (if any), managers (if any), and secretary of the company ; and (5) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification. The statutory report, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares, and to the receipts and payments of the company on capital account, must be certified as correct by the auditors, if any, of the company. Except in the case of a private company, the directors must cause a copy of the statutory report, so certified, to

postpone an ordinary meeting (*Smith v. Paranga Mines, Ltd.*, [1906] 2 Ch. 193.) Clause 48: "The directors may, whenever they think fit, convene an extraordinary general meeting, and extraordinary general meetings shall also be convened on such requisition, or, in default, may be convened by such requisitionists, as provided by section 66 of the Companies (Consolidation) Act, 1908. If at any time there are not within the United Kingdom sufficient directors capable of acting to form a quorum, any director or any two members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors." (See *Hooper v. Kerr, Stuart & Co., Ltd.* (1900), 83 L. T. 729.)

(*k*) See p. 262, *post*.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 65 (1) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 12; Companies Act, 1907 (7 Edw. 7, c. 50), s. 22].

(*b*) *Ibid.*, s. 65 (2), (10). Holders of preference shares and debentures have the same right to receive reports as is possessed by the holders of ordinary shares except in the case of a private company or a company registered before July 1, 1908 (*ibid.*, s. 114 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 23]).

be filed with the registrar as soon as it has been sent to the members of the company (c).

The directors must cause a list showing the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the statutory meeting, and to remain open and accessible to any member of the company during the continuance of the meeting. The members of the company present at the meeting are at liberty to discuss any matter relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed. The statutory meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting has the same powers as an original meeting (d).

SECT. 11.
Regulation
and
Manage-
ment.

List of
members.

402. A general meeting (e) of every company must be held once at the least in every calendar year (f), and not more than fifteen months after the holding of the last preceding general meeting, and, if not so held, the company and every director, manager, secretary, and other officer of the company, who is knowingly a party to the default, will be liable to a fine not exceeding £50, and when default has been made in holding a meeting of the company in accordance with the above provisions, the court may, on the application of any member of the company, call or direct the calling of a general meeting of the company (g).

Annual
meeting.

(ii.) *How Meetings are Convened.*

403. A meeting is convened by notice to the members, which must comply with the articles (h). In default of, and subject to,

Notice.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 65 (3), (4), (5) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 12; Companies Act, 1907 (7 Edw. 7, c. 50), s. 22]. If default is made in filing the report or in holding the statutory meeting the court may order the company to be wound up (*ibid.*, s. 129). But the court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just (*ibid.*, s. 65 (9)).

(d) *ibid.*, s. 65 (6), (7), (8) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 12; Companies Act, 1907 (7 Edw. 7, c. 50), s. 22].

(e) This may be an ordinary or extraordinary meeting (*Hamilton's (Lord Claud) Case* (1873), 8 Ch. App. 548). An extraordinary meeting may be called at any time (*Smith v. Parinya Mines, Ltd.*, [1906] 2 Ch. 193). The articles generally state what is usual business, and that all other is special, and of special business sufficient notice must be given to the shareholders.

(f) January 1 to December 31 (*Gibson v. Barton* (1875), L. R. 10 Q. B. 329).

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 64 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 24 (1), (2)].

(h) *Woolf v. East Nigel Gold Mining Co.*, [1905] 21 T. L. R. 660. Table A of the Act of 1908 contains the following provisions:—Clause 49: "Seven days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day, and the hour of meeting and, in case of special business, the general nature of that business shall be given in manner hereinafter mentioned,

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and
Manage-
ment.

any regulations in the articles a meeting (1) may be called by seven days' (i) notice in writing, served on every member in the manner in which notices are required to be served by Table A of the Act of 1908; (2) five members may call a meeting (j); (3) any person elected by the members present at a meeting may be chairman thereof; and (4) every member has one vote (k).

or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company; but the non-receipt of the notice by any member shall not invalidate the proceedings at any general meeting." Clause 50: "All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, the consideration of the accounts, balance-sheets, and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors." Clause 110: "A notice may be given by the company to any member either personally or by sending it by post to him to his registered address, or (if he has no registered address in the United Kingdom) to the address, if any, within the United Kingdom supplied by him to the company for the giving of notices to him. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post." Clause 111: "If a member has no registered address in the United Kingdom and has not supplied to the company an address within the United Kingdom for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company, shall be deemed to be duly given to him on the day on which the advertisement appears." Clause 112: "A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder named first in the register in respect of the share." Clause 113: "A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or trustee of the bankrupt, or by any like description, at the address, if any, in the United Kingdom supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred." Clause 114: "Notice of every general meeting shall be given in some manner hereinbefore authorised to (a) every member of the company (including bearers of share warrants) except those members who (having no registered address within the United Kingdom) have not supplied to the company an address within the United Kingdom for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or bankruptcy of a member, who, but for his death or bankruptcy, would be entitled to receive notice of the meeting. No other persons shall be entitled to receive notices of general meetings."

(i) This means seven clear days between the day on which the member would receive the notice in ordinary course of post in England and the day of the meeting (*Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204; *Stone v. City and County Bank* (1877), 3 C. P. D. 282, 296, C. A.). This is a matter which concerns the company and shareholders only (*Re Miller's Dale and Ashwood Dale Lime Co.* (1885), 31 Ch. D. 211). Where notice is to be by advertisement in a newspaper the clear days count from the day after the issue of the newspaper (*Sneath v. Valley Gold, Ltd.*, [1893] 1 Ch. 477, C. A.).

(j) This applies where there are regulations, but no board of directors to carry them out (*Re Brick and Stone Co.*, [1878] W. N. 140). The directors, in the absence of express authority in the articles, have no power to postpone a meeting properly called (*Smith v. Paranga Mines, Ltd.*, [1906] 2 Ch. 193).

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 67 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 52].

404. Notwithstanding anything in the articles of a company, its directors must, on the requisition of the holders of not less than one-tenth of its issued share capital upon which all calls or other sums then due have been paid, forthwith proceed to convene an extraordinary general meeting of the company. The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company. It may consist of several documents in like form, each signed by one or more requisitionists. If the directors do not proceed to cause a meeting to be held within twenty-one days from the date of the deposit of the requisition, the requisitionists, or a majority of them in value, may themselves convene it. Any meeting so convened must be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors, but cannot be held after three months from the date of the deposit. If at any such meeting a resolution requiring confirmation at another meeting is passed, the directors must forthwith convene a further extraordinary general meeting for the purpose of considering the resolution and, if thought fit, of confirming it as a special resolution. If the directors do not convene the further meeting within seven days from the date of the passing of the first resolution, the requisitionists, or a majority of them in value, may themselves convene it (*l*). A meeting convened on requisition can only validly pass the business for which it has been expressly convened (*m*).

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and
Manage-
ment.

Requisition
for meeting.

If owing to disputes on the governing body the affairs of the company cannot be carried on, the court will interfere by injunction and the appointment of a receiver until a fresh governing body is appointed (*n*).

Appointment
of receiver.

405. A meeting of the company called by a secretary without the resolution of a directors' meeting at a board cannot pass effectual resolutions so as to bind a member (*o*), but a subsequent meeting of directors can ratify such an informality (*p*). A meeting of the company called by a *de facto* director and adopted by the other

Necessity
of board's
authority.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 66 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 13]. As to summoning an ordinary meeting where there are no specified persons to call it, see *ibid.*, s. 67; and p. 250, *ante*. Directors upon being properly requested, as above, should include all legal required objects in the notice convening the meeting, and if they do not the requisitionists may themselves convene a meeting (*Isle of Wight Rail. Co. v. Tahourdin* (1883), 25 Ch. D. 320, C. A.); and if the shareholders can do so an order will not be made to compel the directors to summon a meeting (*MacDougall v. Gardiner* (1875), 10 Ch. App. 606). If the requisitionists are joint holders of shares it is necessary that each joint holder should sign the requisition (*Patent-wood Keg Syndicate, Ltd. v. Pearse*, [1906] W. N. 164). A meeting cannot be validly convened within the twenty-one days by the secretary acting without the authority of the board (*Re State of Wyoming Syndicate*, [1901] 2 Ch. 431).

(*m*) *Patent-wood Keg Syndicate, Ltd. v. Pearse*, *supra*.

(*n*) *Featherstone v. Cooke* (1873), L. R. 16 Eq. 298; *Trade Auxiliary Co. v. Vickers* (1873), L. R. 16 Eq. 303.

(*o*) *Re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230; *Re State of Wyoming Syndicate*, *supra*, where a resolution to wind up was passed.

(*p*) *Hooper v. Kerr, Stuart & Co., Ltd.* (1900), 83 L. T. 729 (requisitioned meeting).

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and
Manage-
ment.

Insufficient
notice.

directors (*q*), or one called by an acting quorum (*r*), is good under Table A. Directors may pass valid resolutions, and thereby ratify any irregularity committed by the *de facto* director (*s*).

406. Where the notice convening a meeting of the company is insufficient, the business, in the absence of a special provision in the articles, cannot be validly transacted (*t*). Special business should be specially notified and the directions in the articles followed (*u*). If the notice is misleading the court will restrain the holding of the meeting (*a*), or restrain the directors from acting on resolutions passed on insufficient notice, until confirmed by the company at a meeting properly notified (*b*). The transaction of business which has not been sufficiently notified or which is different from that notified may be invalid (*c*). But want of notice of some of the business does not invalidate such business as has been properly notified (*d*).

A notice of a meeting to pass a resolution "with such amendments and alterations as shall be determined at the meeting" enables substantial alteration to be made, although the business is special business the general nature of which is required by the articles to be notified (*e*). A meeting summoned to confirm a special

(*q*) *Transport, Ltd. v. Schonberg* (1905), 21 T. L. R. 305, following *British Asbestos Co., Ltd. v. Boyd*, [1903] 2 Ch. 439; *Southern Counties Deposit Bank, Ltd. v. Rider and Kirkwood* (1895), 73 L. T. 374.

(*r*) *Re Peruvian Railways Co., Ex parte International Contract Co.* (1869), 19 L. T. 803.

(*s*) *Boschoek Proprietary Co. v. Fuke*, [1906] 1 Ch. 148 (the matter being one of internal arrangement, with which the court would not interfere); and see *Browne v. La Trinidad* (1887), 37 Ch. D. 1, C. A.; *Southern Counties Deposit Bank, Ltd. v. Rider and Kirkwood*, *supra*; *British Asbestos Co., Ltd. v. Boyd*, *supra*; *Grant v. United Kingdom Switchback Railways Co.* (1888), 40 Ch. D. 135, C. A. Directors may ratify a notice given without authority (*Hooper v. Kerr, Stuart & Co.* (1900), 83 L. T. 729).

(*t*) And directors then elected are not directors, and their consequent actions are invalid (*Garden Gully United Quartz Mining Co. v. McLister* (1875), 1 App. Cas. 39, P. C.; *Lawes's Case* (1852), 1 De G. M. & G. 421; *Tiessen v. Henderson*, [1899] 1 Ch. 861). As to service of notice, see p. 250, *ante*.

(*u*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. L, Table A, clause 50; and note (*h*), p. 249, *ante*; *Graham v. Van Diemen's Land Co.* (1856) 1 H. & N. 541, Ex. Ch.; *Normandy v. Ind, Coope & Co., Ltd.*, [1908] 1 Ch. 84. As to notice of a resolution to substitute new articles for Table A and offering inspection of such articles, see *Young v. South African and Australian Exploration and Development Syndicate*, [1896] 2 Ch. 268. A director's report accompanying a notice may supplement it (*Boschoek Proprietary Co. v. Fuke*, *supra*). The notice may be looked at to see if the proceedings are regular (*Betts & Co., Ltd. v. Macnaghten*, [1910] 1 Ch. 430).

(*a*) *Jackson v. Munster Bank* (1884), 13 L. R. Ir. 118.

(*b*) *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358, C. A.

(*c*) *Re Bridport Old Brewery Co.* (1867), 2 Ch. App. 191; *Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan* (1868), L. R. 6 Eq. 91; *Re Teede and Bishop, Ltd.* (1901), 70 L. J. (OH.) 409; compare *Henderson v. Bank of Australasia* (1890), 45 Ch. D. 330, C. A.

(*d*) *Re British Sugar Refining Co.* (1867), 3 K. & J. 408; *Wright's Case* (1871), 7 Ch. App. 55; compare *Cleve v. Financial Corporation* (1873), L. R. 16 Eq. 363.

(*e*) *Betts & Co. v. Macnaghten*, *supra*, where the notice proposed that three directors only should be re-elected, but other directors, not previously named, were at the meeting proposed and elected.

resolution to wind up may appoint a different liquidator from the one named in the notice convening the meeting (*f*).

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and
Manage-
ment.

One notice
of two
meetings.

407. One notice of two meetings may be valid (*g*). Where the second meeting depends upon the result of the first, an intimation must be given that notice will be sent if the second is not to be held (*h*). A notice showing that the holding of the second meeting is contingent on the result of the first is also good if one meeting immediately succeeds the other (*i*). But a notice simply stating that the second meeting will be held on a certain date if the resolutions are passed at the first meeting is bad as being conditional, and is not made good by the shareholders acquiring information *aliunde* that the resolutions were passed at the first meeting (*k*). Articles may, however, be so framed as to enable the two meetings required for a special resolution to be convened by one notice (*l*).

408. Special notice should be given of a resolution involving the pecuniary advantage of a director (*m*). A notice not stating the particulars of the advantage is insufficient and the consequent resolutions are bad (*n*). Seeing that the matter is domestic and within the control of the shareholders, the court will not, however, interfere at the instance of some individual shareholders, and the matter must be dealt with by the company in general meeting (*o*), except, it would seem, where the directors, purporting to act on the authority of the resolution, threaten to part with the company's property so as to do an irreparable injury (*p*).

Notice when
director to
gain
advantage.

A notice stating that the meeting will be asked to ratify an act of the directors, which while *ultra vires* of the directors is *intra vires* of the company, is sufficient (*q*), although it does not say why such ratification is required (*r*).

Ratification
of *ultra vires*
acts.

(iii.) *Proceedings at Meetings.*

409. Articles of association usually prescribe the number of members who must be present in order that a valid general meeting may be held (*s*). If the quorum is not present within the

Quorum at
meeting.

(*f*) *Re Trench Tubeless Tyre Co., Bethell v. Trench Tubeless Tyre Co.*, [1900] 1 Ch. 408. C. A.; and see p. 572, *post*. The resolution at the first meeting need not follow the exact terms of the notice (*Torbock v. Westbury (Lord)*, [1902] 2 Ch. 871).

(*g*) *Re Jenner Institute of Preventive Medicine* (1899), 15 T. L. R. 394.

(*h*) *Re Espuela Land and Cattle Co.* (1900), 48 W. R. 684.

(*i*) *Tiessen v. Henderson*, [1899] 1 Ch. 861.

(*k*) *Alexander v. Simpson* (1889), 43 Ch. D. 139, C. A.

(*l*) *Re North of England Steamship Co.*, [1905] 2 Ch. 15, C. A.

(*m*) *Hutton v. West Cork Rail. Co.* (1883), 23 Ch. D. 634, C. A.

(*n*) *Normandy v. Ind, Coope & Co., Ltd.*, [1908] 1 Ch. 84; *Tiessen v. Henderson*, *supra* (resolution giving an option on shares to a director); see *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358, C. A.; and distinguish *Young v. South African and Australian Exploration and Development Syndicate*, [1896] 2 Ch. 268, 276.

(*o*) *Normandy v. Ind, Coope & Co., Ltd.*, *supra*.

(*p*) *Ibid.*, at p. 108; see *Kaye v. Croydon Tramways Co.*, *supra*.

(*q*) *Boschoek Proprietary Co. v. Fuke*, [1906] 1 Ch. 148, 164, applying *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366, 375, P. C.

(*r*) *Grant v. United Kingdom Switchback Railways Co.* (1888), 40 Ch. D. 135, C. A.

(*s*) Table A of the Act of 1908 provides as follows:—Clause 51: "No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein

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and
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ment.

Adjournment
of meeting.

prescribed time after the time appointed for the meeting no business can be transacted, except such as is authorised by statute or by the regulations of the company (a).

410. Except where empowered by the regulations of the company, the chairman (b) cannot adjourn the meeting, nor dissolve it, while any of the business for which it was called remains untransacted (c); and if he refuses to act the meeting may elect another chairman. If he has the right, with the consent of the meeting, to adjourn it, the majority of the members present at the meeting cannot compel him to do so (d). He cannot, however, adjourn or dissolve the meeting against the wish of the majority (e); but he has *prima facie* authority to decide all incidental questions which arise and necessarily require decision at the time (f).

Apart from the regulations an informal meeting cannot be adjourned, as an adjourned meeting is legally a continuation of the original meeting (g).

otherwise provided, three members personally present shall be a quorum." Clause 52: "If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum."

(a) A resolution passed at a meeting in which there is no quorum is void (*Re Cambrian Peat and Fuel Co., Mott's Case and Turner's Case* (1875), 23 W. R. 405; *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85). One shareholder cannot form a meeting (*Sharp v. Dawes* (1876), 2 Q. B. D. 26, C. A.; *Re Sanitary Carbon Co.*, [1877] W. N. 223). Unless otherwise provided by the regulations of the company, members present by proxy cannot be counted in the quorum. Members not entitled to vote may possibly be entitled to form a quorum (see *Young v. South African and Australian Exploration and Development Syndicate*, [1896] 2 Ch. 268, 277).

(b) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 53: "The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company." Clause 54: "If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman." Clause 55: "The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting."

(c) *National Dwellings Society v. Sykes*, [1894] 3 Ch. 159; nor in the absence of special powers can the directors postpone a meeting properly convened (*Smith v. Paringa Mines, Ltd.*, [1906] 2 Ch. 193).

(d) *Salisbury Gold Mining Co. v. Hathorn*, [1897] A. C. 268, P. O.

(e) *National Dwellings Society v. Sykes*, *supra*; compare *Henderson v. Bank of Australasia* (1890), 45 Ch. D. 330, C. A. As to how votes on the question of adjournment should be taken, see *MacDougall v. Gardiner* (1875), 1 Ch. D. 13, C. A.

(f) *Re Indian Zoedone Co.* (1884), 28 Ch. D. 70, C. A.

(g) *Scadding v. Lorant* (1851), 3 H. L. Cas. 418. An adjourned ordinary meeting cannot be an extraordinary meeting (*Wills v. Murray* (1850), 4 Exch. 843). It is sometimes provided that the members present at the adjourned meeting shall form a quorum, but such a provision does not apply to a meeting

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ment.

A meeting of shareholders cannot by a majority refuse to hear the arguments of the minority, but when these arguments have been heard it is competent for the chairman with the consent of the meeting to declare the discussion closed and put the motion to the vote (*h*).

411. The articles usually contain elaborate provisions as to voting at meetings (*i*). Unless otherwise provided by the articles a shareholder, even if a director, is not debarred from

Voting.

of a special class of shareholders (*Hemans v. Hotchkiss Ordnance Co.*, [1899] 1 Ch. 115, C. A.)

(*h*) *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.

(*i*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). Sched. I., Table A, clause 56: "At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least three members, and, unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution." (See pp. 260, 261, *post*.) Clause 57: "If a poll is duly demanded it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded." (See *McMillan v. Le Roi Mining Co., Ltd.*, [1906] 1 Ch. 331; and, p. 257, *post*.) Clause 58: "In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place or at which the poll is demanded, shall be entitled to a second or casting vote." Clause 59: "A poll demanded on the election of a chairman, or on a question of adjournment, shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs." Clause 60: "On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder." Clause 61: "In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members." Clause 62: "A member of unsound mind, or in respect of whom an order has been made by any court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee, *curator bonis*, or other person in the nature of a committee or *curator bonis* appointed by that court, and any such committee, *curator bonis*, or other person may, on a poll, vote by proxy." Clause 63: "No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid." Clause 64: "On a poll votes may be given either personally or by proxy." (See *McMillan v. Le Roi Mining Co., Ltd.*, *supra*.) Clause 65: "The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or, if the appointor is a corporation, either under the common seal, or under the hand of an officer or attorney so authorised. No person shall act as a proxy unless either he is entitled on his own behalf to be present and vote at the meeting at which he acts as proxy, or he has been appointed to act at that meeting as proxy for a corporation." (See *Bombay-Burmah Trading Corporation v. Dorabji Cursetji Shroff*, [1905] A. C. 213, P. C.; *Re Central Bahia Rail. Co.* (1902), 18 T. L. R. 503.) Clause 66: "The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of that power or authority shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid." (See *Foerster v. Newlands (West Griqualand) Diamond*

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using his voting power to carry a resolution by reason of his having a particular interest in the subject-matter of the vote (*j*). But if a member uses his vote for a corrupt purpose, such as obtaining an unfair advantage for himself or another company in which he is shareholder or for a majority of the shareholders, the resolutions will be set aside (*k*). An agreement by a shareholder, although in a representative capacity, with the purchaser of some of his shares that he will vote for the nominee of the purchaser as director is good (*l*). And directors may legitimately use their influence with the shareholders as to the way in which they should vote (*m*).

Every registered holder is entitled to vote subject to any regulations in the articles (*n*), as where the member must have been registered for a fixed term before voting (*o*). Where under the articles there is no right to vote while any sum is due in respect of the shares, a purchaser of a forfeited share cannot vote while calls for which the former holder alone is liable are unpaid (*p*).

Show of
hands.

412. Unless a poll is demanded, the voting is by show of hands, and on such a show the hands are to be counted and not the votes conferred by the shares represented (*q*). The declaration of the chairman as to the result of the voting by show of hands may, by the articles, be either sufficient or conclusive (*r*). When it is only to be sufficient, evidence may be given to disprove it (*s*). Even when it

Mines, Ltd. (1902), 18 T. L. R. 497.) Clause 67: "An instrument appointing a proxy may be in the following form, or in any other form which the directors shall approve:—

"I of in the county of being a member of the Company, Limited, hereby appoint of as my proxy to vote for me and on my behalf at the [ordinary or extraordinary, as the case may be] general meeting of the company to be held on the day of and at any adjournment thereof."

"Signed this day of ."

(*j*) *North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 589, P. C.; *Burland v. Earle*, [1902] A. C. 83, 94, P. C.; *Pender v. Lushington* (1877), 6 Ch. D. 70; *East Pant Du United Lead Mining Co., Ltd. v. Merryweather* (1861), 2 Hem. & M. 254; compare *Mason v. Harris* (1879), 11 Ch. D. 97, C. A.

(*k*) *Menier v. Hooper's Telegraph Works* (1874), 9 Ch. App. 350; *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] W. N. 35.

(*l*) *Greenwell v. Porter*, [1902] 1 Ch. 530.

(*m*) *Campbell v. Australian Mutual Provident Society* (1908), 24 T. L. R. 623, P. C.

(*n*) See *Pender v. Lushington*, *supra*, at p. 80, where shares had been transferred to increase voting power; see p. 186, *ante*.

(*o*) *Ibid.*

(*p*) *Randt Gold Mining Co., Ltd. v. Wainwright*, [1901] 1 Ch. 184.

(*q*) *Ernest v. Loma Gold Mines, Ltd.*, [1897] 1 Ch. 1, 7, C. A., overruling *Re Bidwell Bros.*, [1893] 1 Ch. 603; and see *Re Caloric Engine and Siren Fog Signals Co., Ltd.* (1885), 52 L. T. 846; *Re Horbury Bridge Coal, Iron and Waggon Co.* (1879), 11 Ch. D. 109, C. A.; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 56; and note (*i*), p. 255, *ante*.

(*r*) Under Table A of the Act of 1908 it is conclusive; see clause 56; and note (*i*), p. 255, *ante*. As to the effect of the chairman's declaration in case of an extraordinary or special resolution, see p. 260, *post*.

(*s*) *Re Indian Zoedone Co.* (1884), 26 Ch. D. 70, C. A.; *Re Horbury Bridge Coal, Iron and Waggon Co.*, *supra*; *Wandsworth and Putney Gas-Light and Co. v. Wright* (1870), 22 L. T. 404.

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is to be conclusive it may be disputed where it is inaccurate on the face of it (*t*), or where fraud is shown (*u*), otherwise it cannot be disputed (*a*). The ruling of the chairman that a resolution has been passed by show of hands cannot be challenged if not challenged at the time (*b*). If his decision is challenged, it is his duty to take steps to ascertain the true numbers (*c*). The proper course, if there is only a mistake and no fraud, is to call another meeting (*d*); but if votes are improperly excluded, the court will intervene on proper evidence (*e*).

413. A poll may generally be demanded under the articles (*f*). Poll. At common law a person entitled to vote at a meeting has a right to demand a poll (*g*). Where there is such a right it should be exercised immediately after the declaration of the chairman on the result of the show of hands (*h*). The demand may be made privately to the chairman and by him communicated to the meeting (*i*). It must, as a rule, be made by members personally present at the meeting (*k*). If the chairman refuses a poll on a motion for adjournment which he has declared carried, the court will not interfere (*l*). Unless the articles state the place and time for taking the poll (*m*) the chairman may direct the manner of taking it (*n*). In the absence of special powers he cannot direct the votes to be taken by means of voting papers (*o*).

Where more than one resolution is proposed each must be put to the poll separately (*p*). If after a rightful demand for a poll the poll is not taken, the resolution is void (*q*). A poll is part of

(*t*) *Re Caratal (New) Mines, Ltd.*, [1902] 2 Ch. 498, where the declaration showed that the requisite majority had not been obtained.

(*u*) *Wall v. London and Northern Assets Corporation*, [1899] 1 Ch. 550; *Arnot v. United African Lands, Ltd.*, [1901] 1 Ch. 518, C. A.; *Allison v. Johnson* (1902), 46 Sol. Jo. 686.

(*a*) *Arnot v. United African Lands, Ltd.*, *supra*; *Oppert v. Brownhill Great Southern, Ltd.* (1898), 14 T. L. R. 249, C. A.; *Re Hadleigh Castle Gold Mines, Ltd.*, [1900] 2 Ch. 419, distinguishing *Young v. South African and Australian Exploration and Development Syndicate*, [1896] 2 Ch. 268; and see *Wandsworth and Putney Gas-Light and Coke Co. v. Wright* (1870), 22 L. T. 404.

(*b*) *Arnot v. United African Lands, Ltd.*, *supra*.

(*c*) *R. v. St. Pancras (Vestrymen)* (1839), 11 Ad. & El. 15.

(*d*) *Ibid.*

(*e*) *Pender v. Lushington* (1877), 6 Ch. D. 70; *Young v. South African and Australian Exploration and Development Syndicate*, *supra*; *Re Indian Zoedone Co.* (1884), 26 Ch. D. 70, C. A.

(*f*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 56; and note (*i*), p. 255, *ante*. As to the demand for a poll in the case of extraordinary or special resolutions, see p. 260, *post*.

(*g*) *R. v. Wimbledon Local Board* (1882), 8 Q. B. D. 459, C. A.; *Campbell v. Maund* (1836), 5 Ad. & El. 865, Ex. Ch.

(*h*) *Campbell v. Maund*, *supra*, at p. 881.

(*i*) *Re Phoenix Electric Light and Power Co.* (1883), 31 W. R. 398.

(*k*) *R. v. Government Stock Investment Co.* (1878), 3 Q. B. D. 442.

(*l*) *Foss v. Harbottle* (1843), 2 Hare, 461; *MacDougall v. Gardiner* (1875), 1 Ch. D. 13, C. A.

(*m*) *Re British Flax Producers' Co., Ltd.* (1889), 60 L. T. 215.

(*n*) *Re Chillington Iron Co.* (1885), 29 Ch. D. 159.

(*o*) *McMillan v. Le Roi Mining Co., Ltd.*, [1906] 1 Ch. 331.

(*p*) *Patentwood Keg Syndicate, Ltd. v. Pearse*, [1906] W. N. 164.

(*q*) *R. v. Cooper* (1870), L. R. 5 Q. B. 457.

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Voting by
proxy.

the meeting (r), and for the purpose of taking it the meeting continues until the poll is closed (s).

414. There is no common law right on the part of a member to vote by proxy (t). Where the right exists it depends on the contract between the company and its members as expressed in its regulations, the provisions of which, such as, for instance, those regarding attestation, must be strictly complied with (a). When attestation is required a proxy holder cannot be the attesting witness to his own proxy form (b). The form of proxy is generally given in the articles (c). The proxy form, when signed by the member, may have blanks for the date of execution and the day of the meeting, which may not then be fixed, provided that some person duly authorised by him fills in the blanks (d). A company which is a member of another company may, by resolution of the directors, authorise any of its officials or any other person to act as its representative at any meeting of the other company, the person so authorised being entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of the other (e). A proxy paper directed to any member of a named firm may be good although at the date of the proxy the person who eventually used the proxy was not a member of the firm or of the company (f).

Stamps.

An ordinary proxy paper, or a power of attorney to vote at any one specified meeting or any adjournment thereof, needs only a penny stamp (g). But it must specify the day upon which the meeting at which it is intended to be used is to be held, and will be available only at the meeting so specified, and any adjournment thereof (h). The paper must be stamped before execution by the person executing it, who, if an adhesive stamp is used, must cancel it (i); the penalty for breach of these provisions is £50, and any vote given is void (j). A proxy or power other than one given for one particular

(r) *R. v. Lambeth (Rector)* (1838), 8 Ad. & El. 356.

(s) *R. v. Chester (Archdeacon)* (1834), 1 Ad. & El. 342.

(t) *Harben v. Phillips* (1883), 23 Ch. D. 14, 35, C. A.

(a) *Ibid.*

(b) *Re Parrott, Ex parte Cullen*, [1891] 2 Q. B. 151.

(c) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 67; and note (i), p. 256, *ante*; see also Encyclopædia of Forms, Vol. IV., pp. 377, 685.

(d) *Sadgrove v. Bryden*, [1907] 1 Ch. 318, following *Ernest v. Loma Gold Mines, Ltd.*, [1896] 2 Ch. 572; [1897] 1 Ch. 1, O. A.; and see *Re Lancaster, Ex parte Lancaster* (1877), 5 Ch. D. 911, C. A.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 68 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 24 (3)].

(f) *Bombay-Burmah Trading Corporation v. Dorabji Cursetji Shroff*, [1905] A. C. 213.

(g) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 80, and Sched. I.

(h) As to inserting the date after execution, see *supra*.

(i) It may be effectually cancelled by signing across it or otherwise defacing it (*Macmullen v. Sir Alfred Hickman Steamship, Ltd.* (1902), 71 L. J. (OH.) 766).

(j) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 80. On an arrangement or compromise under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 120, the judge may direct proxies given abroad to be telegraphed as to their total results and counted at the meeting; in such a case the proxy forms are not irregular through having the name of a particular person as agent for the voter, and they may be validly stamped with a 10s. stamp within thirty days of their arrival in England under s. 15 (3) of the Stamp Act, 1891 (*Re English, Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, O. A.).

meeting requires a 10s. stamp (*k*). The directors may, at any rate when their policy is challenged, pay out of the funds of the company the cost of stamping proxy papers and of posting them to the members (*l*).

Proxies cannot vote on a show of hands (*m*), or, when the articles do not so provide, join in demanding a poll (*n*). A vote by a proxy holder "for self and proxies" is good for all the votes he represents (*o*). A proxy paper can be revoked at any time before it is used, and if two are given the later one revokes the earlier one (*p*). A vote by a member personally revokes the authority of his proxy (*q*). At a meeting of a special class of voters only one of that class can be named as a proxy (*r*).

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(iv.) *Resolutions.*

415. Resolutions are of three kinds, namely, ordinary, extraordinary, and special. An ordinary resolution is one which is passed when even a bare majority of votes is in favour of it.

Different
kinds of
resolutions.

A resolution is an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution, has been duly given (*a*).

A resolution is a special resolution when it has been passed in manner required for the passing of an extraordinary resolution; and confirmed by a majority of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a subsequent general meeting, of which notice has been duly given, held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting (*b*). If the interval is too short or too long the resolution is invalid (*c*). But

Special
resolution.

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.; *Trinity House of Hull v. Beadle* (1849), 13 Q. B. 175; and see *Re M'Inerney* (1891), 30 L. R. Ir. 49.

(*l*) *Peel v. London and North Western Rail. Co.*, [1907] 1 Ch. 5, C. A., overruling on this point *Studdert v. Grosvenor* (1886), 33 Ch. D. 528.

(*m*) *Re Caloric Engine and Siren Fog Signals Co., Ltd.* (1885), 52 L. T. 846; *Ernest v. Loma Gold Mines, Ltd.*, [1896] 2 Ch. 572; [1897] 1 Ch. 1, C. A., overruling *Re Bidwell Brothers*, [1893] 1 Ch. 603.

(*n*) *Re Haven Gold Mining Co.* (1882), 20 Ch. D. 151, 157, C. A.; *R. v. Government Stock Investment Co.* (1878), 3 Q. B. D. 442.

(*o*) *Foerster v. Newlands (West Griqualand) Diamond Mines, Ltd.* (1902), 18 T. L. R. 497.

(*p*) *Story on Agency*, s. 474.

(*q*) *Ibid.*, s. 462.

(*r*) *Re Central Bahia Rail. Co., Ltd.* (1902), 18 T. L. R. 503.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 69 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 45]. As to the notice specifying the intention, see *Re Silkstone Fall Colliery Co.* (1875), 1 Ch. D. 38, C. A.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 69 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51]. The fourteen days must be clear days (*Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204; and see *Sneath v. Valley Gold, Ltd.*, [1893] 1 Ch. 477, C. A.); and "month" means calendar month (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3). As to notice by advertisement, see *Re Railway Sleepers Supply Co.*, *supra*; *Mercantile Investment and General Trust Co. v. International Co. of Mexico* (1891), [1893] 1 Ch. 481, n.

(*c*) *Re Railway Sleepers Supply Co.*, *supra*; *Malleson v. National Insurance and*

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when the rights of creditors have intervened a shareholder cannot repudiate shares the creation of which might have been invalid on this ground (*d*). If the resolution is for reduction of capital an objection on this ground cannot be taken after the certificate of the registration of the confirming order has been made (*e*).

For the purposes of the above provisions notice of a meeting is deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in the manner provided by the articles (*f*).

Declaration
of chairman.

416. At any meeting at which an extraordinary resolution is submitted to be passed, or a special resolution is submitted to be passed or confirmed, a declaration of the chairman that the resolution is carried is, unless a poll is demanded, conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution (*g*).

Poll to pass
special or
extraordinary
resolution.

417. A poll may be demanded by three persons for the time being entitled according to the articles to vote, unless the articles of the company require a demand by such number of such persons, not in any case exceeding five, as may be specified in the articles (*h*). When a poll is so demanded, in computing the majority on the poll reference must be had to the number of votes to which each member is entitled by the articles of the company (*i*).

Ordinary
resolution.

418. An ordinary resolution is sufficient for adopting or confirming a contract made by the directors without authority but within the powers of the company, but not for authorising them to enter into future contracts. For this purpose an alteration of the articles by a special resolution would be required (*k*).

A resolution may be wholly invalid if part of it is *ultra vires* (*l*), but where the good part is severable from the bad the former is valid (*m*).

Guarantee Corporation, [1894] 1 Ch. 200. The appointment of a liquidator at the first meeting may be rescinded, though the resolution to wind up is confirmed (*Re Indian Zoedone Co.* (1884), 26 Ch. D. 70, C. A.).

(*d*) *Re Miller's Dale and Ashwood Dale Lime Co.* (1885), 31 Ch. D. 211.

(*e*) *Ladies' Dress Association v. Pulbrook*, [1900] 2 Q. B. 376, C. A.; *Re Walker and Smith, Ltd.*, [1903] W. N. 82.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 69 (6) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51]. Articles may be so framed as to allow notice of both the meetings required to pass and confirm a special resolution to be given by one document (*Re North of England Steamship Co.*, [1905] 2 Ch. 15, C. A.).

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 69 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51]; see *Arnot v. United African Lands, Ltd.*, [1901] 1 Ch. 518, C. A.; and p. 256, *ante*.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 69 (4) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 25].

(*i*) *Ibid.*, s. 69 (5) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51].

(*k*) *Grant v. United Kingdom Switchback Railways Co.* (1888), 40 Ch. D. 135, C. A.

(*l*) *Re Teede and Bishop, Ltd.* (1901), 84 L. T. 561.

(*m*) As in *Thomson v. Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 765, C. A., where a special reconstruction scheme was bad, but the resolution to wind up was good, following *Cleve v. Financial Corporation* (1873), L. R. 16 Eq. 363, 378, and *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176, and distinguishing *Re Imperial Bank of China, India and Japan* (1866), 1 Ch. App. 339, 347.

419. An amendment fairly arising on a resolution which is specified in the notice of meeting must be put to the meeting, and a chairman has no right to refuse it (*n*). No amendment can be allowed at the second or confirmatory meeting of a resolution passed as a special resolution at the first meeting (*o*).

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Amendments.

It is usual for a resolution to be moved by one voter and seconded by another, but if the chairman chooses he can put it to the vote without these formalities (*p*).

420. A copy of every special resolution and of every extraordinary resolution must within fifteen days from the confirmation of the special resolution, or from the passing of the extraordinary resolution, as the case may be, be printed and forwarded to the registrar (who is to record the same) subject to a penalty on the company on default not exceeding £2 for every day during which the default continues (*q*).

Copies of
special and
extraordinary
resolution.

Where articles have been registered, a copy of every special resolution for the time being in force must be embodied in or annexed to every copy of the articles issued after the confirmation of the resolution, and where articles have not been registered, a copy of every special resolution must be forwarded in print to any member at his request, on payment of 1s. or such less sum as the company may direct, subject to a penalty on default not exceeding £1 for each copy in respect of which default is made (*r*). Every director and manager of a company who knowingly and wilfully authorises or permits any default by the company in complying with the requirements of the above provisions is liable to the like penalty as is imposed on the company for that default (*s*).

(*v*.) *Evidence as to Meetings.*

421. Every company must cause minutes of all proceedings of general meetings to be entered in books kept for that purpose. Any such minutes, if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, are evidence of the proceedings. Until the contrary is proved, every general meeting of the company in respect of the proceedings of which minutes have been so made is deemed to have been duly held and convened, and all proceedings

Minutes of
general
meetings.

(*n*) *Torbock v. Westbury* (Lord), [1902] 2 Ch. 871; *Betts & Co. v. Macnaghten*, [1910] 1 Ch. 430. If the chairman refuses, his ruling can be challenged in legal proceedings, though not objected to at the time, and the resolution may be set aside (*Henderson v. Bank of Australasia* (1890), 45 Ch. D. 330, C. A.).

(*o*) *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A. But where there are two resolutions, one to wind up voluntarily and the other to appoint a liquidator, the liquidator can be changed, for no notice is required for that, nor a confirmatory meeting (*Re Trench Tubeless Tyre Co., Bethell v. Trench Tubeless Tyre Co.*, [1900] 1 Ch. 408, C. A.).

(*p*) *Re Horbury Bridge Coal, Iron and Waggon Co.* (1879), 11 Ch. D. 109, 117, C. A.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 70 (1), (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 53, 54; Companies Act, 1907 (7 Edw. 7, c. 50), s. 45].

(*s*) *Ibid.*, s. 70 (6).

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Commence-
ment of
business by
company.

had thereto to have been duly had, and all appointments of directors, managers, or liquidators are deemed to be valid (*t*). The chairman's signature need not be written at the meeting (*u*).

SUB-SECT. 5.—Commencement of Business.

422. A company which is not a private company within the meaning of the Act of 1908 (*a*) cannot commence any business or exercise any borrowing powers (*b*) unless the following requirements are complied with:— (1) Shares held subject to the payment of the whole amount thereof in cash must have been allotted to an amount not less in the whole than the minimum subscription (*c*); (2) every director of the company must have paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription, or in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash (*d*); (3) there must have been filed with the registrar a statutory declaration by the secretary or one of the directors, in the prescribed form (*e*), that the aforesaid conditions have been complied with; and, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, (4) there must have been filed with the registrar a statement in lieu of prospectus (*f*).

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 71 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67]; *ibid.*, Sched. I., Table A, clause 56; and see p. 255, *ante*.

(*u*) *West London Rail. Co. v. Bernard* (1843), Dav. & Mer. 397; *Southampton Dock Co. v. Richards* (1840), 1 Man. & G. 448; *London and Brighton Rail. Co. v. Fairclough* (1841), 2 Man. & G. 674; *Miles v. Bough* (1842), 3 Gal. & Dav. 119; *Re Llanharry Haematite Iron Co., Roney's Case, Stock's Case* (1864), 4 De G. J. & Sm. 426, C. A. As to transcribing minutes from rough notes and altering minutes, see *Re Jennings* (1851), 1 I. Ch. R. 236; *Re Cawley & Co.* (1889), 42 Ch. D. 209, 226, C. A.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); see p. 73, *ante*.

(*b*) Prior to January 1, 1901, when the Companies Act, 1900 (63 & 64 Vict. c. 48), came into operation, any company could commence business or exercise its borrowing powers as soon as it was incorporated. By s. 6 of the Act of 1900 certain conditions had to be complied with before business could be commenced or borrowing powers exercised by any company registered on or after January 1, 1901, which invited the public to subscribe for its shares; and by the Companies Act, 1907 (7 Edw. 7, c. 50), s. 1, Sched. II., the same conditions, subject to certain amendments and modifications, had to be complied with by companies which did not so invite the public unless they were private companies, as defined by the Act, or had allotted any shares or debentures before July 1, 1908. The provisions of the Acts of 1900 and 1907 are substantially those enacted by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

(*c*) As to the meaning of minimum subscription, see *ibid.*, s. 85 (7); and p. 177, *ante*.

(*d*) See *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, C. A.

(*e*) See Order of the Board of Trade of March 29, 1909, Form 44.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 87 (1). If any company commences business or exercises borrowing powers in contravention of the above provisions, every person who is responsible for the contravention is, without prejudice to any other liability, liable to a fine not exceeding £50

The above provisions do not prevent the simultaneous offer for subscription or allotment of any shares, debentures or debenture stock or the receipt of any money payable on application for debentures or debenture stock (*g*).

SECT. 11.
Regulation and Management.

423. The registrar, on the filing of the statutory declaration (but in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares only after a statement in lieu of prospectus has been filed with him), is to certify that the company is entitled to commence business. His certificate is conclusive evidence that the company is so entitled (*h*), and evidence cannot be received to show that the facts did not warrant the issuing of the certificate (*i*).

Registrar's certificate as to right to commence business.

424. Any contract whatever, whether provisional or final, made by a company before the date at which it is entitled to commence business is provisional only, and is not binding on the company until that date, but on that date it becomes binding (*k*). Even a bank which receives subscriptions on application for the company's shares is not entitled to a *quantum meruit* for services rendered before that date (*l*).

Contracts made before company entitled to commence business.

SUB-SECT. 6.—Returns to Registrar.

425. The following returns have to be made by companies to the registrar :—

Joint stock companies.

(1) A return of any allotment of shares in a company limited by shares, with the particulars required by statute, and those specially required where shares are allotted as fully or partly paid up otherwise than in cash (*m*).

(2) An annual return, to be made by every company having a share capital, giving a list of the members, with the particulars required by statute as regards them and the capital of the company, particulars as to the directors and secured indebtedness, and (except in the case of a private company) a summary in the form of a balance-sheet (*n*).

(3) A copy of the register, which is required to be kept at its registered office, of the names, addresses, and occupations of its

for every day during which the contravention continues (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 87 (5)). Banking, insurance, deposit, provident and benefit societies must publish another statement before commencing business (*ibid.*, s. 108); see pp. 613, 618, *post*.

(*g*) *Ibid.*, s. 87 (4).

(*h*) *Ibid.*, s. 87 (2).

(*i*) *Re Yolland, Husson and Birkett, Ltd., Leicester v. Yolland, Husson and Birkett, Ltd.*, [1908] 1 Ch. 152, C. A.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 87 (3); *Re "Otto" Electrical Manufacturing Co. (1903), Ltd., Jenkins' Claim*, [1906] 2 Ch. 390.

(*l*) *New Druce-Portland Co. v. Blakiston* (1908), 24 T. L. R. 583. As to contracts before incorporation, see p. 297, *post*.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 88; and see p. 179, *ante*.

(*n*) *Ibid.*, s. 28; and see p. 264, *post*. As to assurance companies, see Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 6 (4); and p. 631, *post*.

SECT. 11. directors or managers; and also notification of any change amongst its directors or managers (o).

Regulation
and
Manage-
ment.

Annual list.

426. The list above referred to, which must be made by every company having a share capital once at least in every year, is a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company. It must state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and have ceased to be members respectively and the dates of registration of the transfers (p).

Annual
summary.

427. The list must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—(1) The amount of the share capital of the company, and the number of the shares into which it is divided; (2) the number of shares taken from the commencement of the company up to the date of the return; (3) the amount called up on each share; (4) the total amount of calls received; (5) the total amount of calls unpaid; (6) the total amount of the sums (if any) paid by way of commission in respect of any shares, debentures or debenture stock, or allowed by way of discount in respect of any debentures or debenture stock, since the date of the last return; (7) the total number of shares forfeited; (8) the total amount of shares or stock for which share warrants are outstanding at the date of the return; (9) the total amount of share warrants issued and surrendered respectively since the date of the last return; (10) the number of shares or amount of stock comprised in each share warrant; (11) the names and addresses of the persons who at the date of the return are the directors of the company, or occupy the position of directors, by whatever name called; and (12) the total amount of debt due from the company in respect of all

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 75. The penalty on the company for every day of default is £5, and there is a like penalty on every director or manager who knowingly and wilfully authorises or permits the default (*ibid.*). Other matters which must be notified to the registrar are the situation of the company's registered office and any change therein (*ibid.*, s. 62; see p. 83, *ante*); particulars of any return of accumulated profits in reduction of unpaid capital (*ibid.*, s. 40; see p. 103, *ante*); memorandum on a reduction of capital confirmed by the court (*ibid.*, s. 51; see p. 115, *ante*); notice of any increase of capital, or, where the company has no share capital, of any increase in the number of members (*ibid.*, s. 44; see p. 97, *ante*); notice of any consolidation of shares (*ibid.*, s. 42; see p. 98, *ante*), or of the conversion of shares into stock (*ibid.*, s. 43; see p. 100, *ante*); and copies of every extraordinary or special resolution must be forwarded to the registrar (*ibid.*, s. 69; see p. 261, *ante*).

(p) *Ibid.*, s. 26.

mortgages and charges which are required to be registered with the registrar under the Act of 1908, or which would have been required so to be registered if created after July 1, 1908 (*q*).

The summary must (except where the company is a private company) include a statement, made up to such date as may be specified in the statement, in the form of a balance-sheet, audited by the company's auditors, and containing a summary of its share capital, its liabilities, and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the values of the fixed assets have been arrived at, but the balance-sheet need not include a statement of profit and loss (*r*).

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Regulation
and
Manage-
ment.

Audited
statement.

428. The above list and summary must be contained in a separate part of the register of members, and must be completed within seven days after the day prescribed, and the company must forthwith forward to the registrar a copy signed by the manager or by the secretary of the company (*s*).

Filing with
registrar.

SUB-SECT. 7.—*Accounts and Audit.*

(i.) *Accounts.*

429. A company, as a rule, only acts through its agents (*t*), and it is the duty of an agent, where the business in which he is employed admits of or requires it, to keep regular accounts of all his transactions on behalf of his principal, of his payments, disbursements, and receipts, and to render such accounts to his principal at all reasonable times, without any suppression, concealment, or overcharge (*u*).

Duty of
officers to
keep
accounts.

430. Articles invariably contain provisions as to the accounts which are to be kept by the directors of a company (*w*), but

Articles as
to accounts.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 26.

(*r*) *Ibid.*

(*s*) *Ibid.*, s. 26 (1)—(4) [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 26, 27; Companies Act, 1867 (30 & 31 Vict. c. 131), s. 32; Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 19, 30; Companies Act, 1907 (7 Edw. 7, c. 50), ss. 7, 20, 21]. If a company makes default in complying with the above requirements it is liable to a fine not exceeding £5 for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorises or permits the default is liable to the like penalty (*ibid.*, s. 26 (5)). On a summons for penalties the magistrate can inquire into the truth of the statements in the lists and summary, even if they are in accordance with the company's register (*Re Briton Medical and General Life Association* (1888), 39 Ch. D. 61). A default under this section of the Act of 1908 is a criminal offence in regard to which there is no appeal to the Court of Appeal (*R. v. Tyler and International Commercial Co.*, [1891] 2 Q. B. 588, C. A.). The word "default" implies wilful neglect, and does not include an omission which it is impossible to rectify (*Dorté v. South African Super-Aeration, Ltd.* (1904), 20 T. L. R. 425).

(*t*) See p. 291, *post*.

(*u*) Story on Agency, s. 203; *Pearse v. Green* (1819), 1 Jac. & W. 135; see title AGENCY, Vol. I., p. 186.

(*w*) See Encyclopædia of Forms, Vol. IV., pp. 383, 393, 399, 407; and Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, which contains the following regulations as to accounts and audit:—Clause 103: "The

SECT. 11.
Regulation
and
Manage-
ment.

the auditing of the accounts is provided for by the Act of 1908 (x).

Every balance-sheet laid before a company in general meeting must be signed on behalf of the board by two of the directors, or if there is only one by him (a). In the case of a banking company registered after 15th August, 1879, the balance-sheet must be signed by the secretary or manager (if any), and where there are more than three directors by at least three, and where there are not more than three directors by all of them (b).

A director is not bound himself to examine entries in the books of the company, and is entitled to rely on accounts kept and audited by duly authorised officers (c). The fact that the words "by order of the directors" appears on the balance-sheet, is not alone sufficient to fix him with responsibility for its accuracy (d).

Members'
right to
inspect
accounts.

431. Shareholders have not, as a rule, the right to inspect the accounts of the company (e). Where, by the articles, such a right is given, the right ceases after a voluntary liquidation has begun (f).

directors shall cause true accounts to be kept of the sums of money received and expended by the company and the matter in respect of which such receipt and expenditure takes place, and of the assets and liabilities of the company." Clause 104: "The books of account shall be kept at the registered office of the company, or at such other place or places as the directors think fit, and shall always be open to the inspection of the directors." Clause 105: "The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by statute or authorised by the directors or by the company in general meeting." Clause 106: "Once at least in every year the directors shall lay before the company in general meeting a profit and loss account for the period since the preceding account or (in the case of the first account) since the incorporation of the company, made up to a date not more than six months before such meeting." Clause 107: "A balance sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such meeting. The balance sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommend to be paid by way of dividend, and the amount, if any, which they propose to carry to a reserve fund." Clause 108: "A copy of the balance sheet and report shall, seven days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder." Clause 109: "Auditors shall be appointed and their duties regulated in accordance with sections one hundred and twelve and one hundred and thirteen of the Companies (Consolidation) Act, 1908, or any statutory modification thereof for the time being in force."

(x) See p. 267, *post*.

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 113 (3).

(b) *Ibid.*, s. 113 (3), (5) (b) [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 8].

(c) *Re Denham & Co.* (1883), 25 Ch. D. 752; compare *Dovey v. Cory*, [1901] A. C. 477.

(d) *Re Denham & Co.*, *supra*. As to criminal liability in respect of accounts, see p. 312, *post*.

(e) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I, Table A, clause 105.

(f) *Re Yorkshire Fibre Co.* (1870), L. R. 9 Eq. 650; compare *Morgan's Case* (1884), 28 Ch. D. 620.

Every shareholder is entitled to be furnished with a copy of the balance-sheet at a charge not exceeding 6*d.* for every hundred words (*g*).

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and
Manage-
ment.

In the case of a company which has a share capital, and which is not a private company or a company registered before 1st July, 1908, holders of preference shares and debentures have the same right to receive and inspect the balance-sheets and the reports of the auditors and other reports as is possessed by the holders of ordinary shares (*h*).

Absent members of a company are affected by the information furnished by the directors at a general meeting and bound by the proceedings as to matters within its competence (*i*). If the articles provide that a balance-sheet shall be submitted to the shareholders and shall be binding on them, a mere director's report is not binding (*k*).

(ii.) *Audit.*

432. The Act of 1908, by implication, requires that there shall, in the case of every company, subject to its provisions, be an annual audit of accounts resulting in a balance-sheet, to the accuracy of which the auditors shall speak (*a*).

Annual
balance-sheet.

433. The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed will hold office until the first annual general meeting, unless previously removed by a resolution of the shareholders in general meeting, in which case the shareholders at that meeting may appoint auditors (*b*).

Appointment
of auditors.

Every company must at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting (*c*). The directors may fill any casual vacancy in the office of auditor; but while any such vacancy continues the surviving or continuing auditor or auditors, if any, may act (*d*).

434. A director or officer of the company is not capable of being appointed auditor of the company (*e*).

Restrictions
on appoint-
ment.

A person other than a retiring auditor is not capable of being

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 113 (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 19 (3)]. For the penalty for not signing, see note (*i*), p. 269, *post*.

(*h*) *Ibid.*, s. 114 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 23]. As to the reports of auditors, see p. 268, *post*.

(*i*) *Re Norwich Yarn Co., Ex parte Bignold* (1856), 22 Beav. 143, 165; *Evans v. Smallcombe* (1868), L. 3 H. L. 249.

(*k*) *Helby's, Stokes' and Horsey's Cases* (1866), L. R. 3 Eq. 167.

(*a*) *Newton v. Birmingham Small Arms Co., Ltd.*, [1906] 2 Ch. 378, 387. As to the auditing of insurance company's accounts, see p. 631, *post*.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 112 (5) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 21 (4)].

(*c*) *Ibid.*, s. 112 (1). If an appointment of auditors is not made at an annual general meeting, the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services (*ibid.*, s. 112 (2)).

(*d*) *Ibid.*, s. 112 (6).

(*e*) *Ibid.*, s. 112 (3) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 21 (3)].

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Regulation
and
Manage-
ment.

appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a shareholder to the company not less than fourteen days before the annual general meeting. The company must send a copy of any such notice to the retiring auditor, and give notice thereof to the shareholders, either by advertisement or in any other mode allowed by the articles, not less than seven days before the annual general meeting. If, however, after notice of the intention to nominate an auditor has been so given, an annual general meeting is called for a date fourteen days or less after the notice has been given, the notice, though not given within the time required, is deemed to have been properly given for the purposes thereof, and the notice to be sent or given by the company may, instead of being sent or given within the time required, be sent or given at the same time as the notice of the annual general meeting (f).

Remunera-
tion.

435. The remuneration of the auditors must be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors (g).

Access to
accounts.

436. Every auditor of a company has a right of access at all times to the books and accounts and vouchers of the company, and is entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors (h).

A company cannot by its regulations preclude its auditors from obtaining or availing themselves of the information to which they are entitled by statute as material for the report below mentioned (i).

Auditors'
report.

437. The auditors of a company must make a report to the shareholders on the accounts examined by them, and on every balance-sheet laid before the company in general meeting during their tenure of office. The report must state (1) whether or not they have obtained all the information and explanations they have required, and (2) whether, in their opinion, the balance-sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company (k).

Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 112 (4).

(h) *Ibid.*, s. 113 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 19 (1)]. If a banking company registered after 15th August, 1879, has branch banks beyond the limits of Europe, it is sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in the United Kingdom (*ibid.*, s. 113 (5) (a) [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 7 (5)]).

(i) *Newton v. Birmingham Small Arms Co., Ltd.*, [1906] 2 Ch. 378.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 113 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 19 (2)]. As to what is a sufficient report,

The report must be attached to the balance-sheet, or there must be inserted at the foot of the balance-sheet a reference to it, and the report is to be open to inspection by any shareholder, who is also entitled to be furnished with a copy of the balance-sheet and auditors' report at a charge not exceeding 6d. for every hundred words (*l*). The report must be read before the company in general meeting (*m*).

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Regulation
and
Manage-
ment.

438. It is the duty of an auditor not merely to verify the arithmetical accuracy of the balance-sheet, but its substantial accuracy, to see that it includes the particulars required by the articles or by statute, and contains a correct representation of the state of the company's affairs. While, therefore, apart from the Act of 1908, it is not his duty to consider whether the business is prudently conducted, he is bound to consider and report to the shareholders whether the balance-sheet shows the true financial position of the company. To do this he must examine the books and take reasonable care that their report is true. Except in any special cases he should place before the shareholders the information on which it is based, and not merely the means of obtaining it (*n*). The auditor will be liable for improper payments made by the directors and naturally resulting from his breach of duty (*o*). So an auditor who reports confidentially to the directors the insufficiency of the securities on which the capital is invested and the difficulty of realisation, but who only reports to the shareholders that the value depends on realisation, with the result that the shareholders ignorantly approve an improper dividend, is liable to make good the amount paid (*p*).

Duties of
auditors.

439. Auditors are not agents of the company so as to affect the members with knowledge which they have acquired while auditing the accounts, as, for instance, of unauthorised acts of directors (*q*).

Position of
auditor.

and as to the duty of an auditor to give information as to an internal reserve fund, see *Newton v. Birmingham Small Arms Co., Ltd.*, [1906] 2 Ch. 378.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 113 (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 19 (3)]. If any copy of a balance-sheet which has not been signed as required by the Act is issued, circulated, or published, or if any copy of it is issued, circulated, or published without either having a copy of the auditors' report attached thereto or containing such reference to that report as is required by the statute, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, is on conviction liable to a fine not exceeding £50 (*ibid.*, s. 113 (4) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 19 (5)]). The committee of the Stock Exchange require the insertion in articles of a clause that a copy of the balance-sheet and report shall be sent to every registered member and to the secretary of the Share and Loan Department, Stock Exchange, London; see *Encyclopædia of Forms*, Vol. IV., p. 384; and compare Table A of the Act of 1908, clause 108.

(*m*) *Ibid.*, s. 113 (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 19 (3)].

(*n*) *Re London and General Bank* (No. 2), [1895] 2 Ch. 673, O. A.

(*o*) *Spackman v. Evans* (1868), L. R. 3 H. L. 171, 235, 236.

(*p*) *Re London and General Bank* (No. 2), *supra*.

(*q*) *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787; *Re London and General Bank* (No. 2), *supra*, per LINDLEY, L.J., at p. 683. The auditor must show reasonable skill, care and caution in the performance of his duties, but he is not bound to be a detective, and is "a

SECT. 11. But, if appointed under the statutory powers, they are officers of the company, who may be proceeded against for misfeasance (a).

**Regulation
and
Manage-
ment.**

Appointment
by Board of
Trade.

(iii.) *Inspectors.*

440. The Board of Trade may, in the case of a banking company having a share capital, on the application of members holding not less than one third of the shares issued, and in the case of any other company having a share capital, on the application of members holding not less than one tenth of the shares issued, and in the case of a company not having a share capital, on the application of not less than one fifth in number of the persons on the company's register of members, appoint one or more competent inspectors to investigate the affairs of the company and to report thereon in such manner as the Board directs (b).

The application must be supported by such evidence as the Board may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in requiring the investigation; and the Board may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry (c).

Mode of
inspection.

It is the duty of all officers and agents of the company to produce to the inspector all books and documents in their custody or power, and he may examine them on oath in relation to its business, and may administer an oath accordingly. If any officer or agent refuses to produce any book or document which it is his duty so to produce, or to answer any question relating to the affairs of the company, he is liable to a fine not exceeding £5 in respect of each offence (d).

Report.

On the conclusion of the investigation the inspector is to report his opinion in writing or in print, as the Board directs, to the Board. A copy of the report is to be forwarded by the Board to the registered office of the company, and a further copy is, at the request of the applicants for the investigation, to be delivered to them (e).

Costs.

All expenses of and incidental to the investigation must be defrayed by the applicants, unless the Board, as it may do, directs the same to be paid by the company (f).

Appointment
by company.

441. A company may by special resolution appoint inspectors to investigate its affairs, and inspectors so appointed have the same

watch-dog, not a bloodhound" (*Re Kingston Cotton Mill Co.* (No. 2), [1896] 1 Ch. 331).

(a) *Re London and General Bank* (No. 2), [1895] 2 Ch. 673, C. A.; *Re Kingston Cotton Mill Co.*, [1896] 1 Ch. 6; and see p. 478, *post*; *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617, C. A.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 109 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 56, as amended by Companies Act, 1907 (7 Edw. 7, c. 50), s. 44]. As to the court's jurisdiction to interfere, see *Re Grosvenor and West-end Railway Terminus Hotel Co.* (1897), 76 L. T. 337, C. A.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 109 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 57].

(d) *Ibid.*, s. 109 (3), (4), (5) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 58].

(e) *Ibid.*, s. 109 (6) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 59].

(f) *Ibid.*, s. 109 (7) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 59].

powers and duties as inspectors appointed by the Board of Trade, except that, instead of reporting to the Board, they must report in such manner and to such persons as the company in general meeting may direct. Officers and agents of the company incur the like penalties, in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Board of Trade (*g*).

SECT. 11.
Regulation
and
Manage-
ment.

SUB-SECT. 8.—*Dividends.*

442. The ordinary meaning of the term "dividend" is a share of profits, whether at a fixed rate or otherwise (*h*). The term is generally used with reference to trading or other companies (*i*), and to payments made to members of a company as such and not by way of remuneration for services (*j*). Although its strict meaning may be a share of profits periodically payable, it ordinarily comprises also such shares of profits as are divided only occasionally and are usually called "bonuses" or "bonus dividends" (*k*). The terms "preference dividend," "preferential dividend," and "cumulative dividend" are generally used with reference to shares having preferential rights (*l*). Meaning.

443. The general rights of shareholders or other members with reference to dividends to which they are entitled, especially as regards the rate per cent. and priorities, are stated sometimes in the memorandum of association (with a view to making the rights as far as may be unalterable), sometimes in the articles and occasionally in both of those instruments, but the manner in which they are to be declared and paid is invariably stated in the articles (*m*). Right to dividends.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 110 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 60]; see p. 270, *ante*.

(*h*) *Henry v. Great Northern Rail. Co.* (1857), 1 Do G. & J. 606, C. A.; *Re Chelsea Water Co. and Metropolitan Water Board* (1904), 73 L. J. (Q. B.) 532, C. A.; *Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 353, 363; compare *Lamplough v. Kent Waterworks (Company of Proprietors)*, [1903] 1 Ch. 575, 580, C. A.

(*i*) *Jones v. Ogle* (1872), 8 Ch. App. 192, 197 (a case on the Apportionment Act, 1870 (33 & 34 Vict. c. 35)).

(*j*) *Royal College of Music v. Westminster Vestry*, [1898] 1 Q. B. 809, 819, C. A.

(*k*) *Re Griffith, Carr v. Griffith* (1879), 12 Ch. D. 655.

(*l*) See p. 90, *ante*. Even as regards preference shares, "interest" is not an apt word to express the return by way of a share of profits to which a shareholder is entitled in respect of shares paid up in due course and not by way of advance, although it may be used as an inaccurate mode of expressing the measure of the share of profits (*Bond v. Barrow Hematite Steel Co.*, *supra*).

(*m*) See Encyclopædia of Forms, Vol. IV., pp. 382, 393; and Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, which contains the following regulations as to dividends:—Clause 95: "The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors." Clause 96: "The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company." (Payment of declared interim dividends may be postponed (*Lagunas Nitrate Co., Ltd. v. Schroeder & Co. and Schmidt* (1901), 85 L. T. 22); as to interim dividends, see also *Lucas v. Fitzgerald* (1903), 20 T. L. R. 17.) Clause 97: "No dividends shall be paid otherwise than out of profits." (The question of what is profit is a matter for business men to determine (*Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 353), and depends upon the

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444. If dividends are payable on shares, without qualifying words, this means without regard to the amount paid up on them (n), and shareholders who have paid more on their shares than others cannot be favoured at the discretion of the directors (o).

Dividends
not payable
out of capital.

445. Dividends must not be paid out of the capital of a company limited by shares (p), or limited by guarantee, and having a share capital, even if the memorandum or articles purport to authorise such payments (q). The application of this principle may, however, raise questions of the utmost difficulty in their solution. The mode in which a business is carried on, and what is usual or the reverse, may have a considerable influence in determining what may be treated as profits and what as capital, and even the distinction between fixed and floating capital may be inappropriate with reference to a concrete case (r).

result of the whole accounts fairly taken for the year (*Foster v. New Trinidad Lake Asphalt Co., Ltd.*, [1901] 1 Ch. 208). Dividends improperly paid must be refunded (*Lucas v. Fitzgerald* (1903), 20 T. L. R. 17; *Towers v. African Tug Co.*, [1904] 1 Ch. 558, C. A.); and see pp. 273, 276, *post.*) Clause 98: "Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid up on any of the shares in the company dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share." Clause 99: "The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the electors, be applicable for meeting contingencies, or for equalising dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit." (See *Fisher v. Black and White Publishing Co.*, [1901] 1 Ch. 174, C. A.; *Bugot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146, C. A.; *Wemyss Collieries Trust, Ltd. v. Melville* (1905), 8 F. (Ct. of Sess.) 143; as to setting aside a reserve fund, see p. 272, *post.*) Clause 100: "If several persons are registered as joint holders of any share, any one of them may give effectual receipts for any dividend payable on the share." Clause 101: "Notice of any dividend that may have been declared shall be given in manner hereinafter mentioned to the persons entitled to share therein." Clause 102: "No dividend shall bear interest against the company."

(n) *Oakbank Oil Co. v. Crum* (1883), 8 App. Cas. 65; *Wilkinson v. Cummins* (1853), 11 Hare, 337; compare *Re Bridgewater Navigation Co., Ltd.*, *Birch v. Cropper* (1889), 14 App. Cas. 525; *Re Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165, 172. In clause 98 of Table A of the Act of 1908, and in most articles, dividends are directed to be paid in proportion to the amount paid up on the shares.

(o) *Oakbank Oil Co. v. Crum*, *supra*; *Morgan v. Great Eastern Rail. Co.* (1863), 1 Hem. & M. 560.

(p) *Flitcroft's Case* (1882), 21 Ch. D. 519, C. A.; *Guinness v. Land Corporation of Ireland* (1882), 22 Ch. D. 349, C. A.; *Re National Funds Assurance Co.* (1878), 10 Ch. D. 118; *Leeds Estate, Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787; *Trevor v. Whitworth* (1887), 12 App. Cas. 409, 415, 423, 433; *Re Alexandra Palace Co.* (1882), 21 Ch. D. 149; *Rance's Case* (1870), 6 Ch. App. 104.

(q) *Trevor v. Whitworth*, *supra*; *Re Sharpe*, *Re Bennett*, *Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, C. A. As to paying interest on shares out of capital in certain cases, and on capital paid up in advance of calls, see p. 117, *ante*.

(r) *Dovey v. Cory*, [1901] A. C. 477, 486, 487. As to the objections against

The two propositions, that dividends must not be paid out of capital, and that dividends may only be paid out of profits, are not identical but diverse, the first being a requirement of the Act, which must be complied with, and the latter being in Table A, or other regulations of the company (s).

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arriving at the amount of profit by deducting the aggregate amount of the paid-up capital and the liabilities from the value of the assets and against other modes of ascertaining profit, see *Salisbury v. Metropolitan Rail. Co.* (1870), 22 L. T. 839; *Binney v. Ince Hall Coal and Cannel Co.* (1866), 35 L. J. (CH.) 363; *Helby's, Stoke's and Horsey's Cases* (1866), L. R. 2 Eq. 167, 175; *Stringer's Case* (1869), 4 Ch. App. 475; *Lee v. Neuchatel Asphalte Co.* (1889), 41 Ch. D. 1, C. A.; *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502; *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787. The House of Lords has declined to give its assent to the propositions laid down by the Court of Appeal as to when and to what extent capital which has been lost must be replaced before dividends can be paid (*Dovey v. Cory*, [1901] A. C. 477, 486, 487, 493). The appeal before the House was from the decision in *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, C. A., where the main propositions laid down by the Court of Appeal were (1) that though the paid-up capital of a limited company cannot be lawfully returned to shareholders by way of dividend, such a company may pay dividends although its capital is not intact; (2) that the payment of dividends out of excess of the receipts over the outgoings of a year, after making some allowance for bad debts, is not a payment of dividends out of capital, although losses in previous years are ignored and in effect thrown on capital; (3) that there is no hard and fast legal rule on the question what losses can be properly charged to capital and income respectively, but that the question is one for business men to determine. In *Dovey v. Cory*, *supra*, Lords HALSBURY and MACNAGHTEN seem more or less to countenance the last proposition, and Lord DAVEY appears to dissent from the first and second propositions except in so far as they are applicable where the capital which has been lost is fixed, and not floating or circulating capital. Prior to the decision of the House of Lords it was held that the rule was that where a company was formed to work a wasting property, such as a mine or a patent, or to invest money on securities of varying value from time to time, if the receipts from working, or holding the property or securities, exceeded the expenses of working, the surplus might be distributed in dividends without providing a reserve or sinking fund to meet the depreciation by the waste of the property (*Lee v. Neuchatel Asphalte Co.*, *supra*; *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239, C. A. (which see as to the distinction between fixed and circulating capital)). The same principle was applied in *Wilmer v. McNamara & Co., Ltd.*, [1895] 2 Ch. 245, where the company was formed to take over and work an existing carrier's business, and there had been a subsequent depreciation in the value of the goodwill which was held to be a loss of fixed capital; and in *Re Kingston Cotton Mill Co.* (No. 2), [1896] 1 Ch. 331, where the company was formed to reconstruct a cotton spinning company. With these cases must be compared *Bond v. Barrow Hæmatite Steel Co.*, [1902] 1 Ch. 353, where leasehold iron ore mines held by a smelting company, for the purpose of supplying themselves with ore, were held to be circulating capital, which must in all cases be kept up to its original value before dividends can be declared.

(s) *Bond v. Barrow Hæmatite Steel Co.*, [1902] 1 Ch. 353, 365, where FARWELL, J., says that a company which has a balance to the credit of its profit and loss account is not bound at once to apply that sum in making good an estimated deficiency in value of its capital assets, but may carry it to a suspense account or to reserve, and that if the assets subsequently increase in value the amount neither has been nor will be part of the capital, and that if a part of that balance is used in paying a dividend the dividend is not paid out of capital, although it still remains a question whether it has been paid out of profits or not. But as the House of Lords has left the law (see note (r), *supra*), it is too uncertain to be stated in explicit propositions. As to restitution to profits, on an appreciation of capital assets which had previously depreciated, of amounts which have been debited to revenue, in respect

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If there has been a sale of capital assets, with the result that the assets, including the purchase-money, exceed the aggregate amount of the paid-up capital and the company's liability to outside creditors, the company can treat the excess as profit and distribute it in dividends, although it has been called "capital reserve fund" (t).

Guarantee
by vendor of
business.

446. In some cases on the sale of a business to a company the vendor guarantees the payment of dividends on the shares of the company during a certain period (u). In such a case there is no implied contract on the part of the company to carry on business during the whole of the period, so as to disentitle it to enforce the guarantee if it discontinues (u). If there are several businesses the discontinuance of one does not release the vendor (x). Such a guarantee may in a proper case be released by the company (a). In a *bonâ fide* case payments under such a guarantee are not assets of the company which can be claimed by the creditors (b), though it will be otherwise in the case of a guarantee fund furnished out of the purchase-money payable to the vendor (c).

Court's inter-
ference to

447. The court will not, at any rate where there is a *bonâ fide* dispute, interfere with the way the accounts are made out, or say that profit for the year which the shareholders wish to divide as profit ought to be written off against a loss in capital in every case,

of such depreciation, see *Bishop v. Smyrna and Cassaba Rail. Co.* (No. 2), [1895] 2 Ch. 596; *Re Bridgewater Navigation Co.*, [1891] 2 Ch. 317, C. A.; as to recouping to revenue out of borrowed money capital charges which had been debited against it, see *Mills v. Northern Railway of Buenos Ayres Co.* (1870), 5 Ch. App. 621; compare *Hoole v. Great Western Rail. Co.* (1867), 3 Ch. App. 262; as to the case where one asset has been lost, but the value of the total assets has not depreciated, see *Kehoe v. Waterford and Limerick Rail. Co.* (1888), 21 L. R. Ir. 221; as to what allowance for renewal or depreciation of the assets is to be made out of revenue before ascertaining net profits, see *Davison v. Gillies* (1879), cited 16 Ch. D. 347, n.; *Dent v. London Tramways Co.* (1880), 16 Ch. D. 344; and compare *Kehoe v. Waterford and Limerick Rail. Co.*, *supra*, and *Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 353; as to distributing a loss of capital over several years and paying dividends in the meantime, see *Bosanquet v. St. John del Rey Mining Co., Ltd.* (1897), 77 L. T. 206; *Towers v. African Tug Co.*, [1904] 1 Ch. 558, C. A.; *Turquand v. Marshall* (1869), 4 Ch. App. 376.

(t) *Lubbock v. British Bank of South America*, [1892] 2 Ch. 198; approved in *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239, 265, C. A. But a realised accretion to the estimated value of one item of the capital assets cannot be treated as divisible profit without reference to the result of the whole accounts fairly taken as to both capital and income (*Foster v. New Trinidad Lake Asphalt Co., Ltd.*, [1901] 1 Ch. 208); and if the regulations provide that dividends shall only be payable out of the yearly profits, an accretion to capital value cannot be the subject of dividend (*Re Bridgewater Navigation Co., Ltd., Birch v. Cropper* (1889), 14 App. Cas. 525).

(u) *Re South Llanharran Colliery Co., Ex parte Jegon* (1879), 12 Ch. D. 503, C. A., where the amount payable under the guarantee was repayable out of future profits; see *Addison v. Ness* (1893), 9 T. L. R. 607, H. L.

(w) *Brown & Co. v. Brown* (1877), 36 L. T. 272.

(x) *Ibid.*

(a) *Sheffield Nickel Co. v. Unwin* (1877), 2 Q. B. D. 214.

(b) *Re South Llanharran Colliery Co., Ex parte Jegon*, *supra*; *Re Gelly Deg Colliery Co.* (1878), 38 L. T. 440; *Richardson v. English Crown Spelter Co.*, [1885] W. N. 31.

(c) *Re Stuart's Trusts* (1876), 4 Ch. D. 213

especially where that depends on a valuation being made; nor will it compel directors to declare a dividend against their judgment (d). But payment of a dividend may be restrained if proper provision has not been made for expenses, which ought to be paid out of income (e). Any scheme, though sanctioned by the constitution of the company, which would have the effect of paying dividends even out of a special section of the capital, is invalid (f).

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Where directors, after proper investigation of the financial position of a company, declare, and the shareholders confirm, a dividend or bonus, the court will not review the decision on the ground that the estimates have proved erroneous, if the view taken was one which reasonable men might take (g). But where directors act without proper investigation or professional assistance, the burden lies on them to show that the payment was fairly made out of profits (h). So if it would be evident on proper accounts that a dividend had not been earned, the shareholders have no power to declare and pay it, and their receipt of the dividend does not protect the directors; for they cannot bind the company by an act which is *ultra vires* (i). If any outlay or debt obviously chargeable to income is charged to capital in order to swell the profits improperly, any increased payment of dividend occasioned thereby is a payment out of capital, and may be recovered from the directors with 5 per cent. interest without any allowance for income tax (k).

448. Directors and auditors who are parties to the payment of dividend out of capital are liable to proceedings by action, or in the case of winding up by misfeasance summons (l). Liability for improper dividends.

449. Where directors have paid dividends out of capital, shareholders who have received the dividend with knowledge that it has come out of capital are bound to indemnify them against their liability in respect of the payment (m). A shareholder, Liability of shareholders.

(d) *Bolton v. Natal Land and Colonization Co.*, [1892] 2 Ch. 124; *Wilmer v. McNamara & Co.*, [1895] 2 Ch. 245; *Stevens v. South Devon Rail. Co.* (1851), 9 Hare, 313; *Lambert v. Neuchatel Asphalte Co.* (1882), 51 L. J. (CH.) 882; *Yool v. Great Western Rail. Co.* (1869), 20 L. T. 74; *Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 353.

(e) *Davison v. Gillies* (1879), cited 16 Ch. D. 347, n. The burden of proof lies upon the plaintiff (*Stringer's Case* (1869), 4 Ch. App. 475; *City of Glasgow Bank (Liquidators) v. Mackinnon* (1882), 9 R. (Ct. of Sess.) 535; *Lee v. Neuchatel Asphalte Co.* (1889), 41 Ch. D. 1, C. A.). As to declared dividends, compare *Carlisle v. South Eastern Rail. Co.* (1850), 1 Mac. & G. 689; *Fawcett v. Laurie* (1860), 1 Drew. & Sm. 192.

(f) *Guinness v. Land Corporation of Ireland* (1882), 22 Ch. D. 349, C. A.; and see *Bury v. Fumatina Development Corporation, Ltd.*, [1909] 1 Ch. 754, C. A.

(g) *Re Peruvian Guano Co., Ex parte Kemp*, [1894] 3 Ch. 690; *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 1 Ch. 33.

(h) *Rance's Case* (1870), 6 Ch. App. 104.

(i) *Flitcroft's Case* (1882), 21 Ch. D. 519, C. A.

(k) *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, C. A.

(l) See *Re Denham & Co.* (1883), 25 Ch. D. 752; *Municipal Freehold Land Co., Ltd. v. Pollington* (1890), 63 L. T. 238; *Préfontaine v. Grenier*, [1907] A. C. 101, P. C.; and *Turquand v. Marshall* (1869), 4 Ch. App. 376 (bad debts); and see p. 478, *post*.

(m) *Moxham v. Grant*, [1900] 1 Q. B. 88, C. A.; *Re National Funds Assurance Co.* (1878), 10 Ch. D. 118; *Re Alexandra Palace Co.* (1882), 21 Ch. D. 149.

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knowing all the facts, who has been paid an improper dividend cannot maintain an action to make directors liable for paying dividends out of capital unless he has first returned the dividend to the company. He may, however, be ordered to repay that dividend on a counterclaim by the company (*n*). But dividends out of capital innocently received by shareholders, even if directors, cannot be recovered, at any rate where there is no winding up (*o*).

How
dividends
declared.

Interim
dividends.

Reserve fund
out of profits.

When
dividend
recoverable.

450. It is unusual for the articles to empower the directors to declare dividends, and the articles generally place the power of declaring dividends with the company (*p*). A final dividend can, as a general rule, only be sanctioned at the annual meeting, when the accounts are presented to them (*q*). A power to declare interim dividends is usually vested by the articles in the directors (*a*), and their discretion will not be interfered with by the court at the instance of a shareholder (*b*). A directors' declaration of an interim dividend may be rescinded before payment has been made (*c*). The court is less strict in calling directors to account in respect of an interim dividend than it is as regards a final dividend (*d*).

It is also usual to give the directors a discretionary power to form a reserve fund out of profits, and these, as a rule, remain profits capable of future division as such (*e*).

451. Upon declaration and not before, even in the case of a fixed preference dividend, the sums due for dividend are debts due from the company to the shareholders (*f*), and the shareholders can sue the company for the dividend. The relation of trustee and *cestui que trust* is not, however, created, and the Statute of Limitations immediately begins to run (*g*), the period of limitation being twenty years (*h*).

The articles usually provide that amounts due from any member in respect of calls may be deducted from any dividends

(*n*) *Towers v. African Tug Co.*, [1904] 1 Ch. 558, C. A.

(*o*) *Ibid.*; *Lucas v. Fitzgerald* (1904), 20 T. L. R. 17; and see *James v. Eve* (1873), L. R. 6 H. L. 335.

(*p*) See *Encyclopædia of Forms*, Vol. IV., p. 382; *Companies (Consolidation) Act*, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 95; and p. 271, *ante*.

(*q*) See *Nicholson v. Rhodesia Trading Co.*, [1897] 1 Ch. 434; and *Companies (Consolidation) Act*, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 50.

(*a*) See *Encyclopædia of Forms*, Vol. IV., p. 382; *Companies (Consolidation) Act*, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 96; and p. 271, *ante*.

(*b*) *Lever v. Lands Securities Co.* (1891), 8 T. L. R. 94, where a reserve fund of past profits was resorted to.

(*c*) *Lagunas Nitrate Co., Ltd. v. Schroeder & Co. and Schmidt* (1901), 85 L. T. 22, where an interim dividend account had been opened at a bank.

(*d*) *Lucas v. Fitzgerald*, *supra*; and see *Towers v. African Tug Co.*, *supra*.

(*e*) *Lever v. Lands Securities Co.*, *supra*.

(*f*) *Bond v. Barrow Hematite Steel Co.*, [1902] 1 Ch. 353; *Re Accrington Corporation Steam Tramways Co.*, [1908] 2 Ch. 40.

(*g*) *Re Severn and Wye and Severn Bridge Rail. Co.*, [1896] 1 Ch. 559; *Dalton v. Midland Counties Rail. Co.* (1853), 13 C. B. 474.

(*h*) *Ibid.*; *Re Artisans' Land and Mortgage Corporation*, [1904] 1 Ch. 796; *Re Drogheda Steampacket Co.*, [1903] 1 I. R. 512; *Smith v. Cork and Bandon Rail. Co.* (1870), 5 I. R. Eq. 65, O. A.

payable to him; but even in the absence of such a provision calls and dividends may be set off (i) before a winding up commences (k).

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In the absence of special provision to the contrary, dividends must be paid in money, and not in shares or securities (l).

452. Preference shareholders upon declaration of the dividend, unless restricted by special terms in the conditions on which their shares are issued, are entitled to be paid their dividends out of whatever profits are to the company's credit, and not merely out of the profits for the current year or half-year, and, if their dividends are cumulative, to payment of unpaid arrears from the same source (m). They may obtain an injunction to restrain a proposed payment of an interim dividend in excess of that authorised by the articles (n), or of any ordinary dividend in prejudice of their rights (o). They are specialty creditors, with the right to claim for twenty years from the declaration of the dividend, where declaration is necessary (p). Where business is carried on in a colony they may be entitled to their full dividend without deducting any income tax payable there (q).

Dividends of
preference
shares.

453. If the directors have power, as is usual (r), to set aside out of the profits a sum for or towards a reserve fund, their discretion will not be questioned on the ground that it reduces the amount available for dividend, whether on ordinary or preference shares (s). If they have no such expressed power, the company has an implied power to the same effect; for there is no principle which compels a joint stock company while a going concern to divide the whole of its profits among the shareholders (t). Whether the whole or any part should be divided, or what

Directors'
discretion as
to reserve
fund.

(i) Lindley on Companies, 6th ed., p. 610.

(k) As to set-off in winding up, see p. 505, *post*.

(l) *Hoole v. Great Western Rail. Co.* (1867), 3 Ch. App. 262; *Wood v. Odessa Waterworks Co.* (1889), 42 Ch. D. 636.

(m) *Sturge v. Eastern Union Rail. Co.* (1855), 7 De G. M. & G. 158, C. A.; *Ashton Vale Iron Co. v. Abbott*, [1876] W. N. 119; compare *Staples v. Eastman Photographic Materials Co.*, [1896] 2 Ch. 303, C. A.; *Adair v. Old Bushmills Distillery Co.*, [1908] W. N. 24. As to the rights of preference shareholders in a winding up to payments in respect of past dividends, see *Re Odessa Waterworks Co., Ltd.* (1897), [1901] 2 Ch. 190, n.; *Re Crichton's Oil Co.*, [1902] 2 Ch. 86, C. A.

(n) *Durlacher v. Hotchkiss Ordnance Co.* (1887), 3 T. L. R. 807.

(o) *Henry v. Great Northern Railway* (1857), 1 De G. & J. 606, C. A.; *Sturge v. Eastern Union Rail. Co.*, *supra*; *Matthews v. Great Northern Rail. Co.* (1859), 28 L. J. (CH.) 375; *Webb v. Earle* (1875), L. R. 20 Eq. 556; *Foster v. Coles and Foster (M. B.) & Sons* (1906), 22 T. L. R. 555.

(p) See note (f), p. 81, *ante*.

(q) *Spiller v. Turner*, [1897] 1 Ch. 911; compare *Ashton Gas Co. v. A.-G.*, [1906] A. C. 10.

(r) See *Encyclopædia of Forms*, Vol. IV., p. 382; *Companies (Consolidation) Act*, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 99; and note (m), p. 272, *ante*.

(s) *Fisher v. Black and White Publishing Co.*, [1901] 1 Ch. 174, C. A.; *Burland v. Earle*, [1902] A. C. 83, P. O.; *Wemyss Collieries Trust, Ltd. v. Melville* (1905), 8 F. (Ot. of Sess.) 143.

(t) *Burland v. Earle*, *supra*.

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portion should be divided and what portion retained, are questions of internal management which the shareholders must decide for themselves, and the court cannot control or review their decision. Subject to the articles, it makes no difference whether the undivided balance is retained to the credit of the profit and loss account, or carried to the credit of a rest or reserve fund, or appropriated to any other use of the company. The company may invest the undivided moneys on such securities as the directors may select, subject to the control of a general meeting (*u*). A reserve fund formed out of profits retains, as a rule, its character of profits, and is capable of future division as such (*w*). If the formation of a reserve fund is forbidden, the articles can be altered to authorise it (*a*).

Secret
reserve.

If it is desired to form a secret reserve fund, the articles must not go so far as to preclude the auditors from fulfilling their statutory duties to the shareholders by withholding all information (*b*).

Participation
in dividend.

454. As between the company and its members, and subject to the articles, only those members who are on the register when the dividend is declared are entitled to participate in it. But, as between the vendor and the purchaser of shares, where the contract for sale is silent as to dividends, the purchaser is entitled to dividends declared on the shares either before or after the date fixed for completion of the contract, but unpaid at the date of the contract, although the dividend is declared in respect of a period antecedent to such date (*c*).

In the case of securities sold on the Stock Exchange, in the absence of special bargains sales are made "cum div." or "ex div.," according to the official list quotation, which varies with different classes of securities (*d*). If they are not so quoted, the dealers in the special security fix the dates, which in fact makes the bargains special bargains. The same practice applies in the case of "rights" in respect of existing holdings. The right to future dividends may be sold, and such a contract, if carried out by a broker for a client, will be enforced against the latter, although not enforceable by the rules of the Stock Exchange (*e*).

Dividends
on settl¹⁻³
shares.

455. A person holding shares as trustee for another person is registered as a shareholder, and is in fact the only person to be

(*u*) *Burland v. Earle*, [1902] A. C. 83, P. C. As to the investment of the fund, see p. 272, *ante*.

(*w*) *Lever v. Lands Securities Co.* (1891), 8 T. L. R. 94.

(*a*) *British Equitable Assurance Co., Ltd. v. Baily*, [1906] A. C. 35; *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, C. A.

(*b*) *Newton v. Birmingham Small Arms Co., Ltd.*, [1906] 2 Ch. 378.

(*c*) *Black v. Homersham* (1878), 4 Ex. D. 24. As to new shares allotted in respect of old ones, see *Stewart v. Lupton* (1874), 22 W. R. 855; *Rooney v. Stanton* (1900), 17 T. L. R. 28, C. A.; compare *Re Morgan, Ex parte Phillips, Ex parte Marnham* (1860), 2 De G. F. & J. 634, C. A. As to the effect of improper and erroneous accounts on the rights of transferor and transferees, see *Helby's, Stokes' and Horsey's Cases* (1866), L. R. 2 Eq. 167.

(*d*) See Stock Exchange Rules, r. 91; and title **STOCK EXCHANGE**.

(*e*) *Marten v. Gibbon* (1875), 33 L. T. 561.

recognised by the company as entitled to payment of a dividend (*f*). As between the trustee and his *cestuis qui trustent*, the incidents of the trust at once attach, and in particular the rights under the Apportionment Act, 1870 (*g*). Thus, a division or apportionment of the amount received takes place if any transmission of equitable interest has taken place during the period for which the dividend is declared (*h*); but if an extraordinary dividend or bonus is declared, it belongs to the life tenant, although it was earned during the course of several years (*i*). If settled stock is sold, the tenant for life is not entitled to any portion of the purchase-money although the stock is sold "cum" dividend; if, however, for the purpose of distribution the stock is sold after his death instead of being transferred, his estate may share (*k*). Where shares entitled to a cumulative dividend which is not fully paid are sold before the deficiency is made up, the tenant for life who would have been entitled to the deficiency if it had been paid is not entitled to part of the sale-moneys (*l*).

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ment.

456. Where a company has capitalised a portion of its profits such portion, where the shares in respect of which it is accumulated are in settlement, is to be treated as an accretion to the shares and therefore as settled capital (*m*). No formal decision to capitalise is necessary; but in the case of companies having no power to increase their capital the lengthy treatment of the money as floating capital is sufficient (*n*). Where companies have power to increase their capital, their decision to capitalise income binds the shareholders (*o*). Shares allotted in lieu of dividend, where there

Capitalisation
of profits.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 27.

(*g*) 33 & 34 Vict. c. 35, ss. 2, 5, 7; unless the settlement excludes its operation (*Re Lysaght, Lysaght v. Lysaght*, [1898] 1 Ch. 115, C. A.; *Re Clarke, Barber v. Perowne* (1881), 18 Ch. D. 160). The articles of association do not exclude apportionment (*Re Oppenheimer*, [1907] 1 Ch. 399).

(*h*) *Pollock v. Pollock* (1874), L. R. 18 Eq. 329; *Hasluck v. Pedley* (1874), L. R. 19 Eq. 271; *Re Cline's Estate* (1874), L. R. 18 Eq. 213. As to the right to new shares issued in proportion to existing holding, see *Re Malam, Malam v. Hitchens*, [1894] 3 Ch. 578.

(*i*) *Re Hopkins' Trusts* (1874), L. R. 18 Eq. 696; *Re Griffith, Carr v. Griffith* (1879), 12 Ch. D. 655.

(*k*) *Bulkeley v. Stephens*, [1896] 2 Ch. 241. If at the date of the purchase of stock dividends have been earned and declared but not paid, the tenant for life is not entitled to them (*Re Peel's Settled Estates*, [1910] 1 Ch. 389).

(*l*) *Re Taylor's Trusts, Matheson v. Taylor*, [1905] 1 Ch. 734. As to the rights of the tenant for life and remainderman in regard to shares and apportionment generally, see title SETTLEMENTS.

(*m*) *Bouch v. Sproule* (1887), 12 App. Cas. 385, where accumulated profits were in substance credited to shareholders as payment on new shares allotted to them. The shareholders could individually have refused to accept the new shares. Compare *Blyth's Trustees v. Milne* (1905), 7 F. (Ct. of Sess.) 799, where a warrant for bonus out of the reserve fund was synchronous with the application for new shares, which were considered by the court to be an attractive investment to the holders; and see *Gunnis's Trustees v. Gunnis* (1903), 6 F. (Ct. of Sess.) 104; *Re Eastern and Australian Steamship Co.* (1893), 68 L. T. 321.

(*n*) *Irving v. Houston* (1803), 4 Pat. App. 521, H. L.; *Ward v. Combe* (1836), 7 Sim. 634.

(*o*) *Bouch v. Sproule*, *supra*; *Re Barton's (Ezekiel) Trust* (1868), L. R. 5 Eq. 238; *Gunnis's Trustees v. Gunnis*, *supra*, where a reserve fund was converted into new shares.

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Regulation
and
Manage-
ment.

is no intention to capitalise, belong, as far as they are equivalent to dividend, to the tenant for life entitled to the dividend (*p*).

If instead of simply capitalising income the company returns out of profits part of the capital paid up on the shares (*q*), so as to increase the unpaid portion of the shares, this money is capital. Where, however, the company does not observe the formalities necessary, though professing informally to do the same thing, this action has no such effect, and the returned money remains income (*r*).

SECT. 12.—Powers and Liabilities of Company.

SUB-SECT. 1.—In General.

Position of
registered
company.

457. Although a company is a corporation (*s*), it is only a statutory corporation, and has not all the powers of a corporation at common law (*a*). Nor can every company incorporated under the Act of 1908, or the enactments which it replaces, exercise all its functions immediately after it is incorporated; for, unless it is a private company (*b*), it must comply with certain statutory requirements before it can either commence business or exercise its borrowing powers or enter immediately into binding contracts (*c*).

458. The powers of a company registered under the Act of 1908 depend to a certain extent on whether it is unlimited or limited, and if limited, whether it is limited by shares or by guarantee; and in any case the powers are (1) those expressly given by the Act; (2) those which are incident to its being a statutory corporation; (3) those given by its memorandum of association; and (4) those which are taken by its articles of association. As regards companies with a share capital certain powers exercisable by most companies are restricted, or non-exercisable, in the case of a private company (*d*).

Statutory
duties of
companies.

459. A company registered as above mentioned has certain statutory duties attaching to it from the time of its incorporation. such as, for instance, (1) to have a registered office, and give notice of any change in the situation thereof to the registrar (*e*); if limited (unless it is authorised to omit the word "Limited" from its name), (2) to keep its name up on each of its offices or places of business (*f*); (3) to keep and allow inspection of such registers of

(*p*) *Re Malam, Malam v. Hitchens, supra.*

(*q*) See p. 102, *ante*.

(*r*) *Re Piercy, Whitwham v. Piercy*, [1907] 1 Ch. 289.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 16 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 18; Companies Act, 1900 (63 & 64 Vict. c. 48), s. 1 (3)]; see p. 67, *ante*.

(*a*) See p. 68, *ante*; title CORPORATIONS, Vol. VIII., pp. 320, 358; and *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87. A limited company is not a "respectable and responsible person" within the meaning of a proviso against assigning a lease without the lessor's consent (*Willmott v. London Road Car Co., Ltd.* [1910], 1 Ch. 754).

(*b*) See p. 73, *ante*.

(*c*) See p. 262, *ante*. As to the restriction on the holding of land by charitable and other companies, see p. 79, *ante*.

(*d*) See pp. 69, 73, *ante*.

(*e*) See pp. 82–84, *ante*.

(*f*) See *ibid*.

directors (*g*), members (*h*), and securities (*i*) as are required by the Act; (4) to make the returns of allotments (*k*) and other returns (*l*) required; (5) to file contracts in respect of shares issued for a consideration other than cash (*m*); (6) to issue certificates and debentures within the statutory period (*n*); (7) to hold the statutory and annual meetings required by the Act (*o*); (8) to register transfers of shares on request by the transferor in the same manner and subject to the same conditions as if the request were made by the transferee (*p*); in copies of the memorandum issued after alterations of the share capital, (9) to show the alterations made (*q*); and, if a limited company, (10) to have its name engraven in legible characters on its seal, and mentioned in all notices, advertisements and other official publications, and in all bills of exchange, promissory notes, indorsements, cheques, and orders for goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company (*r*).

SECT. 12.
Powers and
Liabilities
of
Company.

As an incorporated company can only act by its agents, the Act of 1908, like its predecessors, imposes many duties on the directors and other officers of such a company, the non-fulfilment of which generally renders them liable to penalties (*s*).

Agents of
companies.

460. Some statutory powers may be exercised subject to conditions by an incorporated company although they are not conferred either by its memorandum of association or by its articles, such as its powers to change its name (*t*), or to reorganise its share capital (*a*), or to close the register of members for a limited period (*b*), or to refer differences to arbitration (*c*). Many of the powers of the Act of 1908 can only be exercised by a company if authorised to exercise them by its articles, that is to say, its articles of association as originally framed or as altered by special resolution (*d*).

Exercise of
general
statutory
powers.

461. The following powers may be exercised by a company if so authorised by its articles, namely, (1) the powers to keep a colonial register of members (*e*); (2) to issue share or stock warrants to bearer (*f*); (3) to arrange for different amounts to be paid on shares,

Statutory
powers only
exercisable
if given by
articles.

(*g*) See p. 212, *ante*.

(*h*) See pp. 148 *et seq.*, *ante*.

(*i*) See p. 364, *post*.

(*k*) See p. 179, *ante*.

(*l*) See p. 263, *ante*.

(*m*) See p. 179, *ante*.

(*n*) See p. 181, *ante*; p. 368, *post*.

(*o*) See pp. 248, 249, *ante*.

(*p*) See p. 193, *ante*.

(*q*) See pp. 97 *et seq.*, *ante*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 63; and see 299, *post*. The above list of statutory duties is not intended to be exhaustive.

(*a*) See p. 314, *post*.

(*b*) See p. 86, *ante*.

(*a*) See p. 116, *ante*.

(*b*) See p. 162, *post*.

(*c*) See p. 601, *post*.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285.

(*e*) See p. 166, *ante*.

(*f*) See p. 185, *ante*.

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of
Company.

with proportionate dividends (*g*); (4) to increase, consolidate, sub-divide, or reduce share capital, convert shares into stock and reconvert the same, and cancel unissued shares (*h*); (5) to have an official seal for use abroad and to empower an agent to use it (*i*); (6) to pay underwriting commissions in respect of share capital (*k*); and (7) to pay interest out of capital during the construction of works (*l*).

Powers
exercisable
by special
resolution.

462. Where a company has powers under the Act of 1908, or under that Act and its articles, a special resolution (*m*) is often required for the exercise of the power, as, for instance, (1) to change the company's name (*n*); (2) to alter the objects of the company as stated in its memorandum of association (*o*); (3) to alter its articles of association (*p*); (4) to return accumulated profits to its shareholders in reduction of paid-up capital (*q*); (5) to sub-divide the shares of the company into shares of smaller amount (*r*); (6) to reduce the capital of the company (*s*); (7) to reorganise its share capital by consolidating shares of different classes or dividing shares into different classes (*t*); (8) to turn an existing liability on shares into a reserve liability (*a*); (9) to alter memoranda so as to make the liability of directors or managers unlimited (*b*); (10) to appoint inspectors to investigate its affairs (*c*); and, (11) to initiate on its own account a winding up by the court (*d*), or, as a rule, to wind up voluntarily (*e*). Articles of association frequently require powers of the company or its directors to be exercised or sanctioned by special or extraordinary resolution.

Where
ordinary
resolution
sufficient.

Where a company is authorised by its articles to increase its share capital, or consolidate its shares or convert them into stock, or reconvert the stock into paid-up shares, or cancel unissued shares, the power may, at any rate if the articles do not require more, be exercised by an ordinary resolution (*f*).

Special
powers.

Special powers are also taken by the articles, with reference to

(*g*) See p. 164, *ante*.

(*h*) See pp. 95 *et seq.*, *ante*.

(*i*) See p. 292, *post*.

(*k*) See p. 92, *ante*.

(*l*) See p. 117, *ante*.

(*m*) See p. 259, *ante*.

(*n*) See p. 86, *ante*.

(*o*) See p. 328, *post*.

(*p*) See p. 207, *ante*.

(*q*) See p. 102, *ante*. A special resolution is required for each return, otherwise there is no valid capitalisation as between a tenant for life and remainderman (*Re Percy, Whitwham v. Percy*, [1907] 1 Ch. 289).

(*r*) See p. 99, *ante*.

(*s*) See p. 103, *ante*. As to the two special resolutions being required where the articles do not authorise a reduction of capital, see *ibid*. Where a special resolution is merely necessary to authorise the directors to perform a single operation, such as to issue fresh capital, it is not necessary to do this by two sets of meetings (*Campbell's Case, Hippisley's Case* (1873), 9 Ch. App. 1, 22).

(*t*) See p. 116, *ante*.

(*a*) See p. 89, *ante*.

(*b*) See p. 235, *ante*.

(*c*) See p. 270, *ante*.

(*d*) See p. 399, *post*.

(*e*) See pp. 569 *et seq.*, *post*.

(*f*) See pp. 95 *et seq.*, *ante*.

such matters as the forfeiture (g) of and lien (h) on shares and fixing the minimum subscription for shares on which directors may proceed to allotment (i). Special provisions are also inserted in the articles in order that the company may obtain an official quotation on the Stock Exchange (k).

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Powers and
Liabilities
of
Company.

SUB-SECT. 2.—*Limitation of Powers.*

463. The memorandum of association of a company is its charter, defining the extent of its powers and the objects of its existence and operations (l). Outside their limits, and the necessary auxiliary powers to effect them, it can only do those things for which the Act of 1908 provides (m).

Objects of
company.

The objects to be stated in the memorandum are those only which the company is to pursue during its corporate life (n).

(g) See p. 200, *ante*.

(h) See p. 168, *ante*.

(i) See p. 177, *ante*.

(k) In order to obtain such a quotation on the London Stock Exchange, articles of association must contain the following provisions:—1. That none of the funds of the company shall be employed in the purchase of, or in loans upon the security of its own shares; 2. That directors must hold a share qualification; 3. That the borrowing powers of the board are limited; 4. That the non-forfeiture of dividends is secured; 5. That the common form of transfer shall be used; 6. That all share and stock certificates shall be issued under the common seal of the company, and shall bear the signature of one or more directors and the secretary; 7. That fully-paid shares shall be free from all lien; 8. That the interest of a director in any contract shall be disclosed before execution, and that such director shall not vote in respect thereof; 9. That the directors shall have power at any time and from time to time to appoint any other qualified person as a director either to fill a casual vacancy or as an addition to the board, but so that the total number of directors shall not at any time exceed the maximum number fixed; but that any director so appointed shall hold office only until the next following ordinary general meeting of the company, and shall then be eligible for re-election; 10. That a printed copy of the report, accompanied by the balance-sheet and statement of accounts, shall, at least seven days previous to the general meeting, be delivered or sent by post to the registered address of every member, and that two copies of each of these documents shall at the same time be forwarded to the secretary of the Share and Loan Department, the Stock Exchange, London; 11. That the charge for a new share certificate issued to replace one that has been worn out, lost, or destroyed shall not exceed 1s. It is provided with regard to all share and stock certificates that they should state on their face the authority under which the company is constituted and the amount of the authorised capital of the company; and that all preference certificates should bear on their face a statement of the company's capital and of the conditions as to both capital and dividends under which the shares are issued. The following footnote must appear on all stock and share certificates:—"The company will not transfer any stock [shares] without the production of a certificate relating to such stock [shares]; which certificate must be surrendered before any deed of transfer, whether for the whole or any portion thereof, can be registered or a new certificate issued in exchange." Where the capital of a company consists of more than one class of shares of the same denomination, the distinctive numbers of the shares of each class must be printed on the face of the share certificates.

(l) As to alteration of the memorandum, see p. 69, *ante*; p. 328, *post*.

(m) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653; *A. G. v. Great Eastern Rail. Co.* (1880), 5 App. Cas. 473; *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87; and see p. 68, *ante*.

(n) See p. 66, *ante*, and p. 285, *post*.

SECT. 12.
Powers and
Liabilities
of
Company.

Construction
of object
clauses of
memorandum.

464. The usual rules applicable in construing documents for the most part apply as regards the construction of the object clauses of a memorandum of association. The first question is, what is the fair construction of the memorandum as a whole, and general words must be taken in connection with what are shown by the context to be the dominant or main objects of the company (o). As there is nothing in the Act of 1908 to limit the number of objects which may be stated in a memorandum of association, the rule of interpretation by reference to what are supposed to be the main or principal objects of a company seems more strictly applicable where the question is whether the company ought to be wound up on the ground that its substratum is gone (p), than when the question is whether something done or proposed to be done, such as the acquisition or working of a new business or mining property, is *ultra vires* of the company (q). General words, however, in the memorandum of association have often been construed as being only ancillary to the main objects of the company on questions as to both winding up and *ultra vires* (r).

Construction
of contem-
poraneous
memorandum
and articles.

465. The articles of association are subordinate to the memorandum (s). Where, however, as is usually the case, the memorandum and articles are contemporaneous documents, the ordinary rule applies, *sub modo*, according to which an ambiguity in one document may be explained by the other or an inconsistency may be explained by taking the two together (t). As regards matters which the Act requires to be in the memorandum, that instrument is dominant, and the articles cannot be read to modify its provisions (u). As regards matters which are, but need not have been,

(o) *Re German Date Coffee Co.* (1882), 20 Ch. D. 169, 188, C. A. The name of the company may be important in construing wide objects (*Re Crown Bank* (1890), 44 Ch. D. 634).

(p) See p. 397, *post*.

(q) *Pedlar v. Road Block Gold Mines of India, Ltd.*, [1905] 2 Ch. 427; compare *Stephens v. Mysore (Kangundy) Mining Co., Ltd.*, [1902] 1 Ch. 745; and see *London and Edinburgh Shipping Co., Ltd.*, [1909] S. C. 1; *Butler v. Northern Territories Mines of Australia, Ltd.* (1906), 96 L. T. 41. As to where the substitution or abolition of a new business may be treated as a matter of internal management, see *Campbell v. Australian Mutual Provident Society* (1908), 77 L. J. (P. C.) 117.

(r) *Joint Stock Discount Co. v. Brown* (1866), L. R. 3 Eq. 139, 150; *Re Suburban Hotel Co.* (1867), 2 Ch. App. 137; *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), 7 H. L. 653; *Re Haven Gold Mining Co.* (1882), 20 Ch. D. 151, C. A.; *Re German Date Coffee Co.*, *supra*, at p. 169; *Re Amalgamated Syndicate*, [1897] 2 Ch. 600; *Re Coolgardie Consolidated Gold Mines, Ltd.* (1897), 76 L. T. 289, C. A.; *London Financial Association v. Kelk* (1884), 26 Ch. D. 107, 138; *Stephens v. Mysore (Kangundy) Mining Co., Ltd.*, *supra*.

(s) See p. 82, *ante*.

(t) *Anderson's Case* (1877), 7 Ch. D. 75, 99, C. A.; *Harrison v. Mexican Rail. Co.* (1875), L. R. 19 Eq. 358; *London Financial Association v. Kelk*, *supra*, at p. 135; *Re South Durham Brewery Co.* (1885), 31 Ch. D. 261, C. A.

(u) *Guinness v. Land Corporation of Ireland* (1882), 22 Ch. D. 349, 381, C. A.; *Re Phoenix Bessemer Steel Co.* (1875), 44 L. J. (OH.) 683; see *Ashbury Railway Carriage and Iron Co. v. Riche*, *supra*. As to the name of the company being regarded in ascertaining its objects, see *Re Crown Bank* (1890), 44 Ch. D. 634; *Pedlar v. Road Block Gold Mines of India, Ltd.*, *supra*; *Re Coolgardie Consolidated Mines, Ltd.*, *supra*.

stated in the memorandum, such as the rights of different classes of shareholders, the memorandum cannot be overridden by the articles (*w*), though the articles may be referred to for the purpose of explaining or supplementing its provisions as to such matters (*x*).

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of
Company.

Meaning of
ultra vires.

466. The term "*ultra vires*" in its proper sense denotes some act or transaction on the part of a corporation which, although not unlawful or contrary to public policy if done by an individual, is yet beyond the legitimate powers of the corporation as defined by the statute under which it is formed, or the statutes which are applicable to it, or by its charter or memorandum of association. The term is misused in applying it to any act or transaction which is beyond the lawful powers of any person (*a*). Acts of directors which should not be undertaken by them without the sanction of the members of the company are, however, frequently described as acts *ultra vires* of the directors.

467. The objects of the company as stated in its memorandum, except so far as they are alterable under the Act of 1908, cannot be departed from (*b*). An attempted departure is as invalid as if the memorandum were a statute of incorporation; it is *ultra vires* of the company, and cannot be validated by the assent either of a general meeting of the members or of every individual member (*c*), or by taking judgment against the company by consent (*d*), or by estoppel (*e*). On the other hand, a transaction which is *ultra vires* of the directors but within the powers of the company may be ratified by an ordinary resolution of the members in general meeting, although to authorise such acts in the future an alteration of the articles by special resolution is required (*f*).

Acts *ultra vires* of the company.

Some of the statutory forms of a memorandum include, amongst the objects of a company, "the doing all such other things as are incidental or conducive to the attainment of the above object" (*g*). Even without these words the same powers would be implied (*h*). In construing a company's object clause it is

Incidental objects.

(*w*) *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361, 369, C. A.; *Re Southern Brazilian Rio Grand do Sul Rail. Co., Ltd.*, [1905] 2 Ch. 78; see *Ashbury v. Watson* (1885), 30 Ch. D. 376, C. A. (subsequent alteration of articles).

(*x*) *Re Southern Brazilian Rio Grande do Sul Rail. Co., Ltd.*, *supra*, at p. 84; and see the cases cited in note (*t*), p. 284, *ante*. As to articles imposing a further liability, see p. 82, *ante*.

(*a*) Machen's Modern Law of Corporations, s. 1012.

(*b*) As to personal liability of directors and officers participating in an *ultra vires* act, see p. 293, *post*. As to alteration of the memorandum, see p. 382, *post*.

(*c*) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653; *East Anglian Railways Co. v. Eastern Counties Rail. Co.* (1851), 11 C. B. 775; *Towers v. African Tug Co.*, [1904] 1 Ch. 558, 566, C. A.

(*d*) *Great North-West Central Railway v. Charlebois*, [1899] A. C. 114, 124, P. C.

(*e*) *Bishop v. Balkis Consolidated Co.* (1890), 25 Q. B. D. 77, 84; see *British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, 718, C. A.; *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396, 407, 415, where, however, it was held that estoppel may give a right to damages.

(*f*) *Grant v. United Kingdom Switchback Railways Co.* (1888), 40 Ch. D. 135, C. A.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. III., Forms A, B, C.

(*h*) *A.-G. v. Great Eastern Rail. Co.* (1880), 5 App. Cas. 473, 481.

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Instances of
ultra vires
acts.

Acts not
ultra vires.

necessary, after ascertaining its main object, to judge whether the proposed transaction is incidental or conducive to the attainment of such object (i).

468. It is not sufficient for the proposed transaction to be convenient if it is not incidental (j). In the absence of a special power in the memorandum, it is *ultra vires* for a company authorised by its memorandum to make and deal in railway carriages to purchase a concession for a foreign railway (k); for a bill-broking company to take shares in a banking company for the purpose of increasing its own business (l); for any company to take shares in another carrying on a different class of business (m); for one company to amalgamate with another company (n); for a company which has power to invest on second mortgages, and which is a second mortgagee, to guarantee payment of the prior mortgage debt for good consideration (o); for a company with power to lend to guarantee the debts of a company promoted by it (p); for a railway company to guarantee the profits of another company which is important to it (q); for a railway company to promote a Bill in Parliament for other than strictly railway purposes (r), or work coal mines except for its own use (s); for a tramway company (t) or a railway company (u) to carry on an omnibus business.

On the other hand, it is not *ultra vires* for a company, if a trading company (a), without any special power to do so, to pay a pension to

(i) See *Small v. Smith* (1884), 10 App. Cas. 119.

(j) *London County Council v. A.-G.*, [1902] A. C. 165; *A.-G. v. Mersey Railway*, [1907] A. C. 415.

(k) *British and Foreign Railway Plant Co. v. Ashbury Carriage and Iron Co.*, *Smith v. Ashbury etc. Co.* (1869), 20 L. T. 360; *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653; see *Guinness v. Land Corporation of Ireland* (1882), 22 Ch. D. 349, C. A.

(l) *Joint Stock Discount Co. v. Brown* (1866), L. R. 3 Eq. 139; (1869) L. R. 8 Eq. 381; compare *Re West of England Bank, Ex parte Booker* (1880) 14 Ch. D. 317.

(m) *Re Lands Allotment Co.*, [1894] 1 Ch. 616. As to investing in shares of another company, see *Re Barnard's Banking Co., Ex parte Contract Corporation* (1867), 3 Ch. App. 105; *Royal Bank of India's Case* (1869), 4 Ch. App. 252; *Re Financial Corporation, Goodson's Claim* (1880), 28 W. R. 760; as to accepting shares by way of compromise, and not for investment, see *Re Lands Allotment Co.*, *supra*.

(n) *Re European Society Arbitration Acts, Ex parte British Nation Life Assurance Association (Liquidators)* (1878), 8 Ch. D. 679, C. A. A power to amalgamate does not include a power to force partly-paid shares on a member (*ibid.*). As to the meaning of amalgamation, see *Re Bank of Hindustan, China and Japan, Higgs's Case* (1865), 2 Hem. & M. 657; *Re Bank of Hindustan, China and Japan* (1865), 13 W. R. 883. As to amalgamation, see *Pulbrook v. New Civil Service Co-operation* (1877), 26 W. R. 11; *Greenwich Pier Co. v. Thames Conservators* (1905), 21 T. L. R. 669; *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.; *A.-G. v. North Eastern Rail. Co.*, [1906] 2 Ch. 675.

(o) *Small v. Smith*, *supra*.

(p) *Re Queen Anne and Garden Mansions Co.* (1894), 1 Mans. 460.

(q) *Colman v. Eastern Counties Rail. Co.* (1846), 10 Beav. 1.

(r) *Munt v. Shrewsbury and Chester Rail. Co.* (1850), 13 Beav. 1.

(s) *A.-G. v. Great Northern Rail. Co.* (1860), 1 Drew. & Sm. 154.

(t) *London County Council v. A.-G.*, *supra*.

(u) *A.-G. v. Mersey Railway*, [1907] A. C. 415.

(a) Where a company is registered without the word "Limited," but with limited liability, the power to give pensions depends on the memorandum of association (*Cyclists' Touring Club v. Hopkinson*, [1910] 1 Ch. 179).

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of
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the family of a deceased officer (b); or to give gratuities to its servants (c); or to pay a loss not within the terms of a policy (d); or to pay a reasonable brokerage for placing its shares (e); or to let off a large part of a hotel for Government offices (f); or to take a larger house than necessary and under-let a portion (g). A company established to buy a special brewery, but with general powers, may buy a different one, although it will not have enough money left to buy the first (h). A trading company may borrow, with or without security (i); or accept bills of exchange (k); or deposit its title deeds to secure an overdraft (l); or issue debenture stock as collateral security (m). A company formed to work a patent can purchase it (n). A colliery company can purchase a colliery (o), or sell land to a builder for the erection of cottages (p). A company whose powers include that of promoting may promote another company, subscribe shares, and pay the expenses of the promotion (q). Where a company has power to "surrender or otherwise deal with and dispose of all or any part of the undertaking" it may sell a concession to a foreign Government without waiting for the time fixed by the Government concession, and may accept in payment Government bonds of a class different from those mentioned in the concession (r).

- (b) *Henderson v. Bank of Australasia* (1888), 40 Ch. D. 170.
 (c) *Hampson v. Price's Patent Candle Co.* (1876), 45 L. J. (CH.) 437; compare *Warren v. Lambeth Waterworks Co.* (1905), 21 T. L. R. 685.
 (d) *Taunton v. Royal Insurance Co.* (1864), 2 Hem. & M. 135.
 (e) *Metropolitan Coal Consumers' Association v. Scrimgeour*, [1895] 2 Q. B. 604, C. A. As to brokerage, see further p. 95, ante.
 (f) *Simpson v. Westminster Palace Hotel Co.* (1860), 8 H. L. Cas. 712.
 (g) *Re London and Colonial Co., Horsey's Claim* (1868), L. R. 5 Eq. 561.
 (h) *Syers v. Brighton Brewery Co.* (1864), 13 W. R. 220; compare *Re Langham Skating Rink Co.* (1877), 5 Ch. D. 669, 685, C. A.
 (i) *Bryon v. Metropolitan Saloon Omnibus Co., Ltd.* (1858), 3 De G. & J. 123, C. A.; *Re Hamilton's Windsor Ironworks, Ex parte Pitman and Edwards* (1879), 12 Ch. D. 707; see p. 337, post.
 (k) *Re Peruvian Railways Co., Peruvian Railways Co. v. Thames and Mersey Marine Insurance Co.* (1867), 2 Ch. App. 617; distinguishing *Bateman v. Mid-Wales Rail. Co.* (1866), L. R. 1 C. P. 499.
 (l) *Re Patent File Co., Ex parte Birmingham Banking Co.* (1870), 6 Ch. App. 83.
 (m) *Whitehaven Joint Stock Banking Co. v. Reed* (1886), 54 L. T. 360, C. A.
 (n) *Leifchild's Case* (1865), L. R. 1 Eq. 231.
 (o) *Re Baglan Hall Colliery Co.* (1870), 5 Ch. App. 346; *Johns v. Balfour* (1889), 5 T. L. R. 389.
 (p) *Re Kingsbury Collieries, Ltd., and Moore's Contract*, [1907] 2 Ch. 259.
 (q) *Butler v. Northern Territories Mines of Australia* (1906), 23 T. L. R. 179; *Re Financial Corporation, Goodson's Claim* (1880), 28 W. R. 760.
 (r) *Loeffler v. Donna Thereza Christina Rail. Co.* (1901), 18 T. L. R. 149. As to purchase of land on a joint account, see *London Financial Association v. Kell* (1884), 26 Ch. D. 107; as to an insurance company compromising claims, *Bath's Case* (1878), 8 Ch. D. 334, C. A.; as to a banking company guaranteeing payment of interest on debentures in another company, *Re West of England Bank, Ex parte Booker* (1880), 14 Ch. D. 317; as to a railway company having authority to keep steam ferry boats, letting them on hire for other purposes, *Forrest v. Manchester etc. Rail. Co.* (1861), 30 Beav. 40; or, when carrying coals, allowing a customer who is a coal merchant to use its weighing machines, *London and North Western Rail. Co. v. Price* (1883), 11 Q. B. D. 485; as to a newspaper company paying the costs of defending the editor in a libel action, *Breay v. Royal British Nurses' Association*, [1897] 2 Ch. 272, C. A.; as to a company with power to borrow on mortgage of its undertaking giving additional security, *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169, C. A.; or mortgaging a portion of its undertaking, *Reere v. Medway (Upper) Navigation Co.*

SECT. 12.
Powers and
Liabilities
of
Company.

Exceeding
statutory
powers.

If the act done by the company is voidable and not void, a shareholder has no right to an injunction (s).

469. Having regard to the above definition of *ultra vires* a company cannot lawfully do anything beyond the powers given by the statute under which it is formed, even if apparently authorised to do so by its articles or by its memorandum of association (t). Thus, it cannot purchase its own shares (a); or accept a surrender of its own shares, except where forfeiture could be justified (b); or issue unauthorised capital (c); or reduce or repay capital without complying with the statutory requirements (d); or distribute bonus shares gratuitously (e); or issue shares at a discount (f); or pay dividends on shares out of capital (g); or make presents to directors out of capital (h); or pay unreasonable sums for services rendered (i); or make payments for the benefit of a section only of the shareholders (k); or subscribe to external objects (l).

(s) *Finance and Issue, Ltd. v. Canadian Produce Corporation, Ltd.*, [1905] 1 Ch. 37, 45.

(t) *Trevor v. Whitworth* (1887), 12 App. Cas. 409, 430; *Re Castle Crag Steamship Co.*, *Raine's Case* (1887), 4 T. L. R. 302; *Re Mersina and Adana Construction Co.* (1889), 5 T. L. R. 680; *General Property Investment Co. (Liquidator) v. Matheson's Trustees* (1888), 16 R. (Ct. of Sess.) 282.

(a) *Trevor v. Whitworth*, *supra*, overruling *Re Dronfield Silkstone Coal Co.* (1880), 17 Ch. D. 76; *Re Balgooley Distillery Co.* (1886), 17 L. R. Ir. 239, C. A.; *Taylor v. Pilsen Joel and General Electric Light Co.* (1884), 27 Ch. D. 268; *Phosphate of Lime Co. v. Green* (1871), L. R. 7 C. P. 43; *Cree v. Somervail* [1879], 4 App. Cas. 648.

(b) *Bellerby v. Rowland and Marwood's Steamship Co., Ltd.*, [1902] 2 Ch. 14, C. A., disapproving *Eichbaum v. City of Chicago Grain Elevators, Ltd.*, [1891] 3 Ch. 459, where ordinary shares are surrendered so as to be exchanged for others of a different class. In the former case a surrenderor was replaced on the register at his own request after seven years, his shares not having been reissued meanwhile. See also *Re Denver Hotel Co.*, [1893] 1 Ch. 495, C. A. As to surrender, see further p. 198, *ante*.

(c) *Bank of Hindustan v. Alison* (1871), L. R. 6 C. P. 222, Ex. Ch., where an applicant for new shares was held not estopped from denying that he was a shareholder.

(d) *Morham v. Grant*, [1900] 1 Q. B. 88, C. A.; *Re Fore Street Warehouse Co., Ltd.* (1888), 59 L. T. 214; *Re Watson, Walker and Quickfall, Ltd.*, [1898] W. N. 69; *Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co.* (1875), 1 Ch. D. 682; see p. 100, *ante*.

(e) *Re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9, C. A.; *Welton v. Saffery*, [1897] A. C. 299.

(f) See p. 91, *ante*.

(g) *Macdougall v. Jersey Imperial Hotel Co., Ltd.* (1864), 2 Hem. & M. 528; see p. 272, *ante*.

(h) *Re Newman (George) & Co.*, [1895] 1 Ch. 674, C. A.; see p. 119, *ante*.

(i) *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141; *Merchants' Fire Office v. Armstrong* (1901), 17 T. L. R. 709, C. A.; *Re Anglo-French Co-operative Society, Ex parte Pelly* (1882), 21 Ch. D. 492, C. A.

(k) *Imperial Mercantile Credit Association v. Chapman* (1871), 19 W. R. 379. Such as costs of a prosecution for libel, though arising out of its business (*Pickering v. Stephenson* (1872), L. R. 14 Eq. 322, 340; *Studdert v. Grosvenor* (1886), 33 Ch. D. 528); or of any action not instituted by the company (*Kernaghan v. Williams* (1868), L. R. 6 Eq. 228), although for its benefit (*Re Liverpool Household Stores Association* (1890), 59 L. J. (Ch.) 616).

(l) As, for instance, to strike funds (*Warburton v. Huddersfield Industrial Society*, [1892] 1 Q. B. 213); to support members of Parliament (*Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87; to the Imperial Institute (*Tomkinson v. South-Eastern Railway* (1887), 35 Ch. D. 675).

SUB-SECT. 3.—*Exercise of a Company's Powers.*SECT. 12.
Powers and
Liabilities
of
Company.

470. Although it has been held that an incorporated company need have no directors, but may be managed by another company (*m*), companies are generally managed by directors (*n*). The extent to which the directors can be controlled by the company in general meeting depends on the construction of the particular articles (*o*).

471. The court has no jurisdiction to interfere with the internal management of companies acting within their powers. To redress a wrong done to the company or to recover money or damages due to it the action must *primâ facie* be brought by the company itself (*p*). Where, however, the persons against whom relief is sought hold and control the majority of the shares, and will not permit an action to be brought in the company's name, shareholders complaining may bring an action in their own names and on behalf of the others. In such an action the plaintiffs have no larger right to relief than the company would have if plaintiff; they cannot complain of acts which are valid if done with the approval of the majority of shareholders, or are capable of being confirmed by the majority, and can only maintain their action when the acts complained of are of a fraudulent character or are *ultra vires* of the company, mere irregularity or informality which can be remedied by the majority being insufficient (*q*). Thus, directors will not be restrained from *bonâ fide* making or enforcing calls (*r*); or from

When court
will not
interfere.

(*m*) *Re Bulawayo Market and Offices Co., Ltd.*, [1907] 2 Ch. 458.

(*n*) See p. 209, *ante*.

(*o*) *Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cuninghame*, [1906] 2 Ch. 34, C. A.; see further, p. 223, *ante*.

(*p*) *Burland v. Earle*, [1902] A. C. 83, 93, P. C.; and see *Foss v. Harbottle* (1843), 2 Hare, 461, where the allegation was that no board was in existence; *Mozley v. Alston* (1847), 1 Ph. 790, where the election of directors was said to be invalid; *Harben v. Phillips* (1883), 23 Ch. D. 14, C. A., where elected directors claimed to act against the wish of the majority of the members; see also *Bainbridge v. Smith* (1889), 41 Ch. D. 462, C. A.; *Marshall's Valve Gear Co., Ltd. v. Manning, Wardle & Co., Ltd.*, [1909] 1 Ch. 267; *Quinn and Arden's, Ltd. v. Salmon*, [1909] A. C. 442; *MacDougall v. Gardiner* (1875), 1 Ch. D. 13, C. A., where the court was asked for a declaration and injunction on the ground of alleged illegality by the chairman declaring a meeting adjourned; *Burland v. Earle*, *supra* (dividing profits, carrying forward or forming a reserve fund, and making investments); *Campbell v. Australian Mutual Provident Society* (1908), 24 T. L. R. 623, P. C. (extending a company's business to other countries where there is a general power to do so).

(*q*) *Burland v. Earle*, *supra*; *Menier v. Hooper's Telegraph Works* (1874), 9 Ch. App. 350; *MacDougall v. Gardiner*, *supra*, at p. 25; *Normandy v. Ind, Coope & Co., Ltd.*, [1908] 1 Ch. 84; *Hoole v. Great Western Rail. Co.* (1867), 3 Ch. App. 262; *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, C. A., where it was held that the action may be brought against the company and the alleged wrongdoers; see *Clinch v. Financial Corporation* (1868), L. R. 5 Eq. 450 (action to restrain an irregular amalgamation); *Atwood v. Merryweather* (1867), L. R. 5 Eq. 464, n.; *Hops v. International Financial Society* (1876), 4 Ch. D. 327, C. A.; *Mason v. Harris* (1879), 11 Ch. D. 97, C. A. If the shareholder names the company as co-plaintiff, in a proper case the court may grant an interim injunction and direct a meeting to be held (*Pender v. Lushington* (1877), 6 Ch. D. 70); see further, p. 319, *post*. Questions on the construction of memoranda and articles may be determined on originating summons (*Morgan's Brewery Co. v. Crosshill*, [1902] 1 Ch. 898).

(*r*) *Bailey v. Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (1849), 12 Beav. 433; *Anglo-Universal Bank v. Baraggon* (1881), 45 L. T. 362, C. A.

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applying the proceeds in a particular manner (*s*); or from applying the proceeds of the issue of new shares to purposes other than those for which the issue was made (*t*); or from otherwise applying the funds of the company within its powers (*a*). Nor will they be interfered with as regards the manner in which profits are ascertained (*b*); or as to distributing profits while debts are unpaid (*c*).

472. The court will interfere to prevent a fraudulent sale by promoters to the company (*d*); or to prevent fraud on a minority (*e*); or where directors are withholding payment of calls on their own shares while making calls on those of other persons (*f*); or where the company is existing only for the purpose of being wound up and gratuities are voted to its servants and directors (*g*); or where an arrangement is being carried out beneficial only to the majority of the shareholders (*h*); or where it is proposed to issue shares in satisfaction of dividends (*i*); or where resolutions have been passed on winding-up purporting to divide the assets in fraud of a class of shareholders (*k*); or where the chairman of a meeting has improperly rejected votes (*l*); or where a proper notice of the purpose of a meeting involving payments to directors has not been given (*m*); or where shares are being issued to secure a majority of votes (*n*); or where the majority of directors exclude the minority from meetings of the board or a committee of it (*o*); or where the company is conducting its business in an illegal way (*p*).

Action on
behalf of
shareholders.

473. Where the action is brought by shareholders the company should be made a defendant (*q*). If made plaintiff without authority its name will be struck out with costs as between solicitor and

(*s*) *Cooper v. Shropshire Union Rail. and Canal Co.* (1849), 6 By. & Can. Cas. 136.

(*t*) *Yette v. Norfolk Rail. Co.* (1849), 3 De G. & Sm. 293.

(*a*) *Taunton v. Royal Insurance Co.* (1864), 2 Hem. & M. 135; *Bank of Turkey v. Ottoman Co.* (1866), L. R. 2 Eq. 366.

(*b*) *Stevens v. South Devon Rail. Co.* (1851), 9 Hare, 313; *Browne v. Monmouthshire Rail. and Canal Co.* (1851), 13 Beav. 32; *Lambert v. Neuchatel Asphalte Co.* (1882), 30 W. R. 913.

(*c*) *Ibid.*; *Stringer's Case* (1869), 4 Ch. App. 475; and see *Lord v. Copper Miners (Governor & Co.)* (1848), 2 Ph. 740; *Inderwick v. Snell* (1850), 2 Mac. & G. 216.

(*d*) *Atwool v. Merryweather* (1867), L. R. 5 Eq. 464, n.; *Duckett v. Gover* (1877), 6 Ch. D. 82; *Mason v. Harris* (1879), 11 Ch. D. 97, C. A.

(*e*) *Gray v. Lewis* (1873), 8 Ch. App. 1035; *Spokes v. Grosvenor and West-End Terminus Hotel Co.* [1897], 2 Q. B. 124, C. A.

(*f*) *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, C. A.

(*g*) *Hutton v. West Cork Rail. Co.* (1883), 23 Ch. D. 654, C. A.; *Stroud v. Royal Aquarium and Summer and Winter Garden Society, Ltd.* (1903), 89 L. T. 243.

(*h*) *Menier v. Hooper's Telegraph Works* (1874), 9 Ch. App. 350.

(*i*) *Hoole v. Great Western Rail. Co.* (1867), 3 Ch. App. 262.

(*k*) *Griffith v. Paget* (1877), 5 Ch. D. 894.

(*l*) *Pender v. Lushington* (1877), 6 Ch. D. 70.

(*m*) *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358, C. A.

(*n*) *Fraser v. Whalley* (1864), 2 Hem. & M. 10; *Punt v. Symons & Co., Ltd.*, [1903] 2 Ch. 506.

(*o*) *Great Western Rail. Co. v. Rushout* (1852), 5 De G. & Sm. 290; *Bray v. Smith* (1908), 124 L. T. Jo. 293.

(*p*) See *Rowell v. Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242, C. A.

(*q*) *Silber Light Co. v. Silber* (1879), 12 Ch. D. 717; *Spokes v. Grosvenor and West End Terminus Hotel Co.*, *supra*; *Towers v. African Tug Co.*, [1904] 1 Ch. 558, 571, C. A.

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client (r). Where, however, the plaintiffs in bringing the action in the name of the company substantially represent the wishes of the majority of the shareholders, the costs may be directed to be paid by the company (s). The company's name should, as a rule, be used as plaintiff only by direction of the company or its directors (t). Where the subject-matter of the action is an agreement between the company and a stranger, it is proper to make the stranger a defendant (a), and also the directors as agents of the company (b). The plaintiff should distinctly allege the illegality of the act complained of and the impossibility of getting the company to impeach its validity (c).

SUB-SECT. 4.—Agency.

(i.) *Employment of Agents by a Company.*

474. An incorporated company, not being a physical person, can only act (1) by the resolution of its members in general meeting, or (2) by its agents (d). The company is not the agent of its members (e), and a member as such is not the agent of the company (f), the company being a separate entity or legal *persona* apart from its members, who are not, even collectively, the company (g). The legal position of a company, as above stated, must be regarded in relation to its contracts (h), to torts committed by it (i), and to its liabilities as regards acts which, if committed by individuals, would bring them within the criminal law (k).

How a
company
may act.

475. The appointment of an agent by an incorporated company need not be made under its corporate seal; it may employ an agent or servant to do ordinary services without a deed (l).

Appointment
of agents.

(r) *La Compagnie de Mayville v. Whitley*, [1896] 1 Ch. 788, C. A.; *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (1879), 13 Ch. D. 310, C. A.; *Silber Light Co. v. Silber* (1879), 12 Ch. D. 717; *Wandsworth and Putney Gas-light and Coke Co. v. Wright* (1870), 22 L. T. 404.

(s) *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (1882), 23 Ch. D. 1, C. A.

(t) *La Compagnie de Mayville v. Whitley*, *supra*, at p. 803.

(a) *Russell v. Wakefield Waterworks Co.* (1875), L. R. 20 Eq. 474, 481.

(b) *Ferguson v. Wilson* (1866), 2 Ch. App. 77, 90.

(c) *Cannon v. Trask* (1875), L. R. 20 Eq. 669; and see *Gray v. Lewis* (1873), 8 Ch. App. 1035, 1050; *Anderson v. Midland Railway*, [1902] 1 Ch. 369; *Salomons v. Laing* (1850), 12 Beav. 339; *Mason v. Harris* (1879), 11 Ch. D. 97, C. A.; *Mills v. Northern Railway of Buenos Ayres Co.* (1870), 5 Ch. App. 621. As to outside persons suing, see *Stockport District Waterworks Co. v. Manchester Corporation* (1862), 9 Jur. (N. S.) 266; *Pudsey Coal Gas Co. v. Bradford Corporation* (1873), L. R. 15 Eq. 167. As to an information, see *A.-G. v. Mersey Railway*, [1907] A. C. 415; *London County Council v. A.-G.*, [1902] A. C. 165. And see title CORPORATIONS, Vol. VIII., pp. 364, 365.

(d) *Ferguson v. Wilson*, *supra*, at p. 89.

(e) *Ibid.*; *Salomon v. Salomon & Co.*, [1897] A. C. 22, 31, 51, 57.

(f) *Machen's Modern Law of Corporations*, s. 1301; *Oakes v. Turquand* (1867), L. R. 2 H. L. 325, 358.

(g) *Flitcroft's Case* (1882), 21 Ch. D. 519, 536, C. A.; *Foster (John) & Sons v. Inland Revenue Commissioners*, [1894] 1 Q. B. 516, 528, C. A.; *Society of Practical Knowledge v. Abbott* (1840), 2 Beav. 559, 567; *Re Sheffield and South Yorkshire Building Society* (1889), 22 Q. B. D. 470, 476; *Farrar v. Farrars, Ltd.* (1888), 40 Ch. D. 395, 410, C. A.

(h) See p. 297, *post*.

(i) See p. 309, *post*.

(l) See titles CORPORATIONS, Vol. VIII., pp. 381, 382; AGENCY, Vol. I., pp. 155, 156.

SECT. 12.
Powers and
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of
Company.

Directors'
position as
agents of
company.

476. Where particular formalities are not prescribed by the Act or by the memorandum or articles, whoever, as a matter of practice, manages the affairs of a trading corporation is able to use the seal for those acts which he is authorised to perform (*m*).

477. The directors are agents of the company (*n*). Wherever an agent is liable they are liable, and where the liability would attach to the principal, and the principal only, the liability is the liability of the company (*o*). But it does not follow that they are the only agents of the company; and they, or the company in general meeting where the company's powers in this respect are not exclusively vested in the directors, may appoint other agents of the company, by whose acts it will be bound (*p*). For instance, clerks in a company's registered office, in the absence of evidence to the contrary, are deemed to have authority during business hours and in the absence of the secretary to receive notices on behalf of the company (*q*).

Attorney to
execute deeds
abroad.

478. A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in the United Kingdom; and every deed signed by such attorney, on behalf of the company, and under his seal, binds the company, and has the same effect as if it were under its common seal (*r*).

Seal of com-
pany for use
abroad.

479. A company whose objects require or comprise the transaction of business in foreign countries may, if authorised by its articles, have for use in any territory, district, or place not situate in the United Kingdom an official seal, which must be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district, or place where it is to be used (*s*), and may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district, or place not situate in the United Kingdom to affix such official seal to any deed or other document to which the company is party in that territory, district, or place (*a*).

The authority of any such agent continues, as between the company and any person dealing with the agent, during the period, if any, mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or

(*m*) *Re Barned's Banking Co., Ex parte Contract Corporation* (1867), 3 Ch. App. 105, 116. As to the form of a company's contracts generally, see p. 299, *post*.

(*n*) See p. 220, *ante*.

(*o*) *Ferguson v. Wilson* (1866), 2 Ch. App. 77, 89, 90.

(*p*) *Smith v. Hull Glass Co.* (1852), 11 O. B. 897. As to the authority of a secretary, see p. 244, *ante*.

(*q*) *Truman's Case*, [1894] 3 Ch. 272.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 78 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 55].

(*s*) *Ibid.*, s. 79 (1) [Companies Seals Act, 1864 (27 Vict. c. 19), ss. 2, 6].

(*a*) *Ibid.*, s. 79 (2) [Companies Seals Act, 1864 (27 Vict. c. 19), s. 3].

determination of the agent's authority has been given to the person dealing with him (b).

The person affixing any such official seal must, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same (c).

A deed or other document to which an official seal is duly affixed binds the company as if it had been sealed with the common seal of the company (d).

SECT. 12.
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of
Company.

(ii.) *Liability of Company for Acts of Agents.*

480. An incorporated company is liable in respect of contracts made by its agents when acting within the scope of their authority, provided that the contract is within the powers of the company (e), but not for acts or representations not within that scope (f). One test as to an act or representation being within the scope of an agent's authority is whether it was committed or made by him for his own benefit or for the benefit of the company (g). Contracts.

A company is liable to be sued for a tort committed by its agent if an action in respect of tort would lie against an individual and the agent is acting within the scope of his authority and in the course of his employment, and the act complained of is one which the company might possibly be authorised by its constitution to commit (h). Torta.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 79 (3) [Companies Seals Act, 1864 (27 Vict. c. 19), s. 4].

(c) *Ibid.*, s. 79 (4) [Companies Seals Act, 1864 (27 Vict. c. 19), s. 5].

(d) *Ibid.*, s. 79 (5) [Companies Seals Act, 1864 (27 Vict. c. 19), s. 5].

(e) See titles AGENCY, Vol. I., pp. 149, 151; CORPORATIONS, Vol. VIII., pp. 381, 382. Compare *Re International Contract Co., Pickering's Claim* (1871), 6 Ch. App. 525, where a company was held not liable on a contract made with the agent personally, though really on behalf of the company.

(f) *Whitechurch (George), Ltd. v. Cavanagh*, [1902] A. C. 117 (secretary falsely certifying transfers of shares); *Ruben v. Great Fingall Consolidated*, [1906] A. C. 439 (secretary issuing fraudulent certificates); *Shaw v. Port Philip Gold Mining Co.* (1884), 13 Q. B. D. 103. It is not within the scope of a manager's duties to make an unusual contract (*Re Cunningham & Co., Ltd., Simpson's Claim* (1887), 36 Ch. D. 532; compare *Cartmell's Case* (1874), 9 Ch. App. 691); nor is the resident agent of a mining company authorised to borrow money to pay labourers' wages, although warrants of distress have been issued (*Hawtayne v. Bourne* (1841), 7 M. & W. 595); nor may a local agent grant a policy (*Linford v. Provincial Horse and Cattle Insurance Co.* (1864), 34 Beav. 291); nor is it within the scope of a secretary's duties to make representations as to the financial arrangements of a company with its contractors (*Barnett v. South London Tramways Co.* (1887), 18 Q. B. D. 815, C. A.); or to guarantee the validity of share certificates or transfers (see p. 244, ante), or to make false statements to induce an investor to take shares (*Newlands v. National Employers' Accident Association* (1885), 54 L. J. (Q. B.) 428, C. A.).

(g) *McGowan & Co. v. Dyer* (1873), L. R. 8 Q. B. 141; *Ruben v. Great Fingall Consolidated*, *supra*; *British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A.; *Thorne v. Heard and Marsh*, [1895] A. C. 495; *Whitechurch (George), Ltd. v. Cavanagh*, *supra*; *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch.; see, further, title AGENCY, Vol. I., p. 202.

(h) See title CORPORATIONS, Vol. VIII., p. 386; *New Brunswick and Canada Rail. etc. Co. v. Conybeare* (1862), 9 H. L. Cas. 711, 738 (shares taken on fraudulent representations of directors); *Ranger v. Great Western Rail. Co.* (1854), 5 H. L. Cas. 72; *Western Bank of Scotland v. Addie* (1867), L. R. 1 Sc. & Div. 145 (or of managers); *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317; *Refuge Assurance Co., Ltd. v. Kettlewell* [1909] A. C. B. 243; *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259, Ex. Ch. (fraud of agents); *Re United*

SMOT. 12.
Powers and
Liabilities
of
Company.

Representa-
 tions as to
 credit.

A company may also be liable for the torts and contracts of its agents under the doctrine of estoppel (i), when they are either acting within their apparent authority (k) or apparently acting within their actual authority (l).

An action for misrepresentation as to the credit of third persons cannot be maintained unless it is in writing signed by the party to be charged therewith (m). A company can only make such a representation under seal (n), and therefore signature by an agent, such as a manager, is not sufficient to charge the company (o), but the agent is himself liable (p).

Criminal acts.

481. In ordinary cases an incorporated company, having no mind, and something in the nature of *mens rea* being essential to a criminal offence, cannot be guilty of such an offence; but it may be indicted for various offences, although they must necessarily have been committed by its agents (q).

Service Co., Johnston's Claim (1870), 6 Ch. App. 212; *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394; *Swire v. Francis* (1877), 3 App. Cas. 106, P. C. (deceit); *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 93 (negligence); *Edwards v. Midland Rail. Co.* (1880), 6 Q. B. D. 287 (malicious prosecution); *Goff v. Great Northern Rail. Co.* (1861), 3 E. & E. 672; *Cornford v. Carlton Bank*, [1899] 1 Q. B. 392; *Lambert v. Great Eastern Railway*, [1909] 2 K. B. 776, C. A. (false imprisonment); *Yarborough v. Bank of England* (1812), 16 East, 6; *Butler v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1888), 21 Q. B. D. 207, C. A. (assault); *Kemp v. Courage & Co.* (1890), 7 T. L. R. 50 (trover); *Citizens' Life Assurance Co. v. Brown*, [1904] A. C. 423, P. C. (malicious libel); *Whitfield v. South Eastern Rail. Co.* (1858), E. B. & E. 115; *Hulton (E.) & Co. v. Jones*, [1910] A. C. 20 (libel); *Finburgh v. Moss, Ltd., Empires*, [1908] S. C. 928 (slander); *Maund v. Monmouthshire Canal Co.* (1842), 4 Man. & G. 452; *Eastern Counties Rail. Co. v. Broom* (1851), 6 Exch. 314, Ex. Ch. (trespass); *Green v. London General Omnibus Co.* (1859), 7 C. B. (N. S.) 290 (obstruction in business); *United Telephone Co. v. London and Globe Telephone and Maintenance Co.* (1884), 26 Ch. D. 766 (infringement of patent). No sensible distinction can be drawn between the case of fraud and the case of any other wrong (*Barwick v. English Joint Stock Bank*, *supra*). As to liability for an agent's fraud, see *Hockey v. Clydesdale Bank* (1898), 1 F. (Ct. of Sess.) 119.

(i) *Smith v. Hull Glass Co.* (1852), 11 C. B. 897, 928; *Re Bentley (Henry) & Co. and Yorkshire Breweries, Ex parte Harrison* (1893), 69 L. T. 204, C. A.; thus, as a principal is estopped from denying the full authority of his agent where the limitation thereof is not disclosed, an application for shares which is conditional in the hands of the applicant's agent may be absolute in the hands of the company (*ibid.*). And a concealed limitation of the powers of directors does not bind third persons without notice (*Commercial Mutual Marine Insurance Co. v. Union Mutual Insurance Co.* (1856), 19 Howard, 318). There can be no estoppel as regards acts *ultra vires* of the company (*British Mutual Banking Co. v. Charnwood Forest Rail. Co.* (1887), 18 Q. B. D. 714, C. A.; see p. 285, *ante*).

(k) *Sutton v. Latham* (1839), 10 Ad. & El. 27, 30; *Trott v. National Discount Co.* (1900), 17 T. L. R. 37.

(l) *Bryant, Pouis and Bryant v. La Banque du Peuple*, [1893] A. C. 170, P. O.; *Hambro v. Burnand*, [1904] 2 K. B. 10, C. A.; *Re Land Credit Co. of Ireland, Ex parte Overend, Gurney & Co.* (1869), 4 Ch. App. 460, distinguished in *Premier Industrial Bank, Ltd. v. Carlton Manufacturing Co., Ltd. and Crabtree, Ltd.*, [1909] 1 K. B. 106; and see *Cuthbert v. Roberts, Lubbock & Co.*, [1909] 2 Ch. 226, 235, C. A.

(m) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 6.

(n) *Bishop v. Balkis Consolidated Co.* (1890), 25 Q. B. D. 77.

(o) *Ibid.*; *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301, Ex. Ch.; *Hirst v. West Riding Union Banking Co.*, [1901] 2 K. B. 560, C. A.

(p) *Swift v. Jewsbury*, *supra*.

(q) See titles CORPORATIONS, Vol. VIII., pp. 390, 391; CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 234, 239, 335; and p. 311, *post*.

(iii.) *Rights and Liabilities of Agents.*SECT. 12.
Powers and
Liabilities
of
Company.Position of
company's
agents.

482. The agent of a company, being employed in personal service, cannot obtain an injunction to prevent his discharge even if his employment was a special feature in the initiation of the company and his acceptance of shares was conditional on his being retained as agent; but he will be left to his action for damages (*r*). Agents of a corporation at common law are exactly in the position of agents of an individual, except that their master is a corporate body and not an individual (*s*).

483. An agent may become liable on a contract made by him on behalf of a company if it is made in his own name and it does not appear from the document that he did not intend to contract as principal; and where there is an ambiguity in this respect on the face of the document parol evidence is admissible to explain it (*t*). But where he expressly contracts on behalf of his company or the company itself contracts, he is not personally liable to the other contracting party in the absence of fraud or misrepresentation (*a*), even for gross negligence, unless he expressly or impliedly warrants an authority which he has not got or a state of facts that does not exist. The rule applies even where the agent knows or ought to know that the company is breaking its contract (*b*).

How far
liable on
contracts.

Where a director or other agent has entered into a contract for which he has no sufficient authority, and which in the event cannot be carried out, the contracting party has a remedy against him, if he has explicitly or impliedly warranted that he had authority and damage results (*c*). Thus, borrowing by the directors is a warranty that they as directors, or the company, as the case may be, have power to borrow (*d*). A promise within the scope of their authority that the company will do something which it has power to do is

(*r*) *Mair v. Himalaya Tea Co.* (1865), L. R. 1 Eq. 411; *Johnson v. Shrewsbury and Birmingham Rail. Co.* (1853), 3 De G. M. & G. 914, C. A. As to a director, see *Harben v. Phillips* (1883), 23 Ch. D. 14, C. A.; and as to a managing director, see *Bainbridge v. Smith* (1889), 41 Ch. D. 462, C. A.

(*s*) *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (1882), 23 Ch. D. 1, 13, C. A. As to attachment against directors for contempt of court, see *McKeown v. Joint Stock Institute, Ltd.*, [1899] 1 Ch. 671.

(*t*) *McCullin v. Gilpin* (1881), 6 Q. B. D. 516, C. A.; *Re International Contract Co., Pickering's Claim* (1871), 6 Ch. App. 525; see title AGENCY, Vol. I., pp. 206—211, 219.

(*a*) *Godwin v. Francis* (1870), L. R. 5 C. P. 295 (misrepresentation of authority); *Chapman v. Smethurst*, [1909] 1 K. B. 927 (promissory note); *Premier Industrial Bank, Ltd. v. Carlton Manufacturing Co., Ltd. and Crabtree, Ltd.*, [1909] 1 K. B. 106; *Landes v. Marcus* (1909), 25 T. L. R. 478; see title AGENCY, Vol. I., p. 220.

(*b*) *Ferguson v. Wilson* (1866), 2 Ch. App. 77 (non-allotment of shares); *Gadd v. Houghton* (1876), 1 Ex. D. 357, C. A.; *Wilson v. Bury (Lord)* (1880), 5 Q. B. D. 518, C. A.

(*c*) *Collen v. Wright* (1857), 8 E. & B. 647, Ex. Ch.; and see title AGENCY, Vol. I., pp. 221—223. Directors are liable on bills accepted by them for the company without authority (*West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A.; and see p. 306, post).

(*d*) *Chapleo v. Brunswick Building Society* (1881), 6 Q. B. D. 696, C. A.; *Richardson v. Williamson* (1871), L. R. 6 Q. B. 276; *Looker v. Wrigley* (1882), 9 Q. B. D. 397; *Whitehaven Joint Stock Banking Co. v. Reed* (1886), 54 L. T. 360, C. A.

SECT. 12. not, however, a contract on which they can be made liable for the Powers and Liabilities of Company. company's default (e).

484. An agent who commits a tort for the benefit of his principal is himself liable in damages to the full amount, and if there are more than one acting, each agent is so liable; and this applies to a company's agent in the same way as to any person's agent; but one of two or more agents is only liable for his own acts unless he has expressly or impliedly authorised the acts of the other (f).

Sub-agents. Directors are not responsible to third persons for the acts of sub-agents of the company properly appointed (g).

(iv.) *Ratification.*

485. As directors have no powers by implication except such as are incident to or properly to be inferred from the powers expressed in the memorandum and articles of association of the company (h), and as the company is confined in its operations to the powers expressed in the memorandum or conferred by statute (i), it cannot confirm or ratify anything which is beyond those powers (k), and the transaction is void (l).

A transaction by the directors which is beyond their own powers, but within the powers of the company, can be ratified by acquiescence, provided that the shareholders have knowledge of the facts relating to the transaction to be ratified or the means of knowledge are available to them (m).

A company may, by subsequent meetings, ratify any business which it has purported to transact at a meeting informally called (n).

(e) *Elkington & Co. v. Hurter*, [1892] 2 Ch. 452.

(f) *Cargill v. Bower* (1878), 10 Ch. D. 502; see title AGENCY, Vol. I., pp. 224, 225.

(g) *Weir v. Bell* (1878), 3 Ex. D. 238, C. A., unless they have derived benefit from a fraud (*ibid.*); and see *Weir v. Barnett* (1877), 3 Ex. D. 32; *Betts v. De Vitre* (1868), 3 Ch. App. 429, 441; *Cargill v. Bower*, *supra*.

(h) *Oakbank Oil Co. v. Crum* (1882), 8 App. Cas. 65, 71.

(i) See p. 280, *ante*.

(k) See pp. 285, 293, *ante*; and title AGENCY, Vol. I., p. 174. As to ratifying a contract made before incorporation, see p. 297, *post*.

(l) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653, 668; *James v. Eve* (1873), L. R. 6 H. L. 335; part of a transaction may be valid, if severable from that which is void (*Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.); and see *Power v. Hoey* (1871), 19 W. R. 916.

(m) *Grant v. United Kingdom Switchback Railways Co.* (1888), 40 Ch. D. 135, C. A.; *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366, P. C.; see *Campbell's Case* (1873), 9 Ch. App. 1 (irregular amalgamation); *Sewell's Case* (1868), 3 Ch. App. 131; *Re London and New York Investment Corporation*, [1895] 2 Ch. 860 (increase of capital made without the previous sanction of a resolution, required by the articles, being validated by a subsequent resolution); *Phosphate of Lime Co. v. Green* (1871), L. R. 7 C. P. 43 (what is a sufficient intimation to shareholders); *Spackman v. Evans* (1868), L. R. 3 H. L. 171; *Houldenworth v. Evans* (1868), L. R. 3 H. L. 263. And see *Imperial Mercantile Credit Association (Liquidators) v. Coleman* (1873), L. R. 6 H. L. 189; *London Financial Association v. Kelk* (1884), 26 Ch. D. 107, 152. As to ratification after repudiation by the other party, see *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295; followed in *Re Tiedemann and Ledermann Frères*, [1899] 2 Q. B. 66, but doubted in *Fleming v. Bank of New Zealand*, [1900] A. C. 577, 587, P. C. A contract entered into by an agent in his own name and without authority cannot be ratified (*Keighley, Marted & Co. v. Durant*, [1901] A. C. 240).

(n) *British Medical General and Life Association v. Jones* (1889), 61 L. T. 384.

A contract entered into by directors at a meeting irregularly constituted may be ratified at a subsequent duly constituted meeting, and is sufficiently ratified by an action being brought by the company to enforce it (o).

An incorporated company may also ratify a tort committed by its agent (p).

SECT. 12.
Powers and
Liabilities
of
Company.

SUB-SECT. 5.—*Contracts.*

(i.) *Contracts before Incorporation or Commencement of Business.*

486. An incorporated company is not bound by contracts purporting to be entered into on its behalf by its promoters or other persons before its incorporation (a). Nor can the company after incorporation ratify or adopt any such contract (b). In order that the company may be bound by agreements entered into before its incorporation, there must be a new contract to the effect of the previous agreement (c). This new contract may, however, be inferred from the acts of the company when incorporated (d), except where such acts are done in the mistaken belief that the agreement is binding (e).

How far
company
liable.

487. The adoption and confirmation by a resolution of the directors of a contract made before the incorporation of the company by persons purporting to act on its behalf does not

Adoption of
pre-incorpora-
tion con-
tracts.

(o) *Re Portuguese Consolidated Copper Mines, Ltd., Ex parte Badman, Ex parte Bosanquet* (1890), 45 Ch. D. 16, 26, 27, C. A.; see *Re Land Credit Co. of Ireland, Ex parte Overend, Gurney & Co.* (1869), 4 Ch. App. 460, 473, where it was said that formal ratification is not necessary; *Re State of Wyoming Syndicate*, [1901] 2 Ch. 431.

(p) *Curter v. St. Mary Abbott's Vestry* (1900), 64 J. P. 548, C. A.; compare *Hoole v. Speak*, [1904] 2 Ch. 732.

(a) See p. 56, *ante*. The person purporting to enter into such a contract is personally liable upon it (*Kelner v. Baxter* (1866), L. R. 2 C. P. 174; *Wilson & Co. v. Baker, Lees & Co.* (1901), 17 T. L. R. 473). A solicitor who prepares the memorandum and articles cannot recover his costs for the same from the company when incorporated (*Re English and Colonial Produce Co., Ltd.*, [1906] 2 Ch. 435, C. A.), or even the fees required to be paid on the registration of the company (*Re National Motor Mail-Coach Co., Ltd., Clinton's Claim*, [1908] 2 Ch. 515, C. A., overruling the decision of BUCKLEY, J., in *Re English and Colonial Produce Co.*, *supra*, at p. 439, which was not appealed against on this point); and see *Smith v. Brown*, [1896] A. C. 614, P. C. As to the contract by a director named in the articles to take shares, see p. 213, *ante*.

(b) *Kelner v. Baxter, supra*; *Scott v. Ebury (Lord)* (1867), L. R. 2 C. P. 255; *Re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16, C. A.; *Re Dale and Plant, Ltd.*, [1889] W. N. 131; *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, 249, C. A.; *Natal Land etc. Co. v. Pauline Colliery Syndicate*, [1904] A. C. 120, P. C.; *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1901] 1 Ch. 196; *North Sydney Investment and Tramway Co. v. Higgins*, [1899] A. C. 263.

(c) *Melhado v. Porto Alegre Rail. Co.* (1874), L. R. 9 C. P. 503; *Re Hereford and South Wales Waggon and Engineering Co.* (1876), 2 Ch. D. 621, C. A.; *Re Empress Engineering Co.* (1880), 16 Ch. D. 125, C. A.; *Re Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 103, C. A.; compare *Hutchison v. Surrey Consumers Gas Co.* (1851), 11 C. B. 689; *Payne v. New South Wales Coal and Inter-colonial Steam Navigation Co.* (1854), 10 Exch. 283.

(d) *Re Empress Engineering Co., supra*; *Re Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co.* (1898), 38 Ch. D. 156; and see *Browning v. Great Central Mining Co.* (1860), 5 H. & N. 856; *Touche v. Metropolitan Railway Warehousing Co.* (1871), 6 Ch. App. 671; *Spiller v. Paris Skating Rink Co.* (1878), 7 Ch. D. 368.

(e) *Re Northumberland Avenue Hotel Co., supra*; *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co., supra*.

SECT. 12. create any contractual relation between the company and the other party to the contract, or impose any obligation on the company towards him (*f*). But if it has notice of a contract between the persons under whom it claims property, real or personal, of which it takes possession, and a former owner of the property, whereby a charge or incumbrance was imposed on the property, the company takes subject to the charge or incumbrance, although it is not liable as assignee to be sued for non-performance of the terms contained in the contract other than those as to the charge (*g*).

Directors' duty. It is the duty of directors of a company which is formed to adopt a special contract to make careful and full inquiries before finally committing the company to it and to act as prudent men of affairs would in their own business (*h*). If any corrupt inducement is afforded to the directors to adopt the contract, it will not be enforced as against the company (*i*).

Contracts made before a company is entitled to commence business. **488.** Even when a company is incorporated (unless it is a private company, or was registered before January 1st, 1901, or was registered before July 1st, 1908, and did not invite the public to subscribe for its shares), any contract made by it before it is entitled to commence business (*k*) is provisional only, and is only binding on it when it is so entitled (*l*).

Effect of articles on a contract. **489.** The articles of association do not form a contract as between the company and anyone claiming in any other capacity than as a member (*m*). They may, however, be evidence of the terms on which services are rendered to or property acquired by the company (*n*). Where there is a written agreement the terms

(*f*) *North Sydney Investment and Tramway Co. v. Higgins*, [1899] A. C. 263, 271, P. C.; *Re Johannesburg Hotel Co., Ex parte Zoutpansberg Prospecting Co.*, [1891] 1 Ch. 119, C. A.

(*g*) *Werderman v. Société Générale d'Electricité* (1881), 19 Ch. D. 246, C. A., as explained in *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146, 157, C. A. It may be, however, that the original assignee might succeed by suing in the name of the intermediate assignee (*ibid.*). As to lien, see *Gifford v. Mashonaland Development Co. (Willoughby's), Ltd.* (1902), 18 T. L. R. 274, H. L. As to the right of a trustee to indemnity against liability in respect of it, see *Hardoon v. Belilios*, [1901] A. C. 118, P. C.

(*h*) See *Overend and Gurney Co. v. Gibb* (1872), L. R. 5 H. L. 480; *Twycross v. Grant* (1877), 2 C. P. D. 469, 494, C. A. As to the disclosures to be made to the company as regards profit and other matters, see p. 52, *ante*.

(*i*) *Maxwell v. Port Tennant Patent Steam Fuel and Coal Co.* (1857), 24 Beav. 495.

(*k*) See p. 262, *ante*.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 87 (3).

(*m*) See p. 80, *ante*; *Eley v. Positive Government Security Life Assurance Co.* (1876), 1 Ex. D. 88, C. A. (appointment of a solicitor); *Re Dale and Plant, Ltd.* (1889), 61 L. T. 206 (appointment of a secretary); *Re Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 103, C. A.; *Melhado v. Porto Alegre Rail. Co.* (1874), L. R. 9 C. P. 503 (payment of preliminary expenses); *Re Empress Engineering Co.* (1880), 16 Ch. D. 125, C. A. (payment of costs of registration); *Browne v. La Trinidad* (1887), 37 Ch. D. 1, C. A. (appointment of a director); *Pritchard's Case* (1873), 8 Ch. App. 956 (allotment of fully-paid shares); and compare *Re Rhodesian Properties, Ltd.*, [1901] W. N. 130, and *Orton v. Cleveland Fire Brick Co.* (1865), 3 H. & C. 868.

(*n*) *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1898), 39 Ch. D. 339, 366, C. A.; *Swabey v. Port Darwin Gold Mining Co.* (1889), 1 Meg. 385, C. A.; *Re New British Iron Co., Ex parte Beckwith*, [1898] 1 Ch. 324 (directors' remuneration); see also *Re London and Scottish Bank, Ex parte Logan* (1870),

of the articles will not be imported unless they are specifically referred to (o).

SECT. 12.
Powers and
Liabilities
of
Company.

(ii.) *Form of Contracts; Authentication of Documents.*

490. Any contract which, if made between private persons, would be by law required to be under seal may be made on behalf of the company in writing under its common seal (p), and may in the same manner be varied or discharged (q).

Contracts
under seal.

Directors may affix the seal to any authorised document (r). The articles usually make provision as to the affixing of the seal (s). Contracts required in the case of individuals to be under seal are those which are made without valuable consideration, certain leases, assignments and surrenders of leases, assignments of sculpture, assignments of ships and shares in ships, and, generally, transfers of shares in companies (t).

When a deed is necessary it is generally sufficient for the person contracting with the company to see that the seal is there, and he is not concerned to inquire whether it was properly affixed (u). A mere irregularity in affixing it is not material (w). If, however, it is affixed by an unauthorised person fraudulently, the deed is a forgery and does not bind the company (a).

L. R. 9 Eq. 149 (compensation for loss of office by manager); *Molineaux v. London, Birmingham and Manchester Insurance Co.*, [1902] 2 K. B. 589, C. A.; *Isaacs' Case*, [1892] 2 Ch. 158, C. A. (qualification shares of directors); *Re International Cable Co., Ex parte Official Liquidator* (1892), 66 L. T. 253. As to altering articles to the prejudice of contractual rights, see *British Equitable Assurance Co., Ltd. v. Baily*, [1906] A. C. 35.

(o) *Re Alexander's Timber Co.* (1901), 70 L. J. (CH.) 767; *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339, 366, C. A.

(p) As to the name of the company being engraved on its seal, see p. 301, *post*.

(q) *Companies (Consolidation) Act, 1908* (8 Edw. 7, c. 69), s. 76 (1) (i.) [*Companies Act, 1867* (30 & 31 Vict. c. 131), s. 37]. As to appointing a person to seal contracts abroad, see p. 292, *ante*. As to execution and attestation of deeds by companies, see title *DEEDS AND OTHER INSTRUMENTS*, Vol. X., p. 392.

(r) *Clarke v. Imperial Gas Co.* (1832), 4 B. & Ad. 315.

(s) See *Companies (Consolidation) Act, 1908* (8 Edw. 7, c. 69), Sched. I., Table A, clause 76: "The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose; and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence." But such an article, at any rate when read with other clauses, may be directory only (*Re Hansard Publishing Union, Ltd.* (1892), 8 T. L. R. 280, C. A.; *Landowners West of England and South Wales Land Drainage and Inclosure Co. v. Ashford* (1880), 16 Ch. D. 411).

(t) See titles *CONTRACT*, Vol. VII., p. 360; *COPYRIGHT*, Vol. VIII., p. 207; *DEEDS AND OTHER INSTRUMENTS*, Vol. X., p. 361.

(u) *Re Athenæum Society, Ex parte Eagle Co.* (1858), 4 K. & J. 549; *Re Barnard's Banking Co., Ex parte Contract Corporation* (1867), 3 Ch. App. 105; *Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629.

(w) *Ruben v. Great Fingall Consolidated*, [1906] A. C. 439; compare *Merchants of the Staple of England (Mayor etc.) v. Bank of England (Governor & Company)* (1887), 21 Q. B. D. 160, C. A. As to notice of irregularity in affixing the seal, see *Davies v. Bolton (R.) & Co.*, [1894] 3 Ch. 678.

(a) *Ruben v. Great Fingall Consolidated*, *supra*.

SECT. 12. Certificates of shares or stock and share warrants to bearer, Powers and although required to be under the seal of the company (b), are not Liabilities deeds (c), and are not in themselves contracts, although the fact of of the former being sealed may with other documents constitute debts due by the company (d).

Written contracts.

491. Any contract which, if made between private persons, would be by law required to be in writing signed by the parties to be charged therewith may be made on behalf of the company in writing and signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged (e).

Independently of this statutory provision a corporation constituted for the purpose of trading may for such purpose enter into a contract which is not under seal (f).

Many contracts when made by individuals are by statute required to be in writing and duly signed (g). A director's signature to a resolution referring to a draft agreement may be sufficient to satisfy the Statute of Frauds (h); and companies are bound by part performance of contracts in the same way that individuals are (i).

Bills and notes may be signed on behalf of a company by duly authorised persons (k).

Parol contracts.

492. Any contract which, if made between private persons, would by law be valid although made by parol only and not reduced into writing may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same way be varied or discharged (l).

A company may perhaps give a parol consent to an act although no resolution on the subject has been passed (m). It is liable, equally with an individual, to be estopped by the acts of its agents (n).

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 23, 37.

(c) *R. v. Morton* (1873), L. R. 2 C. C. R. 22, 27; *Hibblewhite v. M'Morine* (1840), 6 M. & W. 200, 214.

(d) *Re Artisans' Land and Mortgage Corporation*, [1904] 1 Ch. 796; *Re Drogheda Steampacket Co.*, [1903] 1 I. R. 512.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 76 (1) (ii.) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 37]; see *Beer v. London and Paris Hotel Co.* (1875), L. R. 20 Eq. 412.

(f) *South of Ireland Colliery Co. v. Waddle* (1869), L. R. 4 C. P. 617, Ex. Ch. As to when the use of the seal may be dispensed with in the case of a corporation generally, see title CORPORATIONS, Vol. VIII., pp. 382—385.

(g) See titles CONTRACT, Vol. VII., pp. 361 *et seq.*; DEEDS AND OTHER INSTRUMENTS, Vol. X., pp. 361, 419 *et seq.* As to an agent's authority to bind a company by a contract to sell land, see *Beer v. London and Paris Hotel Co.*, *supra*.

(h) *Jones v. Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314, C. A.; *Re Patent Ivory Manufacturing Co.*, *Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156; *Wilson v. West Hartlepool Rail. Co.* (1865), 2 De G. J. & Sm. 475, C. A.

(i) See title CONTRACT, Vol. VII., pp. 378—382.

(k) See p. 305, *post*.

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 76 (1) (iii.) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 37]; see p. 145, *ante*.

(m) *Bourke v. Alexandra Hotel Co.*, [1877] W. N. 30; but see *ibid.* 157, C. A. As to verbal contracts, see *Reuter v. Electric Telegraph Co.* (1856), 6 E. & B. 341.

(n) *Bourke v. Alexandra Hotel Co.*, *supra*.

493. Every limited company (not being one which has limited liability without the obligation to use the word "limited" as part of its name) must have its name engraven in legible characters on its seal, and mentioned in legible characters in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, indorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company (o).

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of
Company.
Publication
of company's
name.

Any director, manager, or officer of a company, or any person acting on its behalf who is party to a breach of the above provisions, is liable to a fine not exceeding £50, and is further personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company (p).

Although documents omitting the name of the company are therefore invalid, moneys paid under them to persons known to represent the company are not on that account payable over again (q).

494. A document or proceeding merely requiring authentication by a company may be signed by a director, secretary, or other authorised officer of the company, and need not be under its common seal (r).

Authentica-
tion of
company's
documents.

(iii.) *Contracts of Companies in General.*

495. Persons contracting with the company (s), whether they are shareholders or not, are bound to know, or are precluded from denying that they know, the constitution of the company and its powers as given by statute and the memorandum and articles (t). They cannot complain that a contract which is *ultra vires* is void (u)

Notice of

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 63 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 41]; see *Pearks, Gunston and Tee, Ltd. v. Thompson, Talmey & Co.* (1901), 18 R. P. C. 185, C. A.; *Randall (H. Es), Ltd. v. British and American Shoe Co.*, [1902] 2 Ch. 354. As to bills and notes, see further, p. 304, *post*.

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 63 (3).

(q) *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, 893; *Beer v. London and Paris Hotel Co.* (1875), L. R. 20 Eq. 412.

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 117 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 64]; and see *Premier Industrial Bank v. Carlton Manufacturing Co., Ltd. and Crabtree, Ltd.*, [1909] 1 K. B. 106.

(s) As to contracts with promoters, see p. 49, *ante*; as to contracts with other persons in a fiduciary position, see p. 226, *ante*; as to filing contracts where shares are allotted as fully or partly paid up, otherwise than for cash, see p. 179, *ante*.

(t) See *Peel's Case* (1867), 2 Ch. App. 674; *Sewell's Case* (1868), 3 Ch. App. 131, 140; *Campbell's Case* (1873), 9 Ch. App. 1; *Griffith v. Paget* (1877), 6 Ch. D. 511, 517; and *Oakbank Oil Co. v. Crum* (1882), 8 App. Cas. 65, 70 (as to shareholders); *Ernest v. Nicholls* (1857), 6 H. L. Cas. 401, 419; and *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, 893 (as to outsiders); see also p. 81, *ante*.

(u) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653, 668; *Great North-West Central Railway v. Charlebois*, [1899] A. C. 114, P. C.; *James v. Eve* (1873), L. R. 6 H. L. 335; except as to provisions that are severable (*Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.).

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of
Company.

and cannot be enforced (x) or that the company may be restrained from carrying it out (a).

But persons contracting with a company and dealing in good faith may assume that acts within the powers of the company have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular (b). Sometimes special articles validate certain acts of officers notwithstanding want of authority (c), but the particular act to be protected must on the face of it comply with the articles (d).

Where there is a power of delegation a person contracting with the company may assume that that power has been duly exercised (e). But a person dealing with the company is not entitled to assume that powers have been amplified by the passing of a special resolution (f). A company which has appointed a manager of its business is bound by contracts made by him in the usual course of the business,

(x) *Ellis v. Colman* (1858), 25 Beav. 662.

(a) *Charlton v. Newcastle and Carlisle Rail. Co. and North Eastern Rail. Co.* (1859), 5 Jur. (N. S.) 1096; *Hattersley v. Shelburne (Earl)* (1862), 31 L. J. (CH.) 873; *Mounsell v. Midland Great Western (Ireland) Rail. Co.* (1863), 1 Hem. & M. 130. A contract to take shares, good on the face of it, may be enforced, although a collateral contract is illegal (*Odessa Tramways Co. v. Mendel* (1877), 8 Ch. D. 235, C. A.), if the two are sufficiently severable.

(b) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327, Ex. Ch., where a power to borrow could only be exercised with the sanction of a general meeting which had not been held; and see *Landowners West of England and South Wales Land Drainage and Inclosure Co. v. Ashford* (1880), 16 Ch. D. 411, where the order of a statutory meeting was held to be directory only; *Heiton v. Waverley Hydropathic Co.* (1877), 4 R. (Ct. of Sess.) 830, where the meeting had been irregularly summoned; *Agar v. Athenæum Life Assurance Society* (1858), 3 C. B. (N. S.) 725; *Re Athenæum Society, Ex parte Eagle Co.* (1858), 4 K. & J. 549 (issue of debentures not duly authorised); *Prince of Wales Assurance Co. v. Harding* (1857), E. B. & E. 183 (policies); *Re British Provident etc. Assurance Society, Grady's Case* (1863), 1 De G. J. & Sm. 488 (no consent by a general meeting); *Reuter v. Electric Telegraph Co.* (1856), 6 E. & B. 341, where a verbal contract was upheld, the constitution requiring special formalities; *Bargate v. Shortridge* (1855), 5 H. L. Cas. 297 (irregular registration of transfer by directors); *Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629 (mortgage executed at a board meeting of less than a quorum); *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, 893 (bankers honouring cheques signed by a self-appointed board); *Re County Life Assurance Co.* (1870), 5 Ch. App. 288, 293 (policy issued by *de facto* directors); *Montreal and St. Lawrence Light and Power Co. v. Robert*, [1906] A. C. 196, P. C. (contract made on a resolution of directors less than a quorum); *Owen and Ashworth's Claim, Whitworth's Claim*, [1901] 1 Ch. 115, C. A. (security given for debts in similar circumstances, following *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, C. A. (allotment of shares)); *Duck v. Tower Galvanizing Co.*, [1901] 2 K. B. 314 (debenture issued, although no directors had been appointed and no resolution of the company had been passed). And see *Re Payne (David) & Co., Ltd.*, *Young v. Payne (David) & Co., Ltd.*, [1904] 2 Ch. 608, C. A.; *Re Marseilles Extension Rail. Co., Ex parte Crédit Foncier and Mobilier of England* (1871), 7 Ch. App. 161 (purposes of borrowing); *Re Land Credit Co. of Ireland, Ex parte Owerend, Gurney & Co.* (1869), 4 Ch. App. 460 (bills in hands of a *bond fide* holder); and compare *Premier Industrial Bank, Ltd. v. Carlton Manufacturing Co., Ltd. and Crabtree, Ltd.*, [1909] 1 K. B. 108.

(c) *Davies v. Bolton (R.) & Co.*, [1894] 3 Ch. 678 (issue of debentures for consideration); see p. 211, *ante*.

(d) *Ibid.*, at p. 688.

(e) *Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.

(f) *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366, P. C.

although sufficient powers have not in fact been delegated to him (*g*). Where goods are supplied to the order of unauthorised persons the company is liable, if the goods are received and used for the purposes of its trade (*h*).

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496. Actual or constructive notice of an irregularity prevents a person contracting with the company obtaining the protection of the rule that the regularity of internal management may be relied on (*i*), except where he is claiming for value through another who had not notice (*k*).

Notice of
irregularity.

Of the internal regulation of a company the members are absolute masters, subject to the memorandum and articles (*l*), and where a company purports to do that which it could lawfully do either with the sanction of a general meeting or by special resolution, the court will not grant an interlocutory injunction, restraining what is proposed to be done, but will either suspend the order until the necessary meetings have been held, or will grant an injunction until the meeting or meetings (*m*).

497. A prospectus or statement in lieu of a prospectus must state the dates of and parties to material contracts, other than those entered into in the ordinary course of the business carried on or intended to be carried on by the company, or entered into more than two years before the date of issue of the prospectus or date of filing of the statement (*n*).

Statements
as to
contracts in
prospectus.

A company must not previously to the statutory meeting vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the statutory meeting (*o*).

Varying con-
tract before
statutory
meeting.

A statement in a prospectus that directors will take shares is no evidence of an agreement to take any definite number, and a director cannot on that statement alone be made liable either on agreement or estoppel (*p*). The representations in a prospectus on the faith of which a contract (other than a contract to purchase from the company securities offered thereby) is entered into cannot

Statements
in prospectus
not contract.

(*g*) *Smith v. Hull Glass Co.* (1852), 11 C. B. 897; see further, p. 211, *ante*.

(*h*) *Ibid.*

(*i*) *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366, P. C.; *Wandsworth and Putney Gas-Light and Coke Co. v. Wright* (1870), 22 L. T. 404; as where a director is himself claiming (*Re Greymouth Point Elizabeth Rail. and Coal Co., Ltd., Yuill v. Greymouth Point Elizabeth Rail. and Coal Co., Ltd.*, [1904] 1 Ch. 32); *Davies v. Bolton (R.) & Co.*, [1894] 3 Ch. 678, where a copy of the articles was supplied to the creditor.

(*k*) *Owen and Ashworth's Claim, Whitworth's Claim*, [1901] 1 Ch. 115, C. A.

(*l*) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653, 671; and see p. 223, *ante*.

(*m*) *Harben v. Phillips* (1883), 23 Ch. D. 14, C. A.; *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358, C. A.; *Featherstone v. Cooke* (1873), L. R. 16 Eq. 298; *Trade Auxiliary Co. v. Vickers* (1873), L. R. 16 Eq. 303. As to cases where the company is plaintiff, see *Boschoek Proprietary Co., Ltd. v. Fuke*, [1906] 1 Ch. 148.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 81 (1) (*k*), 82, and Sched. II.; and see p. 123, *ante*.

(*o*) *Ibid.*, s. 83 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 11; Companies Act, 1907 (7 Edw. 7, c. 50), s. 1 (2)].

(*p*) *Re Moore Brothers & Co., Ltd.*, [1899] 1 Ch. 627, C. A.

SECT. 12. be read as part of the contract with the company, unless expressly
Powers and incorporated(*q*).
Liabilities

of
Company.

Assignment
of contracts.

498. The question how far the benefit of a commercial contract is assignable by or to a company is decided on the same principles as in the case of an individual, and depends on the circumstance of each case (*a*). Thus, a publishing agreement between an author and a company is not assignable by the company without the consent of the author (*b*).

(iv.) *Bills and Notes.*

Power to deal
with bills
or notes.

499. A corporation has no general power to incur liability on bills of exchange or promissory notes, although it may draw cheques on its current account at a bank (*c*). A non-trading corporation, although it may transfer the property in a bill or note, cannot incur liability thereon unless its instrument of incorporation expressly or by clear implication confers the power (*d*). The Act of 1908 (*e*) does not give to all companies incorporated under it, as an incident of their incorporation, the power of accepting bills or issuing negotiable instruments, but leaves such power on the part of a company so incorporated to be determined on the construction of its memorandum and articles (*f*). If they are silent on the subject, the power may be inferred where the nature of the company's business involves such a power (*g*).

Signature.

500. Where in the case of an individual a bill or note is required to be signed, it is sufficient, in the case of a corporation, if it is

(*q*) *British Equitable Assurance Co., Ltd. v. Dailly*, [1906] A. C. 35 (policy of assurance).

(*a*) *Tolhurst v. Associated Portland Cement Manufacturers* (1900), [1903] A. C. 414; *Kemp v. Baerselman*, [1906] 2 K. B. 604, C. A.; see titles CHUSES IN ACTION, Vol. IV., pp. 369, 403; CONTRACTS, Vol. VII., pp. 494 *et seq.*

(*b*) *Griffith v. Tower Publishing Co., Ltd., and Moncrieff*, [1897] 1 Ch. 21; see title COPYRIGHT, Vol. VIII., p. 162.

(*c*) See titles CORPORATIONS, Vol. VIII., pp. 361, 362; BILLS OF EXCHANGE ETC., Vol. II., pp. 491, 492.

(*d*) *Re Peruvian Railways Co., Peruvian Railways Co. v. Thames and Mersey Marine Insurance Co.* (1867), 2 Ch. App. 617, 623. As to inferring the power from the course of dealing, see *Bramah v. Roberts* (1837), 5 Scott, 172. The following companies are not trading companies having as such the implied power:—A railway company (*Bateman v. Mid-Wales Rail. Co.* (1866), L. R. 1 C. P. 499), a waterworks company (*Broughton v. Manchester Waterworks Co.* (1819), 3 B. & Ald. 1), a mining company (*Dickinson v. Valpy* (1829), 10 B. & C. 128, 137), a cemetery company (*Steele v. Harmer* (1845), 14 M. & W. 831), a gas company (*Bramah v. Roberts* (1837), 3 Bing. (N. C.) 963), a salt company (*Bull v. Morrell* (1840), 12 Ad. & El. 745), a salvage company (*Thompson v. Universal Salvage Co.* (1848), 1 Exch. 694), a mining company (*Hawtayne v. Bourne* (1841), 7 M. & W. 595).

(*e*) 8 Edw. 7, c. 69. As to the necessity of mentioning of company's name in all instruments, see p. 301, *ante*. As to the personal liability of directors accepting a bill for the company, but omitting the word "Limited," see p. 306, *post*.

(*f*) *Re Peruvian Railways Co., Peruvian Railways Co. v. Thames and Mersey Marine Insurance Co.*, *supra*; *Bateman v. Mid-Wales Rail. Co.*, *supra*.

(*g*) *Re General Estates Co., Ex parte City Bank* (1868), 3 Ch. App. 758, where a land and building company was held to have the power; and see *East London Waterworks Co. v. Bailey* (1827), 4 Bing. 283, 288; *Murray v. East India Co.* (1821), 5 B. & Ald. 204; *Dickinson v. Valpy*, *supra*; *Steele v. Harmer*,

As to the power of a liquidator, see p. 446, *post*.

sealed with the corporate seal, but the bill or note of a corporation is not required by statute to be under seal (*h*).

A bill of exchange or promissory note is deemed to have been made, accepted, or indorsed on behalf of a company if made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority (*i*). It is not necessary that a formal resolution of the directors should be passed that bills should be accepted (*k*); but where a director without authority accepts bills on behalf of a company whose articles give power to delegate the duty of accepting bills to one director, and the delegation has not taken place, the company is not liable (*l*).

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501. A holder in due course is not concerned to see that the authority of the agent has been strictly followed (*a*). Where there is no express power, the company, even if it would in other cases be liable, is not liable if the bill is given to meet an unusual occurrence or emergency not in the ordinary course of business (*b*). Where a holder has notice that the agent has only a limited authority he is bound to inquire into the extent of that authority (*c*) and cannot say that he made no inquiry (*d*).

Holders
duties as to
inquiry.

502. A proviso in a bill of exchange by an unlimited company professing to limit the liability thereunder is void (*e*).

Proviso
limiting
liability.

503. If the company is liable on the bill, its authorised agents are not personally liable, although using words apparently sufficient for that purpose, such as "I promise" or "We promise" (*f*), provided

Liability of
company's
officers.

(*h*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 91 (2); and see *Re General Estates Co., Ex parte City Bank* (1868), 3 Ch. App. 758; and p. 300, *ante*; see also title BILLS OF EXCHANGE ETC., Vol. II., p. 491.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 77 [*Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 47]; see *Re Barber & Co., Ex parte Agra Bank* (1870), L. R. 9 Eq. 725; compare *Herald v. Connah* (1876), 34 L. T. 885.

(*k*) *Re Land Credit Co. of Ireland, Ex parte Overend, Gurney & Co.* (1869), 4 Ch. App. 460, 473.

(*l*) *Premier Industrial Bank, Ltd. v. Carlton Manufacturing Co., Ltd., and Crabtree, Ltd.*, [1909] 1 K. B. 106, distinguishing *Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629 (mortgage by deed), and *Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.

(*a*) *Re Land Credit Co. of Ireland, Ex parte Overend, Gurney & Co., supra*, where bills were authorised on condition that security was deposited; *Hambro v. Burnand*, [1904] 2 K. B. 10, C. A., where the agent acted for his own purposes; *Thompson v. Wesleyan Newspaper Association* (1849), 8 C. B. 849, where the authorised amount was exceeded; *Re State Fire Insurance Co., Ex parte Meredith's and Convers's Claims* (1863), 32 L. J. (CH.) 300.

(*b*) *Re Cunningham & Co., Ltd., Simpson's Claim* (1887), 36 Ch. D. 532; *Hawthorne v. Bourne* (1841), 7 M. & W. 695; *Re Moseley Green Coal and Coke Co., Ex parte Official Liquidator* (1864), 10 L. T. 819.

(*c*) *Bryant, Powis and Bryant v. La Banque du Peuple*, [1893] A. C. 170, P. C.; *Gompertz v. Cook* (1903), 20 T. L. R. 106; *Reid v. Rigby & Co.*, [1894] 2 Q. B. 40; *Stagg v. Elliott* (1862), 12 O. B. (N. S.) 373; *Alexander v. Mackenzie* (1848), 6 C. B. 768; *National Bank of Scotland, Ltd. v. Dewhurst, The "Gonchar" and the "Izgar"* (1896), 1 Com. Cas. 318.

(*d*) *Jacobs v. Morris*, [1902] 1 Ch. 816, C. A.; *Balfour v. Ernest* (1859), 5 O. B. (N. S.) 601.

(*e*) *Re State Fire Insurance Co., Ex parte Meredith's and Convers's Claims, supra*.

(*f*) *Chapman v. Smethurst*, [1909] 1 K. B. 927, C. A.; *Lindus v. Melrose*

SECT. 12. that the signatures are expressed to be on behalf of a principal or in a representative capacity (*g*). Words describing them as being Powers and Liabilities of Company. officers of the company do not of themselves exempt them (*h*).
 Where a bill is drawn on a company "Limited" and accepted without the word, the company is liable (*i*), and if a bill is directed to a company and accepted by its directors describing themselves as directors of the (named) company the company alone is liable (*k*).

Where a company has no power to accept, an acceptance by directors and secretary "for and on behalf of the company" makes them personally liable on a warranty of authority (*l*); but there is no implied warranty that the company has funds at its bank to meet a cheque or acceptance (*m*). If a loan is made to a director who has become liable on a bill accepted for the company's purposes, it is a question of evidence whether the loan is made to him personally or to the company (*n*).

SUB-SECT. 6.—Notice.

(i.) Notice to a Company.

How notice is given.

504. A notice (if it is in a document) may be served on a company by leaving it at or sending it by post to the registered office of the company (*o*). This provision applies to a writ of summons in civil proceedings, so that a writ may be served by

(1858), 3 H. & N. 177, Ex. Ch.; *Halford v. Cameron's Coalbrook etc. Rail. Co.* (1851), 16 Q. B. 442; *Forbes v. Marshall* (1855), 11 Exch. 166; *Aggs v. Nicholson* (1856), 1 H. & N. 165.

(*g*) *Alexander v. Sizer* (1869), L. R. 4 Exch. 102; *Dutton v. Marsh* (1871), L. R. 6 Q. B. 361, 364; *Landes v. Marcus* (1909), 25 T. L. R. 478; *Leadbitter v. Farrow* (1816), 5 M. & S. 345; *Mare v. Charles* (1856), 5 E. & B. 978; *Liverpool Borough Bank v. Walker* (1859), 4 De G. & J. 24, C. A.

(*h*) *Courtauld v. Saunders* (1867), 16 L. T. 562, C. A.; *Dutton v. Marsh*, *supra* (notwithstanding that the seal of the company was also affixed to the note); *Penkivil v. Connell* (1850), 5 Exch. 381; *Penrose v. Martyr* (1858), E. B. & E. 499; *Atkins & Co. v. Wardle* (1889), 58 L. J. (q. b.) 377; *Nassau Steam Press v. Tyler* (1894), 70 L. T. 376, where the company was described by a wrong name. By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (1), "Where a person signs a bill as a drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal or in a representative capacity, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent or as filling a representative character does not exempt him from personal liability"; see title **BILLS OF EXCHANGE ETC.**, Vol. II., pp. 495, 506, 523.

(*i*) *Dermatine Co. v. Ashworth* (1905), 21 T. L. R. 510. As to the personal liability of a secretary or director who accepts a bill for a limited company without using the word "Limited," or in a wrong name, see *Penrose v. Martyr*, *supra*; *Atkins & Co. v. Wardle*, *supra*; *Nassau Steam Press v. Tyler*, *supra*; and p. 295, *ante*.

(*k*) *Okell v. Charles* (1876), 34 L. T. 822, C. A.

(*l*) *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A.; compare *Liverpool Borough Bank v. Walker*, *supra*. As to a signature on behalf of an unregistered society, see *Gray v. Raper* (1866), L. R. 1 C. P. 694.

(*m*) *Beattie v. Ebury (Lord)* (1874), L. R. 7 H. L. 102.

(*n*) *Colley v. Smith* (1838), 2 Mood. & R. 96; compare *McCollin v. Gilpin* (1881), 6 Q. B. D. 516, C. A.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 116, 285 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 62]. S. 63 of the Act of 1862, providing how service by post was to be effected, is repealed by the Act of 1908 and not re-enacted; see p. 309, *ante*.

post (p). It also applies to a summons in criminal proceedings, which accordingly must be served at the registered office (q).

In order that notice to a company may be effectual it should either be given to the company through its proper officers (r) or received by the company in the course of its business. Notice to a director in that character is sufficient (s), unless it is received in the course of a transaction in which he was not concerned as director (t) or as one of a board of another company (a), or unless it relates to a matter which he was not bound to (b), and did not (c), disclose, or is a case in which he is acting fraudulently (d). Verbal notice to a sitting board will suffice (e).

A verbal notice given to a clerk of the company at its registered office, in office hours, and during the absence of the secretary, is good notice to the company itself (f), and so is a verbal notice given to a managing director or the secretary in that character (g).

The notice which a company receives through its officers or other agents is not properly called constructive notice, but is actual notice (h).

Where the conduct of a party charged with notice shows that he

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officers.

(p) *R. S. C.*, Ord. 9, r. 8; *White v. Land and Water Co.*, [1883] W. N. 174; *Vignes v. Smith (Stephen) & Co.* (1909), 53 Sol. Jo. 716. As to other process, see p. 17, *ante*; as to service in Scotland and Ireland, see *Watkins v. Scottish Imperial Insurance Co.* (1889), 23 Q. B. D. 285; and p. 18, *ante*; as to service on foreign and colonial corporations, see p. 19, *ante*; as to service at branch offices, see *Wood v. Anderston Foundry Co.* (1888), 36 W. R. 918. The address of the company's chief office should be on the writ (*Le Tailleur v. South Eastern Rail. Co.* (1877), 3 C. P. D. 18). As to service of process, see generally pp. 17—21, *ante*.

(q) *Pearks, Gunston & Tee, Ltd. v. Richardson*, [1902] 1 K. B. 91.

(r) *Re Eyles, Ex parte Stright* (1832), Mont. 502; *Alletson v. Chichester* (1875), L. R. 10 C. P. 319. As to a managing director, see *Jaeger's (Dr.) Sanitary Woollen System Co. v. Walker & Sons* (1897), 77 L. T. 180, C. A.; as to notice of a trust, see p. 150, *ante*.

(s) *Re Carew's Estate Act* (No. 2) (1862), 31 Beav. 39, 46; *Gale v. Lewis* (1846), 9 Q. B. 730; *Bank of Ireland v. Cogry Spinning Co.*, [1900] 1 I. R. 219; *Re European Bank, Ex parte Oriental Commercial Bank* (1870), 5 Ch. App. 358.

(t) *Société Générale de Paris v. Tramways Union Co.* (1884), 14 Q. B. D. 424, C. A.; affirmed *sub nom. Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20, where it was suggested that a director might be personally liable in disregarding a notice; *Re Peruvian Railways Co., Peruvian Railways Co. v. Thames and Mersey Marine Insurance Co.* (1867), 2 Ch. App. 617; *North British Insurance Co. v. Hallett* (1861), 7 Jur. (N. S.) 1263; *Powles v. Page* (1846), 3 C. B. 16.

(a) *Re Marsilles Extension Rail. Co., Ex parte Crédit Foncier and Mobilier of England* (1871), 7 Ch. App. 161.

(b) *Re Payne (David) & Co., Ltd., Young v. Payne (David) & Co., Ltd.*, [1904] 2 Ch. 608, C. A., where the same person was director of both contracting companies.

(c) *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, 431, 432.

(d) *Re European Bank, Ex parte Oriental Commercial Bank, supra*; *Re Hirth (Carl), Ex parte the Trustees*, [1899] 1 Q. B. 612, 625, C. A.; compare *Cure v. Cave* (1880), 15 Ch. D. 639; *Ruben v. Great Fingall Consolidated*, [1906] A. C. 439; *Gluckstein v. Barnes*, [1900] A. C. 240, 247.

(e) *Re Worcester, Ex parte Agra Bank* (1868), 3 Ch. App. 555.

(f) *Truman's Case*, [1894] 1 Ch. 272; and see *Re Natal Investment Co., Wilson's Case* (1869), 20 L. T. 962.

(g) *Jaeger's (Dr.) Sanitary Woollen System Co., Ltd. v. Walker & Sons, Alletson v. Chichester, supra*.

(h) *Espin v. Pemberton* (1859), 3 De G. & J. 547.

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Offices of two
 companies.

had suspicions of a state of facts the knowledge of which would affect his legal rights, but that he deliberately refrained from making inquiries, he will be treated as having had notice (i).

505. Notice to an officer of a company must, as a rule, in order to affect his company, be given to him as being its officer (j). Notice to a secretary in his private capacity is not notice to his company (k), nor is notice acquired by him as officer of one company notice to him as officer of another company, unless it was his duty as officer of the one to communicate his knowledge to the second company (l) and as officer of the second company to receive such notice (m). If there is any fraud or irregularity on his part the court will not infer that he fulfilled these duties (m). The manager of one company, however, dealing with himself as the manager of another may affect the second company with notice of a trust in receipt of money of which it cannot discharge itself by merely paying the manager (n). Where a director of one company is interested in another company, his knowledge that the latter company wishes to borrow money for an *ultra vires* purpose will not be imputed to the former company if it lends the money (o).

(ii.) *Notice by a Company.*

Provisions
 in articles.

506. Articles of association generally provide as to how notices should be given by the company to its members (p). But provisions in articles as to service of notices on members generally apply only to notices relating to the ordinary business of the company, and service in the manner pointed out by them is not, *per se*, sufficient to fix a shareholder with knowledge of the falsity of a misrepresentation which would entitle him to repudiate his shares (q). Nor does such a provision that service of a notice at the registered address shall be good apply to substituted service of a debtor's summons (r).

Notice in
 special cases.

507. Even if the articles do not so provide, it is unnecessary to give notice of meetings to shareholders who reside abroad (a).

When a member has died a notice addressed to him at his

(i) *Jones v. Smith* (1841), 1 Hare, 43.

(j) *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20.

(k) *Société Générale de Paris v. Tramways Union Co.* (1884), 14 Q. B. D. 424, C. A., affirmed *sub nom. Société Générale de Paris v. Walker*, *supra*.

(l) *Deep Sea Fishery Co.'s (Ltd.) Claim*, [1902] 1 Ch. 507.

(m) *Re Hampshire Land Co.*, [1896] 2 Ch. 743.

(n) *Hardy v. Metropolitan Land and Finance Co.* (1872), 7 Ch. App. 427.

(o) *Re Payne (David) & Co., Ltd., Young v. Payne (David) & Co., Ltd.*, [1904] 2 Ch. 608, C. A.; see *Re Marseilles Extension Rail. and Land Co., Ex parte Crédit Foncier and Mobilier of England* (1871), 7 Ch. App. 161.

(p) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clauses 110—114; *Encyclopædia of Forms*, Vol. IV., p. 386. As to notice of meetings, see p. 249, *ante*; as to authentication of notices, see p. 250, *ante*.

(q) *Re London and Staffordshire Fire Insurance Co.* (1883), 24 Ch. D. 149; and see *Peek v. Gurney* (1873), L. R. 6 H. L. 377.

(r) *Re Studer, Ex parte Chatteris* (1875), 10 Ch. App. 227.

(a) *Re Union Hill Silver Co.* (1870), 22 L. T. 400; see *Halifax Sugar Refining Co. v. Francklyn* (1890), 62 L. T. 563.

registered address is good, if the company have no notice of his death (b), though not, it seems, if the directors are aware of the death (c). In the latter case a notice required by the articles to be served on members need not be sent at all, even to the personal representatives, unless they have been registered as members (d).

A notice sent to all the members on the register at the date of sending out is good, although the register is subsequently rectified retrospectively as on a day prior to that date (e).

508. If service is effected by post, it is deemed to be effected by properly addressing, prepaying (f), and posting a letter containing the notice. Unless the contrary is proved, it is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post (g). It is sufficient that the letter is addressed with substantial accuracy (h). But giving the letter to a postman who is not authorised to receive letters for the post is not "posting" (i).

509. For the purpose of calling a meeting of debenture-holders in the absence of special provision, notice by advertisement, even when some of the debentures are registered, is sufficient (k). Such a notice will be deemed to have been given on the date of the publication of the advertisement (l).

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Service by
post.

Notice to
debenture-
holders.

SUB-SECT. 7.—Torts.

510. In a sense, every tort is *ultra vires*, for no corporation is formed for the purpose of committing wrongs, but a company is not thereby exempted from liability *ex delicto* (m). It is liable for torts, such as, for instance, malicious prosecution (n), libel (o), or

Liability for
torts of
agents.

(b) *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622, C. A. (notice of a call).

(c) *James v. Buena Ventura Nitrate Grounds Syndicate, Ltd.*, [1896] 1 Ch. 456, 466, C. A. (offer of new shares).

(d) *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, C. A. (meeting to alter articles to prejudice of deceased). As to notice to persons entitled to shares in consequence of the bankruptcy of the holders, see *Graham v. Van Diemen's Land Co.* (1856), 1 H. & N. 541, Ex. Ch.

(e) *Re Sussex Brick Co.*, [1904] 1 Ch. 598, C. A.

(f) See *Walthamstow Urban District Council v. Henwood*, [1897] 1 Ch. 41.

(g) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 26; see Companies (Consolidation) Act, 1908 (8 Edward 7, c. 69), Sched. I., Table A, clause 110; and p. 250, *ante*; Encyclopædia of Forms, Vol. IV., p. 386. As to the meaning of "ordinary course of post," see *Re London and Northern Bank, Ex parte Jones*, [1900] 1 Ch. 220; *Doogan v. Colquhoun* (1886), 20 L. R. Ir. 361, C. A.; also reported [1899] W. N. 148.

(h) *Liverpool Marine Insurance Co. v. Haughton* (1874), 23 W. R. 93.

(i) *Re London and Northern Bank, Ex parte Jones*, *supra*.

(k) *Mercantile Investment and General Trust Co. v. International Co. of Mexico* (1891), cited [1893] 1 Ch. 484, n., 488, n., C. A.

(l) *Ibid.*, at p. 489, n.

(m) Machen's Law of Modern Corporations, s. 1072; see *Yarborough v. Bank of England* (1812), 16 East, 6; and title CORPORATIONS, Vol. VIII., pp. 386–390.

(n) *Cornford v. Carlton Bank, Ltd.*, [1900] 1 Q. B. 22, C. A.; compare *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270, P. C.; *Bank of New South Wales v. Piper*, [1897] A. C. 383, P. C. As to the liability generally of a principal for his agent's torts, see title AGENCY, Vol. I., pp. 211 *et seq.*

(o) *Nevill v. Fine Art and General Insurance Co.*, [1897] A. C. 68; *Citizens' Life Assurance Co. v. Brown*, [1904] A. C. 423, P. C.

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fraudulent misrepresentation (*p*) committed by its agents in the course of its business and for its benefit, although no express command or privity of the company is proved. It may sometimes be liable for the acts of its liquidator (*q*).

Fraud.

511. Although persons who have been induced to enter into transactions with a company for the purchase of chattels or goods by fraudulent misrepresentation may, instead of claiming rescission with a return of money paid, elect to retain the goods or chattels and recover any damages which have been sustained, the same principle does not apply where the contract is to take shares or stock in a company; in such cases, if rescission is impossible owing either to the winding up of the company or to the plaintiff having done something inconsistent with rescission, no damages can be claimed against the company (*r*).

The liability, however, of the agent acting tortiously remains, and is not dependent on the continuance of the right to rescind (*s*), as in tort he is a principal. As against him damages for deceit may be obtained by the injured party (*t*).

But an action of deceit will not lie for a false statement unless it is made knowing it to be false (*a*) or recklessly without caring whether it is false or not (*b*). Nor will it lie against the representatives of a deceased agent, except to the extent that his estate has benefited thereby (*c*).

The personal representative of a deceased person against whom a tort has been committed can sue in respect of a cause of action for tort where the personal estate is injured (*d*).

Slander at
company
meeting.

512. An action will not lie for slanders uttered at a meeting of a company provided the allegations are germane to its affairs, for to

(*p*) *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259, 266, Ex. Ch.; *National Exchange Co. of Glasgow v. Drew and Dick* (1855), 2 Macq. 103, H. L.; *New Brunswick and Canada Rail. etc. Co. v. Conybeare* (1862), 9 H. L. Cas. 711. The principle was not meant to be called in question in *Western Bank of Scotland v. Addie* (1867), L. R. 1 Sc. & Div. 145; see *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317, 326. As to the rescission of contracts to take shares on the ground of misrepresentation, see p. 127, *ante*. As to rescission of contracts generally for misrepresentation, see title MISREPRESENTATION AND FRAUD.

(*q*) *Metropolitan Bank v. Pooley* (1885), 10 App. Cas. 210, 218.

(*r*) *Houldsworth v. City of Glasgow Bank*, *supra*; compare *Burgess's Case* (1880), 15 Ch. D. 507; *Re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191, C. A.

(*s*) See title AGENCY, Vol. I., pp. 224, 225; *Re Cape Breton Co.* (1885), 29 Ch. D. 795, 809, C. A.

(*t*) *Peek v. Gurney* (1873), L. R. 6 H. L. 377.

(*a*) *Derry v. Peek* (1889), 14 App. Cas. 337.

(*b*) *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64. A false statement made carelessly is not fraud, though it may be evidence of fraud (*Derry v. Peek*, *supra*; *Glazier v. Rolfs* (1889), 42 Ch. D. 436, C. A.; *Angus v. Clifford*, [1891] 2 Ch. 449; *Jackson v. Turquand* (1869), L. R. 4 H. L. 305; *Peek v. Gurney*, *supra*); and see p. 132, *ante*. As to the statutory remedy for untrue statements in a prospectus, see p. 136, *ante*.

(*c*) *Peek v. Gurney*, *supra*; *Phillips v. Homfray* (1883), 24 Ch. D. 439, C. A.

(*d*) *Twycross v. Grant* (1878), 4 C. P. D. 40, C. A.; stat. (1330) 4 Edw. 3, c. 7; see title EXECUTORS AND ADMINISTRATORS.

that extent the occasion is privileged; and complaints made touching the conduct of its affairs to the directors or managers are likewise privileged in the absence of malice (e). Away from meetings of the company a shareholder has no privilege in making communications to another shareholder as such (f).

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Neither a company nor its directors are liable in an action for libel if they without malice circulate among the shareholders an auditor's report reflecting on one of the agents (g).

513. An incorporated company may sue for any damage done to it in its corporate capacity by a tort (not of a purely personal nature), such as a libel affecting its property, or a libel reflecting on the management of its trade or business, or attacking its financial position (h). It is unnecessary to prove special damage (i).

Tort com-
mitted against
company.

An action will lie by a trading company in respect of the malicious and unreasonable presentation of a winding-up petition against it (k).

SUB-SECT. 8.—Crimes and Offences.

514. In ordinary cases an incorporated company cannot be guilty of a criminal offence, such as treason, or felony (l), or criminal maintenance (m), or perjury (n), although the individuals comprising it may be (l). Nor where the only punishment for crime is death or imprisonment can a company be indicted for the crime (o). But it may be fined (p), and it is indictable for breach of a public duty, whether by nonfeasance or misfeasance, such as non-repair or obstruction of a highway (q), or for a public nuisance

Criminal
liability of
company.

(e) *Harris v. Thompson* (1853), 13 C. B. 333. As to words obviously defamatory, see *Marks v. Samuel*, [1904] 2 K. B. 287, C. A. (blackmailer).

(f) *Brooks v. Blanshard* (1833), 1 Cr. & M. 779. Under the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 4, which in certain circumstances exonerates newspapers, it has been held that a report of charges made against officers of the company was not privileged as being of matters of public concern or for the public benefit in publication (*Ponsford v. Financial Times* (1900), 16 T. L. R. 248).

(g) *Lawless v. Anglo-Egyptian Cotton Co.* (1869), L. R. 4 Q. B. 262; compare *Nevill v. Fine Art and General Insurance Co.*, [1897] A. C. 68; *Philadelphia, Wilmington and Baltimore Railroad Co. v. Quigley* (1858), 21 Howard, 202. As to statements in official reports by official receivers and other officials, see *Bottomley v. Brougham*, [1908] 1 K. B. 584; *Burr v. Smith*, [1909] 2 K. B. 306, C. A.

(h) *Metropolitan Saloon Omnibus Co. v. Hawkins* (1859), 4 H. & N. 87; *Thorley's Cattle Food Co. v. Massam* (1880), 14 Ch. D. 763, C. A.; and see title CORPORATIONS, Vol. VIII., p. 390.

(i) *South Hetton Coal Co. v. North-Eastern News Association*, [1894] 1 Q. B. 133, C. A.; *Empire Typesetting Machine Co. of New York v. Linotype Co.* (1898), 79 L. T. 8, C. A.

(k) *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q. B. D. 674, C. A.

(l) See title CORPORATIONS, Vol. VIII., pp. 390, 391.

(m) *Metropolitan Bank v. Pooley* (1885), 10 App. Cas. 210.

(n) *Wych v. Meal* (1734), 3 P. Wms. 310.

(o) See title CORPORATIONS, Vol. VIII., p. 391.

(p) *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857, 870; *Whitfield v. South Eastern Rail. Co.* (1858), E. B. & E 115.

(q) *R. v. Great North of England Rail. Co.* (1846), 9 Q. B. 315.

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or a criminal libel (r). The breach of a statutory duty by an incorporated company as a rule renders it indictable (s).

In a public statute the word "person" means *primâ facie* a person in law, and therefore includes a corporation as well as a natural person (t). By the Interpretation Act, 1889 (a), in all enactments relating to offences punishable on indictment the expression "person" includes a body corporate "unless a contrary intention appears." In such cases it is a matter of construction of the particular statute applicable to the offence. Thus a company cannot be convicted for acting as a chemist (b), or for using the title "surgeon dentist" (c) or "registered dentist" (d); but it can be fined under the Sale of Food and Drugs Act, 1875 (e). Where an Act as regards a particular offence imposes imprisonment on the first conviction, and imprisonment and whipping on a second conviction, but does not enable a fine to be imposed, and a general statute enables a fine to be substituted, it does not follow that an incorporated company can be convicted of the offence (f).

Criminal
liability of
officers.

515. In all cases of fraud where two or more persons, such as directors, co-operate, an indictment for conspiracy will lie (g).

Directors and other officers of companies are by statute indictable for many criminal acts. Every director, public officer, or manager

(r) *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857, 870.

(s) *R. v. Birmingham and Gloucester Rail. Co.* (1842), 3 Q. B. 233; *R. v. Great North of England Rail. Co.* (1846), 9 Q. B. 315; *R. v. Tyler and International Commercial Co.*, [1891] 2 Q. B. 588, 594, C. A. A proceeding for penalties under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), is "a criminal cause or matter" within the meaning of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47 (*R. v. Tyler and International Commercial Co.*, *supra*).

(t) See title CORPORATIONS, Vol. VIII., p. 357.

(a) 52 & 53 Vict. c. 63, s. 2 (1).

(b) *Pharmaceutical Society v. London and Provincial Supply Association*, *supra*. But the actual seller must be a qualified person (*ibid.*); see title MEDICINE AND PHARMACY.

(c) *O'Duffy v. Jaffe*, [1904] 2 I. R. 27.

(d) *R. (Rowell) v. Registrar of Joint Stock Companies*, [1904] 2 I. R. 634. But an injunction can be granted to prevent a company using the word "dentist" in such a way as to amount to a false representation (*A.-G. v. Smith (George C.), Ltd.* (1909), 25 T. L. R. 257, following *A.-G. v. Myddletons, Ltd.*, [1907] 1 I. R. 471).

(e) 38 & 39 Vict. c. 63, s. 6; *Pearks, Gunston & Tee, Ltd. v. Ward*, [1902] 2 K. B. 1; compare *Lawler v. Egan's, Ltd.*, [1901] 2 I. R. 589 (poisons).

(f) *Hawke v. Hulton (E.) & Co.*, [1909] 2 K. B. 93, where it was held that a company could not be convicted as a rogue and vagabond.

(g) *Twycross v. Grant* (1877), 2 C. P. D. 469, 493, C. A. (directors receiving presents etc. from promoters); *Re Gold Co.* (1879), 11 Ch. D. 701, 723, C. A. (watering the capital); *Burnes v. Pennell* (1849), 2 H. L. Cas. 497, 524 (publishing false statements); *R. v. De Berenger* (1814), 3 M. & S. 67 (inducing buying of shares); *Scott v. Brown, Doering, McNab & Co.* [1892] 2 Q. B. 724, 730, C. A.; *R. v. Aspinall* (1876), 2 Q. B. D. 48, C. A. (inducing the Committee of the Stock Exchange to grant a quotation of shares); *R. v. Barber* (1887), 3 T. L. R. 491 (paying a concealed profit to a broker). An agreement between two or more persons to purchase shares in a company in order to induce persons thereafter purchasing shares in it to believe, contrary to the fact, that there is a *bonâ fide* market in the shares, and that there is a real premium, being an offence indictable as a conspiracy, no action can be maintained in respect of such an agreement or purchase of shares (*Scott v. Brown, Doering, McNab & Co.*, *supra*). And see *Taylor v. Chester* (1869), L. R. 4 Q. B. 309; *Begbie v. Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491.

of any body corporate or public company is guilty of a misdemeanour who fraudulently misapplies any of its property, or falsifies the books or accounts, and he or any member of such a body is also guilty of a misdemeanour if he destroys, alters, mutilates or falsifies any document or valuable security, or omits to enter material particulars in any book of account or other document. Every such director, manager, or public officer is also guilty of a misdemeanour if he circulates false written statements with intent to deceive a shareholder or intending member, shareholder, or creditor, or intending lender, or person intending to enter into any security for the company's benefit (*h*). Such an officer or member cannot refuse to give evidence on oath in civil proceedings about such matters (*i*).

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The Act of 1908 in particular enacts or re-enacts many provisions rendering directors and others criminally liable, as, for instance, where the names of creditors, or the particulars of their claims, are concealed or misrepresented in the case of a reduction of capital requiring the court's confirmation (*k*), or where there are delinquencies as to share warrants (*l*).

516. Where a company is being wound up, any director, officer, or contributory who destroys, mutilates, alters, or falsifies any books, papers, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or document belonging to the company with intent to defraud or deceive any person, is guilty of a misdemeanour, and liable to imprisonment for any term not exceeding two years, with or without hard labour (*m*).

Destruction
and falsifica-
tion of
documents.

If any person on examination on oath authorised under the Act of 1908, or in any affidavit or deposition in or about the winding up of any company or otherwise in or about any matter arising under that Act, wilfully and corruptly gives false evidence, he is liable to the penalties for wilful perjury (*n*).

False
evidence.

If any person, in any return, report, certificate, balance-sheet, or other document, required by or for the purposes of any of certain provisions of the Act of 1908, wilfully makes a statement false in any material particular, knowing it to be false,

False
statement in
documents.

(*h*) Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 81—84. It is necessary to prove that the alleged director was properly appointed (*R. v. Atkins* (1900), 64 J. P. 361, decided on ss. 81 and 83 of the Act); see, however, *Coventry and Dixon's Case* (1880), 14 Ch. D. 660, C. A. The Act applies to a person who without having been appointed an officer of the company has in fact managed its affairs (*R. v. Lawson*, [1905] 1 K. B. 541, decided on s. 84 of the Act).

(*i*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 85, as amended by Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), ss. 27, 29; see CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 655, 656, 660. A director employed to collect moneys due to a company may be convicted of embezzlement under s. 68 of the Larceny Act, as being a clerk or servant (*R. v. Stuart*, [1894] 1 Q. B. 310; also reported *sub nom. R. v. Steward* (1893), 17 Cox, C. C. 723).

(*k*) See p. 111, *ante*.

(*l*) See p. 185, *ante*.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 216 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 166]. As to prosecutions in a winding up, see p. 563, *post*.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 218 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 169].

SECT. 12. he is guilty of a misdemeanour, and on conviction on indictment is liable to imprisonment for a term not exceeding two years, with or without hard labour, and on summary conviction to imprisonment for a term not exceeding four months, with or without hard labour, and in either case to a fine in lieu of or in addition to such imprisonment as aforesaid; but the fine imposed on summary conviction is not to exceed £100 (o).

Penalties
under the
Act of 1908.

517. The Act of 1908 also in many cases imposes pecuniary penalties upon companies and their officers who fail to comply with its requirements (p).

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 281 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 28; Companies Act, 1907 (7 Edw. 7, c. 50), s. 22 (1)]. The provisions are referred to in *ibid.*, Sched. V., and are *ibid.*, s. 17 (conclusiveness of certificates of incorporation), *ibid.*, s. 72 (restrictions on appointments or advertisement of directors), *ibid.*, s. 87 (restrictions on commencement of business), *ibid.*, s. 88 (returns as to allotments), *ibid.*, s. 65 (statutory meetings), *ibid.*, s. 26 (particulars as to directors and mortgage debt and the statement in the form of a balance-sheet in the annual summary), *ibid.*, ss. 112, 113 (appointment and remuneration, and powers and duties, of auditors), *ibid.*, s. 82 (obligations of companies where no prospectus is issued), *ibid.*, s. 93 (registration of mortgages and charges), *ibid.*, s. 95 (filing of accounts of receiver and manager), *ibid.*, s. 187 (notice by liquidator in voluntary winding up of his appointment), *ibid.*, s. 188 (rights of creditors in a voluntary winding up), *ibid.*, s. 274 (requirements as to companies established outside the United Kingdom), and *ibid.*, s. 283 (annual report by Board of Trade).

(p) The following is a table of offences for which companies or their officers are liable to penalties under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69):—

Section of Act.	Offence.	Offender.	Maximum Penalty.
S. 9	Failing to deliver to registrar documents on alteration of objects	Company . . .	£10 a day
S. 18	Failing to supply members on request with copy of memorandum and articles	„	£1 for each offence
S. 25	Failing duly to keep register of members	Company, and every director and manager (a secretary may be a manager) (<i>Gibson v. Barton</i> (1875), L. R. 10 Q. B. 329), who is cognisant	£5 a day
S. 26	Failing to make and file annual list of members and of persons ceasing to be members since the last return (if the annual meeting is not held it is not “wilful default” to neglect to send the list (<i>Dorté v. South African Super-Aeriation, Ltd.</i> (1904), 20 T. L. R. 425; <i>R. v. Newton</i> (1879), 48 L. J. (M. C.) 77); but the annual meeting is now itself compulsory under penalties) and summary of particulars of issued shares	Company, and every director and manager cognisant	„

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Section of Act.	Offence.	Offender.	Maximum Penalty.
S. 30	Refusing inspection of register of members.	Company, and every director and manager cognisant	£2 for each refusal and £2 for each subsequent day
S. 41	Issuing copy of memorandum after alteration but unrectified	"	£1 per copy
S. 44	Neglecting to notify registrar of resolution increasing capital etc. (registrar should receive this notice whenever tendered, although outside statutory period (<i>Re Criccieth Pier and Harbour Co.</i> , [1891] W. N. 15)	"	£5 a day
S. 52	Failing to embody in every copy of memorandum minute of order sanctioning reduction	"	£1 a copy
S. 60	Failing to give notice to proposed director of unlimited liability of directors in such a company	Promoter, manager, director, proposer, or secretary	£100, and damages
S. 61	Failing to embody in each copy of memorandum provision of special resolution making liability of directors unlimited	Company, and every director and manager cognisant	£1 per copy
S. 62	Failing to have registered office and to give notice of its situation or of any change therein	Company . . .	£5 a day
S. 63	Failing to publish name of limited company	Company, and every director, manager, or officer cognisant	£50 " and personal liability on bills etc.
S. 64	Failing to hold annual general meeting	Company, and every director, manager, secretary, or officer cognisant	£50
S. 70 (4) (6)	Failing to forward copy of special or extraordinary resolution to registrar	Company, and every director and manager cognisant	£2 a day
S. 70 (5) (6)	Failing to embody the same in copy of articles	"	£1 a day
S. 72	Failing to deliver to registrar list of agreed directors, or delivering imperfect list	Applicant for registration of company	£50

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Section of Act.	Offence.	Offender.	Maximum Penalty.
S. 73	Acting as director when unqualified	Any unqualified person	£5 a day
S. 75	Failing to keep and send to registrar list of directors and notify changes	Company, and every director and manager cognisant	"
S. 80	Failing to file prospectus	Every party to the issue	"
S. 87	Commencing business before issue of certificate of registrar	Company, and every person responsible	£50 a day
S. 88	Failing to file return of allotments with registrar	Every director, manager, secretary, or other officer cognisant	"
S. 92	Failing to issue certificates etc.	"	£5 a day
S. 94	Failing to register appointment of receiver or manager	Any person obtaining the appointment	"
S. 95	Failing to file accounts	Receiver or manager in possession	£50
S. 99 (1), (2)	Failing to file particulars of mortgage or charge	Company, and every director, manager, or other officer cognisant	£50 a day and on summary conviction £100
S. 99 (3)	Delivering debenture or certificate of debenture stock without copy of certificate of registration indorsed	Every person cognisant and wilfully acting	£100
S. 100	Failing to enter on register particulars of mortgage etc.	Every director, manager, or officer cognisant	£50
S. 101	Refusing inspection of copies of instruments creating charges and register	Every officer refusing and every director and manager cognisant	£5 and £2 a day
S. 102	Refusal to permit debentureholder to inspect register of debentures, or to have copy of trust deed	Company, and every director, manager, or officer cognisant	"
S. 108	Omitting to publish scheduled statement in case of banking or insurance company or deposit, provident, or benefit society	Company, and every director and manager cognisant	£5 a day
S. 109	Refusing to produce to Board of Trade inspector any book or document or to answer his questions	Any officer or agent	£5 each offence

518. All offences under the Act of 1908 made punishable by any fine may be prosecuted under the Summary Jurisdiction Acts (q). There is, however, no appeal to quarter sessions, but a right to apply for a case stated for the opinion of the Divisional Court on a point of law (r). Powers and Liabilities of Company.

A magistrate should accept the register as conclusive so far as the right to be on the register is concerned, unless it is proved before him that certain entries are fictitious and that the summary based on them is false and misleading (s). Register conclusive.

Section of Act.	Offence.	Offender.	Maximum Penalty.
S. 110	Refusing to produce any book or document to inspector appointed by company or to answer his questions	Any officer or agent.	£ 5 each offence
S. 113	Issue of balance-sheet unsigned or without auditors' report	Company, and every director, manager, or officer cognisant	£50
S. 147	Default in regard to statement of affairs required on winding up	Any person in default	£10 a day
S. 172	Failing to report dissolution of company	Liquidator	£5 a day
S. 195 (3)	Failing to return holding of final meeting in voluntary winding up	"	"
S. 195 (5)	Failing to file copy of order deferring dissolution	Applicant for order	"
S. 223	Failing to file order declaring dissolution void	"	"
S. 224	Failing to make periodical statement of proceedings in liquidation	Liquidator	£50 a day
S. 274	Failing to comply with requirements as to foreign companies	Company, and every officer or agent	£50 or £5 a day
S. 282	Using word "Limited" when not incorporated with limited liability	Any person	£5 a day

(q) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 276 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 49]. The Summary Jurisdiction Acts are (1848) 11 & 12 Vict. c. 43; (1879) 42 & 43 Vict. c. 49; (1884) 47 & 48 Vict. c. 43; see title MAGISTRATES.

(r) This being a "criminal cause or matter" within the meaning of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47, there is no further appeal (*R. v. Tyler and International Commercial Co.*, [1891] 2 Q. B. 588, O. A.).

(s) *Re Briton Medical and General Life Association* (1888), 39 Ch. D. 61, following *Grosvenor Bank Co. v. Boaler* (1885), 49 J. P. 774. The Chancery

SECT. 12. The offence of not forwarding a list of members to the registrar is a continuing one (a).

Powers and Liabilities of Company.

Common

519. The court imposing any fine under the Act of 1908 may direct the whole or any part thereof to be applied in or towards payment of the costs of the proceedings, or in or towards rewarding the person on whose information or at whose suit the fine is recovered. Subject to any such direction all fines under the Act are, notwithstanding anything in any other Act, to be paid into the Exchequer (b).

SUB-SECT. 9.—*Actions and Proceedings.*

(i.) *Parties.*

Action by or against company.

520. A company registered under the Act of 1908 or the Acts which it replaces, whether limited by shares or by guarantee, or unlimited, is a body corporate (c) and can only sue or be sued in its corporate name (d) even if it is in winding up (e).

Change of company's name.

The change of a company's name does not render defective any legal proceedings by or against it, but any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name (f). A change in the directorate or in the persons who are members of the company does not affect pending proceedings (g).

Control of company's litigation.

521. As regards litigation with an incorporated company, the directors are, as a rule, the persons who have authority to act for the company (h); but, in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide, even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed (i).

Company to be made party.

522. In an action to redress a wrong done to a company or to recover moneys or damages alleged to be due to a company, the

Division has the right to issue a writ of prohibition to the magistrate if it considers he is exceeding his jurisdiction (*ibid.*).

(a) *R. v. Catholic Life and Fire Assurance and Annuity Institution* (1883), 48 L. T. 675.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 277 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 66].

(c) *Ibid.*, s. 16 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 18; Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), s. 3].

(d) *Re Hodges* (1873), 8 Ch. App. 204; *Pilbrow v. Pilbrow's Atmospheric Rail. Co.* (1846), 3 C. B. 730; and see title CORPORATIONS, Vol. VIII., pp. 392, 393.

(e) See p. 420, *post*. As to arbitrations, see p. 601, *post*.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 8 (5).

(g) See title CORPORATIONS, Vol. VIII., p. 392.

(h) See p. 220, *ante*; *Harben v. Phillips* (1883), 23 Ch. D. 14, 29, C. A.

(i) See *Marshall's Valve Gear Co., Ltd. v. Manning, Wardle & Co., Ltd.*, [1909] 1 Ch. 267, 272; *Pender v. Lushington* (1877), 6 Ch. D. 70; *Duckett v. Gover* (1877), 6 Ch. D. 82; *Harben v. Phillips*, *supra*; compare *Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cunningham*, [1906] 2 Ch. 34, C. A.; *Gramophone and Typewriter, Ltd. v. Stanley*, [1908] 2 K. B. 89, 98, 105, C. A.; *Quin and Axtens, Ltd. v. Salmon*, [1909] A. C. 442. As to joining the company as plaintiff, see *Harben v. Phillips*, *supra*.

company is the only proper plaintiff (*k*). Proceedings may be brought, however, by any member or members in his or their own name or names where the majority will not allow the action to be brought in the name of the company and the act complained of is of a fraudulent character, or oppressive, or is *ultra vires* of the company (*l*); or where the wrong-doers control the majority of votes or the majority approve the act complained of (*m*). But persons who were parties to the wrongful act cannot raise the question by action (*n*). Where the action is brought by shareholders the company should be made defendant (*o*). Subject as above, the court has no jurisdiction to interfere with the internal management of companies acting within their powers (*p*).

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of
Company.

523. Where an action is brought by a member to enforce or protect the rights of members generally, the plaintiff usually sues on behalf of himself and the other members. This form of action is encouraged by the court as it avoids the conflict as to the persons who are entitled to put forward the company as plaintiff (*q*). Where the members complaining represent the majority of the company, the action may be brought in the name of the company, though the directors who control the use of the seal object (*r*). The court may allow the matter to stand over so that a meeting of the company can be held to decide whether the action should proceed in the name of the company (*s*). At such a meeting the votes of the persons complained of cannot be excluded (*t*). If the name of the company has been wrongly used as plaintiff, it will be

Representa-
tive action.

(*k*) *Foss v. Harbottle* (1843), 2 Hare, 461; *Mozley v. Alston* (1847), 1 Ph. 790; *MacDougall v. Gardiner* (1875), 1 Ch. D. 13, C. A.; *Duckett v. Gover* (1877), 6 Ch. D. 82, where the company was made defendant in the first instance and leave was given to amend by making it plaintiff; *Burland v. Earle*, [1902] A. C. 81, 83, P. C.; see *Morris v. Morris*, [1877] W. N. 6.

(*l*) *Burland v. Earle*, *supra*, at p. 93; *Menier v. Hooper's Telegraph Works* (1871), 9 Ch. App. 350; *Atwood v. Merryweather* (1867), L. R. 5 Eq. 464, n.; *Spokes v. Grosvenor and West-End Hotel Co.*, [1897] 2 Q. B. 124, C. A.; *Mason v. Harris* (1879), 11 Ch. D. 97, C. A.; *Towers v. African Tug Co.*, [1904] 1 Ch. 558, C. A.; and see *Anderson v. Midland Railway*, [1902] 1 Ch. 369; *Morgan's Brewery Co. v. Crosskill*, [1902] 1 Ch. 898.

(*m*) *Russell v. Wakefield Waterworks Co.* (1875), L. R. 20 Eq. 474, 482.

(*n*) *Whitwam v. Watkin* (1898), 78 L. T. 188, where the plaintiffs became shareholders for the purpose of bringing the action.

(*o*) See p. 290, *ante*.

(*p*) *MacDougall v. Gardiner*, *supra*; *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.; *Burland v. Earle*, *supra*.

(*q*) *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, C. A. As to joining the company as defendant, see also *Mason v. Harris*, *supra*; *Spokes v. Grosvenor and West-End Hotel Co.*, *supra*. An action by one or more persons on behalf of all persons in the same interest has been recognised by the rules of procedure (R. S. C., Ord. 16, r. 9; see *Bedford (Duke) v. Ellis*, [1901] A. C. 1; *Wood v. McCarthy*, [1893] 1 Q. B. 775; Mitford on Pleadings, pp. 408—417; p. 320, *post*; and title PRACTICE AND PROCEDURE). As to county courts, see County Court Rules, Ord. 3, r. 7; and title COUNTY COURTS, Vol. VIII., pp. 454, 461.

(*r*) *MacDougall v. Gardiner* (1875), 1 Ch. D. 13, 22, C. A.; *Pender v. Lushington* (1877), 6 Ch. D. 70; *Imperial Hydropathic Hotel Co., Blackpool v. Hampson* (1893), 23 Ch. D. 1, C. A.; *Harben v. Phillips* (1883), 23 Ch. D. 14, C. A.

(*s*) *Ibid.*

(*t*) *Mason v. Harris*, *supra*, at p. 107.

SECT. 12.
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Liabilities
of
Company.

Position of
plaintiff in
representative
action.

struck out as plaintiff (a), but may be added as defendant (b). The solicitor (c) or the person who instructed him and who was also plaintiff (d) may be ordered to pay the costs of a company improperly made plaintiff as between solicitor and client and of the defendant as between party and party (e). Where the action is properly brought in the name of the company, the solicitors for those who unsuccessfully apply for a stay may be ordered to pay the costs personally (f).

524. An action by a shareholder or other person on behalf of himself and others of the same class may be brought without the consent of the others on whose behalf he sues (g). Whatever is a defence to the plaintiff suing in a representative capacity is a defence to the action, although other persons on whose behalf he is suing might maintain the action (h). If the plaintiff is suing as a creditor and becomes bankrupt *pendente lite*, the right of action vests in his trustee, and unless the trustee intervenes the action will be dismissed (i). A plaintiff suing on behalf of a class must specify the class as accurately as possible (j); but the fact that the interest of some members of the class is different from that of the plaintiff so suing does not make the action defective (k). The fact that the plaintiff is suing on behalf of himself and others should be stated in the title of the action, and not merely in the indorsement of the writ or in the statement of claim (l). A plaintiff suing in a representative capacity will not be ordered to add as co-plaintiffs those on whose behalf he sues (m), or to disclose their names and addresses (n), and if anyone objects to the plaintiff suing on his behalf he should apply by summons to have himself

(a) *Atwood v. Merryweather* (1867), L. R. 5 Eq. 464, n.; *Pender v. Lushington* (1877), 6 Ch. D. 70; *Oystermouth Railway or Tramroad Co. v. Morris*, [1876] W. N. 129, 192.

(b) *Silber Light Co. v. Silber* (1879), 12 Ch. D. 717.

(c) *Newbiggin-by-the-Sea Gas Co. v. Armstrong* (1879), 13 Ch. D. 310, C. A.; *Morley (John) Building Co. v. Barras*, [1891] 2 Ch. 386; *Gold Reefs of Western Australia, Ltd. v. Dawson*, [1897] 1 Ch. 115.

(d) *La Compagnie de Mayville v. Whiteley*, [1896] 1 Ch. 788, C. A.; see *Wandsworth and Putney Gas Light and Coke Co. v. Wright* (1870), 22 L. T. 404.

(e) See also *Silber Light Co. v. Silber*, *supra*. Where a solicitor had originally authority to defend an action for a company which was afterwards dissolved, he was ordered to pay the cost of the plaintiff as between solicitor and client as from the date on which he might with due diligence have known of the dissolution (*Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43). The proper order would probably now date from the dissolution itself; see *Yonge v. Toynbee*, [1910] 1 K. B. 215, C. A.

(f) *Marshall's Valve Gear Co., Ltd. v. Manning, Wardle & Co., Ltd.*, [1909] 1 Ch. 267, 275.

(g) *White v. Carmarthen etc. Rail. Co.* (1863), 1 Hem. & M. 786; *Bloxam v. Metropolitan Rail. Co.* (1868), 3 Ch. App. 337. As to the plaintiff's right to discontinue the action, see *Handford v. Storie* (1825), 2 Sim. & St. 196; *Re Alpha Co., Ltd., Ward v. Alpha Co.*, [1903] 1 Ch. 203.

(h) *Burt v. British Nation Life Assurance Association* (1859), 4 De G. & J. 158, C. A.; *Scarth v. Chadwick* (1850), 14 Jur. 300.

(i) *Wolff v. Van Boelen* (1906), 94 L. T. 502.

(j) *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, C. A.

(k) *Hallows v. Fernie* (1868), 3 Ch. App. 467; *Watson v. Cave* (No. 1) (1881), 17 Ch. D. 19, C. A.

(l) *Re Tottenham, Tottenham v. Tottenham*, [1896] 1 Ch. 628, explaining *Eyre v. Cox* (1876), 24 W. R. 317; *Worraker v. Pryor* (1876), 2 Ch. D. 109.

(m) *De Hart v. Stevenson* (1876), 1 Q. B. D. 318.

(n) *Leathley v. McAndrew & Co.*, [1875] W. N. 259.

added as a defendant (o); but the application must be made promptly (p). The court will not allow a person to represent himself and others as defendants unless it is satisfied that he is authorised to represent the others (q).

The judgment in a representative action binds all the members of the class represented (r).

525. A representative action is properly brought by a person holding one or more debentures of a series the rest of which are held by other persons (s), or by a shareholder to prevent the improper declaration or payment of dividends (t), or the misapplication of the company's funds (u), or purchase by the company of its own shares (a), or an improper reduction of capital (b), or improper forfeiture of shares (c), or to stop directors from making calls unfairly (d), or to make them account for moneys received by them (e), or to pay damages to the company (f), or to prevent loans to them (g), or to impeach the validity of resolutions as to the issue of shares or otherwise (h). An action may be brought by an applicant for shares on behalf of himself and other depositors when the company is abortive and no shares have been issued (i). A representative action may sometimes be maintained where there would be a good defence to it if it were brought in the name of the company (j).

SECT. 12.
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Liabilities
of
Company.

When
representative
action may
be brought.

(o) *Wilson v. Church* (1878), 9 Ch. D. 552; *Watson v. Cave* (No. 1) (1881), 17 Ch. D. 19, C. A.; *Fraser v. Cooper, Hall & Co.* (1882), 21 Ch. D. 718; *May v. Newton* (1887), 34 Ch. D. 347. As to appeals, see *Wilson v. Church*, *supra*; *Watson v. Cave* (No. 1), *supra*; *Re Markham, Markham v. Markham* (1880), 16 Ch. D. 1, C. A.; *Re Securities Insurance Co.* [1894] 2 Ch. 410, C. A.

(p) *Conybeare v. Lewis* (1883), 48 L. T. 527.

(q) *Morgan's Brewery Co. v. Crosskill*, [1902] 1 Ch. 898. As to appointing parties to represent absent persons, see R. S. C., Ord. 16, rr. 32, 46; and title PRACTICE AND PROCEDURE.

(r) *City of London Sewers Commissioners v. Gellatly* (1876), 3 Ch. D. 610, 615.

(s) See p. 385, *post*.

(t) *Hoole v. Great Western Rail. Co.* (1867), 3 Ch. App. 262; *Bloxam v. Metropolitan Rail. Co.* (1868), 3 Ch. App. 337; *Wood v. Odessa Waterworks Co.* (1889), 42 Ch. D. 636; compare *Carlisle v. South Eastern Rail. Co.* (1850), 1 Mac. & G. 689 (payment of dividends actually declared, not restrained); *Salisbury v. Metropolitan Rail. Co.* (1870), 18 W. R. 484.

(u) *Guinness v. Land Corporation of Ireland* (1882), 22 Ch. D. 349, C. A.; *Smith v. Manchester (Duke)* (1883), 24 Ch. D. 611 (costs of dismissed winding-up petition by directors); *Studdert v. Grosvenor* (1886), 33 Ch. D. 528 (as to the points decided in this case, see *Peel v. London and North Western Railway*, [1907] 1 Ch. 5, C. A.); *Tomkinson v. South Eastern Railway* (1887), 35 Ch. D. 675; *Lyde v. Eastern Bengal Rail. Co.* (1866), 36 Beav. 10; *Vance v. East Lancashire Rail. Co.* (1856), 3 K. & J. 50 (application to Parliament); *Warburton v. Huddersfield Industrial Society*, [1892] 1 Q. B. 817, C. A.

(a) *Hope v. International Financial Society* (1876), 4 Ch. D. 327, C. A.

(b) *Bannatyne v. Direct Spanish Telegraph Co.* (1886), 34 Ch. D. 287, C. A.

(c) *Sweny v. Smith* (1869), L. R. 7 Eq. 324.

(d) *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, C. A.

(e) *Shaw v. Holland*, [1900] 2 Ch. 305, C. A.; *Bryson v. Warwick and Birmingham Canal Co.* (1853), 4 De G. M. & G. 711, C. A.

(f) *Spokes v. Grosvenor and West-End Railway Terminus Hotel Co.*, [1897] 2 Q. B. 124.

(g) *Bluck v. Mallalus* (1859), 27 Beav. 398.

(h) *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361, C. A.; *Preston v. Grand Collier Dock Co.* (1840), 11 Sim. 327.

(i) *Moseley v. Cressey's Co.* (1865), L. R. 1 Eq. 405.

(j) *Vigers v. Pike* (1842), 8 Ol. & F. 562, H. L.

SECT. 12. In an action against directors for misrepresentation, several Powers and persons may join as plaintiffs (*k*).
Liabilities
of
Company.

526. For all and any of the purposes of the Bankruptcy Act, 1883, an incorporated company may act by any of its officers authorised in that behalf under its seal (*l*). The company may either act in its own name or in the name of its duly authorised officer. In the former case, which is usual, the officer signs the petition on the company's behalf (*m*), and must prove his authority at the hearing (*n*). Any authorised person becomes an officer of the company for this purpose (*o*).
Bankruptcy
proceedings
by company.

(ii.) *Form of Proceedings.*

Mode of
application.

527. The Act of 1908 and the rules made thereunder (*p*) provide for many applications being made to the court with reference to the companies which are subject to provisions of the Act. Proceedings must be commenced by petition when it is sought to obtain the winding up of a company by the court (*q*); or to obtain the confirmation by the court of reductions of capital (*r*), or of alterations of companies' objects (*s*), or to obtain the sanction of the court to a compromise or arrangement between a company and its creditors or members or any class of either of them (*t*). Applications to obtain the confirmation by the court of reorganisations of capital (*a*) have also been made by petition (*b*). Inspection of a company's register of members (*c*) is generally obtained on summons, and rectification of the register by motion (*d*). An application to extend the time for filing any contract or document relating to shares which are not fully paid up in cash is generally made by originating motion (*e*), and the same practice applies where an extension of the time for registering charges is required (*f*). Inspection of copies of instruments creating a mortgage or charge requiring registration under the Act of 1908 with the registrar, and of the register of mortgages required to be kept by every limited company (*g*), may be obtained on originating summons.

(*k*) *Dringbier v. Wood*, [1899] 1 Ch. 393.

(*l*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 148; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 35, 49, 231.

(*m*) *Re Whitley, Ex parte Mirfield Commercial Co.* (1891), 8 Morr. 149; *Re Collier, Ex parte Rylands (Dan), Ltd.* (1891), 8 Morr. 80.

(*n*) *Re Sanders, Ex parte Sanders* (1894), 1 Mans. 382.

(*o*) *Re Tomkins & Co.*, [1901] 1 K. B. 476, C. A.

(*p*) See pp. 552 *et seq.*, *post*.

(*q*) See p. 398, *post*.

(*r*) See p. 108, *ante*.

(*s*) See p. 330, *post*.

(*t*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 120; and pp. 602 *et seq.*, *post*. An order for the preliminary meetings under the section is obtained on summons (*ibid.*).

(*a*) See p. 116, *ante*.

(*b*) The cases have not been reported.

(*c*) See p. 152, *ante*.

(*d*) See p. 153, *ante*.

(*e*) See p. 181, *ante*.

(*f*) See p. 371, *post*.

(*g*) See *ibid.*

If it is desired to ascertain the meaning of the memorandum or articles of a company the court will decide the question as between the company and the shareholder who is the other party to an originating summons (*h*), but will not usually appoint a defendant shareholder to represent a class, or decide the question so as to bind the class unless a meeting of the members of the class is first called and nominates a person to represent the class (*i*).

SECT. 12.
Powers and
Liabilities
of
Company.

(iii.) *Evidence.*

528. Where a company (*k*) is a party to any cause or matter any opposite party may apply for an order allowing him to deliver interrogatories (*l*) to any member or officer of the company, and an order may be made accordingly (*m*). A mere member of the company should not be examined on interrogatories unless the judge is satisfied that there is no officer capable of making the required discovery, and that the proposed member has the means of answering (*n*). If it is desired to interrogate a member, notice of the application should be given to him, and the judge may insist upon such notice being given (*o*). No such notice need be served upon an officer.

Inter-
rogatories.

Primâ facie, the secretary is the person to be interrogated (*a*), but in cases of doubt (as, for instance, as to which officer should be interrogated, or as to the exact office of the person sought to be interrogated) the order is for delivery of interrogatories to be answered by "the proper officer of the company" (*b*). An officer

(*h*) *Mason v. Schuppisser* (1899), 81 L. T. 147.

(*i*) *Morgan's Brewery Co. v. Crosskill*, [1902] 1 Ch. 898.

(*k*) In addition to those mentioned in the text, there are various provisions relating to evidence contained in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), including those relating to (1) registrar's certificate of incorporation (*ibid.*, s. 17 (1), see p. 67; *ante*); (2) registrar's certificate that the company is entitled to commence business (*ibid.*, s. 93 (5); see p. 262, *ante*); (3) registrar's certificate of registration of mortgage (*ibid.*, s. 87 (2); see p. 370, *post*); (4) copies of documents kept in the registration offices (*ibid.*, s. 243 (7); see p. 60, *ante*); (5) copies of orders in course of winding up (*ibid.*, s. 180; see p. 547, *post*); (6) orders made on contributories (*ibid.*, s. 168; see p. 504, *post*); (7) commissioners for taking evidence in winding up (*ibid.*, s. 226; see p. 559, *post*); (8) copies of reports of inspectors (*ibid.*, s. 111; see p. 270, *ante*); (9) orders and certificates of the Board of Trade (*ibid.*, s. 236; see p. 437, *post*); (10) share certificates (*ibid.*, s. 23; see p. 182, *ante*); (11) register of members (*ibid.*, s. 33; see p. 151, *ante*); (12) minutes of meetings (*ibid.*, s. 71; see p. 261, *ante*); (13) books in winding up (*ibid.*, s. 220; see p. 505, *post*). As to the evidence required on reduction of capital, see p. 109, *ante*; on a winding-up petition, p. 407, *post*.

(*l*) See title DISCOVERY, INSPECTION, AND INTERROGATORIES, Vol. IX., pp. 46, 47, 109.

(*m*) R. S. O., Ord. 31, r. 5. As to the rights of a liquidator where another company is proving in a winding up, see *Re Alexandra Palace Co.* (1880), 16 Ch. D. 58. As to the right of discovery against a liquidator, see *Re Barned's Banking Co., Ex parte Contract Corporation* (1867), 2 Ch. App. 350; *Gooch's Case* (1871), 7 Ch. App. 207; *London and Yorkshire Bank v. Cooper* (1885), 15 Q. B. D. 473, O. A.; *Re Mutual Society* (1883), 22 Ch. D. 714, O. A.; *Re Sir John Moore Goldmining Co.* (1877), 37 L. T. 242.

(*n*) *Berkeley v. Standard Discount Co.* (1879), 13 Ch. D. 97, O. A.

(*o*) *Chaddock v. British South Africa Co.*, [1896] 2 Q. B. 153, O. A.

(*a*) *Re Alexandra Palace Co.*, *supra*. As to the chairman, see *Tannetta, Walker & Co. v. Newport (Alexandra) Dock Co.* (1890), 6 T. L. R. 325.

(*b*) *Chaddock v. British South Africa Co.*, *supra*; *A.-G. v. North Metropolitan*

SECT. 12. is only bound to give such information as the company, if
Powers and Liabilities of Company. an individual, would have been bound to give. He is bound to answer as to his own individual knowledge, and to get information from other servants of the company who have personally conducted the transaction, or acquired the knowledge as such servants; but he need not make inquiries of directors or other officers about matters which did not come to their knowledge as such (c). The answer of the officer is the answer of the company, and can be read as an admission which binds the company (d).

The company's solicitor should act for the person interrogated. That person can be compelled to make the affidavit before he is paid his costs (e). It is vexatious to make the company's solicitor or any officer or member a party to an action for the purpose of discovery (f).

Discovery of documents.

529. It is not necessary to make an officer of a company party to an action in order to obtain discovery of documents, as there is power under the rules of procedure (g) to order an officer of the company to swear the affidavit of documents (h). This affidavit must be full and comprise all documents in the possession or power of the company or its directors or officers, whether privileged or not, though any valid claim of privilege can be raised in the affidavit (i). In an action of a shareholder against directors and others for fraud to which the company is properly made defendant, the company can be ordered to make discovery of documents (j).

In an action against some only of the directors of a company the defendants will not be ordered to produce the books of the company even with its consent (k).

Admissions by agents.

530. In cases of express authorisation, an admission by an agent of the company is an admission by the company itself, where the statement or act is made or done in the ordinary course of employment (l). In a transaction between the company and a third person (m), books kept by an agent in the regular course of

Tramways Co., [1892] 3 Ch. 70; or the officer selected by the company (*Costa Rica Republic v. Erlanger* (1875), 1 Ch. D. 171, C. A.; *Manchester Val de Travers Paving Co. v. Slagg*, [1882] W. N. 127, C. A.).

(c) *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.*, [1900] 2 Ch. 1, C. A.; compare *Southwark Water Co. v. Quick* (1878), 3 Q. B. D. 315, 321, C. A.

(d) *Chaddock v. British South Africa Co.*, [1896] 2 Q. B. 153, C. A.

(e) *Berkeley v. Standard Discount Co.* (1879), 13 Ch. D. 97, C. A.

(f) *Burstall v. Beyfus* (1884), 26 Ch. D. 35, C. A.; *Wilson v. Church* (1878), 9 Ch. D. 552.

(g) R. S. C., Ord. 31, r. 12.

(h) *Dyke v. Stephens* (1885), 30 Ch. D. 189, 191; *Cook v. Oceanic Steam Co.*, [1875] W. N. 220.

(i) *Clinch v. Financial Corporation* (1866), L. R. 2 Eq. 271.

(j) *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124, C. A.

(k) *Williams v. Ingram* (1900), 16 T. L. R. 434, 451, C. A.

(l) See title AGENCY, Vol. I., p. 215. As to admissions by a bank manager relating to the practice of his bank, see *Simmons v. London Joint Stock Bank* (1890), 62 L. T. 427; as to admissions by a liquidator, see *Re Empire Corporation, Re City and County Assurance Co.* (1869), 17 W. R. 431; as to representations by agents, see p. 295, ante.

(m) See title AGENCY, Vol. I., p. 215. Private reports made to directors or the company are not admissions available in evidence against the company

his duty are admissible as evidence against his principal, but not other books kept by him (*n*).

A company which has issued certificates of shares stating on the face of them that they are fully paid is estopped from denying the truth of this statement as against a holder for valuable consideration without notice (*o*).

An unregistered transferee may be estopped by his conduct from saying that he is not a shareholder, as where he has received benefits from the company on the ground of his being a shareholder (*p*).

531. It is presumed in favour of third persons or members of the company that acts which are proved to have been performed have been properly performed, so that the burden of proving the contrary is thrown upon the company (*q*).

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Liabilities
of
Company.
Estoppel.

Presumption
as to acts
being
properly
performed.

(iv.) *Enforcement of Judgments and Orders.*

532. Judgment against an incorporated company (*r*) may be enforced by writ of *fieri facias* or *elegit*, as in the case of a natural person (*s*). A garnishee order absolute is of no avail against a debenture-holder with a floating charge, unless followed by payment before a receiver is appointed on behalf of the debenture-holders (*t*); but as against the liquidator the service of the order *nisi* is effectual (*u*). Any judgment or order against the company which is wilfully disobeyed may, by leave of the court or a judge, be enforced by sequestration against its property, or by attachment against its directors or other officers, or by writ of sequestration against their property (*w*). An incorporated

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judgments
and orders.

(*Re Devala Provident Gold Mining Co.* (1883), 22 Ch. D. 593). As to a speech by a director to a meeting of shareholders, see *ibid.*; *Re British Burmah Lead Co., Ltd., Ex parte Vickers* (1887), 56 L. T. 815. As to a report by a mining engineer to the company, see *Lampson & Co. v. London and India Dock Joint Co.* (1901), 17 T. L. R. 663. An admission by a director at a board meeting may be evidence against the company (*Ridley v. Plymouth Grinding and Baking Co.* (1848), 2 Exch. 711).

(*n*) *Shrewsbury v. Blount* (1841), 2 Man. & G. 475. Conversations among principals and between them and their agent are admissible to prove *bona fides* (*ibid.*).

(*o*) *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004; *Re Hall (A. W.) & Co.* (1887), 37 Ch. D. 712; *Bloomenthal v. Ford*, [1897] A. C. 156.

(*p*) *Re St. George's Steam Packet Co., Maguire's Case* (1849), 3 De G. & Sm 31. As to "holding out" with respect to outside contractors, so as to be estopped from denying partnership in an unlimited company, see *Harvey v. Kay* (1829), 9 B. & C. 356; *Ralph v. Harvey* (1841), 1 Q. B. 845; *Tredwen v. Bourne* (1840), 6 M. & W. 461. As to admissions when made under a misapprehension, see *Vice v. Anson* (1827), 7 B. & C. 409; *Ridgway v. Philip* (1834), 1 Cr. M. & R. 415. See, generally, title ESTOPPEL.

(*q*) See title EVIDENCE; *Knight's Case* (1867), 2 Ch. App. 321, where a forfeiture of shares was held to be valid although there was no proof of a resolution of the directors to that effect; *Clarke v. Imperial Gas Co.* (1832), 4 B. & Ad. 315.

(*r*) Such a company, in the construction of the rules of procedure, is included in the word "person," unless the contrary appears (R. S. C., Ord. 71, r. 1).

(*s*) *Worral Waterworks Co. v. Lloyd* (1866), L. R. 1 C. P. 719; *Spokes v. Bunbury Board of Health* (1865), L. R. 1 Eq. 42; and see title EXECUTION.

(*t*) *Cairney v. Back*, [1906] 2 K. B. 746; and see, further, pp. 350, 351, *post*; and title EXECUTION.

(*u*) *Re National United Investment Corporation*, [1901] 1 Ch. 950.

(*w*) R. S. C., Ord. 42, r. 31.

SECT. 12. company cannot be attached for contempt of court (*x*); but a
Powers and sequestration will be ordered if the corporation contumaciously
Liabilities refuses to obey, though not in the case of casual or accidental and
of unintentional disobedience (*a*). Sequestration may be ordered
- Company. against a new company which is a mere reconstruction of the
 company disobeying an order of the court (*b*).

(*v.*) *Practice in General.*

Appointment
of solicitor.

533. A company must employ a solicitor to conduct the proceedings (*c*). He must be appointed under its common seal (*d*), although, in the absence of evidence to the contrary, the solicitor on the record is presumed to be validly appointed (*e*). A defendant company can only appear by a solicitor (*f*).

Statement of
claim against
company.

A statement of claim against a company, if it states the corporate title, need not allege that the company is a corporation or state how it was incorporated (*g*). In a debenture-holder's action the writ of summons must be intitled in the name of the company (*h*).

Injunction.

Where a transaction by a company is within its powers but is about to be carried out without the necessary sanction of a general meeting, an injunction may be granted until the meeting has been held to sanction the transaction (*i*).

Where a company is seeking an interlocutory injunction, the court may accept from its counsel an undertaking in damages, unless its solvency is questioned (*k*).

Effect of
winding-up.

If a petition for the winding up of a company is presented, an

(*x*) *R. v. Windham* (1776), Cowp. 377; *Re Hooley, Ex parte Hooley* (1899), 79 L. T. 706.

(*a*) *Fairclough v. Manchester Ship Canal Co.*, [1897] W. N. 7, C. A.

(*b*) *Bosch v. Simms Manufacturing Co.* (1909), 25 T. L. R. 419; compare *A.-G. v. Birmingham, Tame and Rea Drainage Board* (1881), 17 Ch. D. 685, C. A. As to procedure by sequestration or attachment against officers of the company, see *Milburn v. Newton Colliery* (1908), 52 Sol. Jo. 317; *Lewis v. Pontypridd, Cuerphilly and Newport Rail. Co.* (1895), 11 T. L. R. 203, C. A.; *Re Robbins of the Press Association, Ex parte Green* (1891), 7 T. L. R. 411; *Pratt v. Inman* (1889), 43 Ch. D. 175, 179. An order will not be enforced by attachment of a director until he has been personally served (*McKeown v. Joint Stock Institute*, [1899] 1 Ch. 671). As to attachment, see title CONTEMPT OF COURT ETC., Vol. VII., pp. 308 *et seq.*

(*c*) As to service of proceedings, see p. 16, *ante*.

(*d*) See title CORPORATIONS, Vol. VIII., p. 381.

(*e*) *Thames Haven Rail. Co. v. Hall* (1843), 5 Man. & G. 274; *Faviell v. Eastern Counties Rail. Co.* (1848), 2 Exch. 344.

(*f*) See Bro. Abr. tit. Corporations, 28; Co. Litt. 60 a, b; *Scriven v. Jescott (Leeds), Ltd.* (1908), 126 L. T. Jo. 100; and title CORPORATIONS, Vol. VIII., p. 395. The practice of accepting appearance by the liquidator, "The Company, Ltd., in liquidation by E. F. its liquidator duly appointed," was put an end to by a masters' resolution of March 9th, 1909.

Woolf v. City Steamboat Co. (1849), 6 Dow. & L. 606.

See p. 384, *post*.

Kaye v. Croydon Tramways Co., [1898] 1 Ch. 358, C. A.; *Towers v. African Tug Co.*, [1904] 1 Ch. 558, C. A.

(*k*) *Manchester and Liverpool Banking Co. v. Parkinson* (1888), 60 L. T. 47; *East Molesey Local Board v. Lambeth Waterworks Co.*, [1892] 3 Ch. 289, C. A. But the practice requiring an undertaking by a director or other responsible person (1 Seton's Judgments and Orders, 6th ed., p. 522) is still, as a rule, followed.

action pending against it may be stayed or restrained (*l*), and a winding-up order or supervision order prevents any action or proceeding being proceeded with or commenced against the company without the court's leave (*m*). Where a company goes into voluntary liquidation any action against it may be brought or continued unless it is stayed or restrained (*n*).

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Liabilities
of
Company.

(vi.) *Security for Costs.*

534. Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given (*o*). This provision does not apply to an unlimited company, even if it is in winding up (*p*), or enable security to be ordered to be given by the liquidator of a company, even where he has no means, either when he is applying by misfeasance summons or is coming to the court in exercise of any other statutory duty (*q*). The fact of a company being in liquidation is *prima facie* evidence that it will if unsuccessful be unable to pay the defendant's costs, even if the liquidation occurs while the action is pending (*r*). A defendant company is not obliged to give security (*s*); nor need it do so if it is plaintiff in a mere cross-action against a person who is suing it in another action in regard to the same subject-matter (*t*). If, however, there is a counterclaim or cross-action to impeach the transaction in respect of which the action is brought, security may be ordered (*u*). The amount of

Security for
costs by
company.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 140; and see pp. 533 *et seq.*, *post*.

(*m*) *Ibid.*, s. 142; and see p. 420, *post*.

(*n*) See p. 583, *post*.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 278 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 69]. Security may be ordered up to a certain stage of the proceedings, with liberty to apply (*Western of Canada Oil Lands and Works Co. v. Walker* (1875), 10 Ch. App. 628). As to evidence, see *Southampton, Isle of Wight and Portsmouth Improved Steam-coal Co. v. Pinnock* (1863), 11 W. R. 978.

(*p*) *United Ports Insurance Co. v. Hill* (1870), L. R. 5 Q. B. 395.

(*q*) *Re Strand Wood Co., Ltd.*, [1904] 2 Ch. 1, C. A. But the liquidator may in such a case be ordered to pay costs personally; see p. 450, *post*. Where a company is in voluntary winding up and has no assets, a foreign company petitioning for a compulsory order will be ordered to give security, even where the debt is admitted (*Re Alabama Portland Cement Co.*, [1909] W. N. 157; distinguishing *Re Contract and Agency Corporation*, [1887] W. N. 218); see p. 409, *post*.

(*r*) *Northampton Coal, Iron and Waggon Co. v. Midland Waggon Co.* (1878), 7 Ch. D. 500, C. A.; *Pure Spirit Co. v. Fowler* (1890), 25 Q. B. D. 235; *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, C. A.; *Re Photographic Artists' Co-operative Supply Association* (1883), 23 Ch. D. 370, C. A.; *Lydney and Wigpool Iron Ore Co. v. Bird* (1883), 23 Ch. D. 358; *Moscow (City) Gas Co. v. International Financial Society* (1872), 7 Ch. App. 225, 229.

(*s*) *Accidental and Marine Insurance Co. v. Mercati* (1866) L. R. 3 Eq. 200.

(*t*) *Ibid.*

(*u*) *Strong v. Carlyle Press* (No. 2), [1893] W. N. 51; *Moscow (City) Gas Co. v. International Financial Society*, *supra*; *Washoe Mining Co. v. Ferguson* (1866),

SECT. 12. security required should equal the probable amount of costs payable (b); but the court has an absolute discretion as to the amount of the security, and as to when and in what manner and form it is to be given (c).
Powers and Liabilities of Company. Where a company appeals from a winding-up order against it, security for costs may be required (d).

SUB-SECT. 10.—Alteration of Objects.

Companies which may alter their objects.

535. A company may, subject to the provisions of the Act of 1908, by special resolution, and with the sanction of the court, alter the provisions of its memorandum of association with respect to the objects of the company (e). This provision applies to any company which has been formed and registered under the Act of 1908, and to an existing company (f), including a company which has been registered but not formed under the Joint Stock Companies Acts or the Companies Act, 1862 (g), and to a registered unlimited company which has no shares and no capital (h).

What alterations may be made.

536. Alterations as regards objects can only be made so far as they may be required to enable the company (1) to carry on its business more economically or more efficiently; or (2) to attain its main purpose by new or improved means; or (3) to enlarge or change the local area of its operations; or (4) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or (5) to restrict or abandon any of the objects specified in the memorandum (i).

L. R. 2 Eq. 371; and see *Sinclair v. Glasgow and London Contract Corporation* (1904), 6 F. (Ct. of Sess.) 818; *Freehold Land and Brickmaking Co. v. Spargo*, [1868] W. N. 94.

(b) *Imperial Bank of China, India and Japan v. Bank of Hindustan, China, and Japan* (1866), 1 Ch. App. 437; *Dominion Brewery, Ltd. v. Foster* (1897), 77 L. T. 507, C. A.

(c) R. S. C., Ord. 65, r. 6.

(d) *Re Photographic Artists' Co-operative Supply Association* (1883), 23 Ch. D. 370, C. A.; *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] W. N. 66; *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, C. A. As to an appeal against an order in favour of a plaintiff company, see *Star Fire and Burglary Insurance Co. v. Davidson & Sons* (1902), 4 F. (Ct. of Sess.) 997.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 9 (1), (2). For forms of resolutions, see *Encyclopædia of Forms*, Vol. IV., p. 329.

(f) See p. 36, ante.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 246. Under the Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), there was some doubt as to what companies could alter their objects without re-registering under the Act of 1862; see *Re General Credit Co.*, [1891] W. N. 153; *Re Nitrophosphate and Odams Chemical Manure Co., Ltd.*, [1893] W. N. 141; *Re Hong Kong and China Gas Co., Ltd.*, [1898] W. N. 158 (3); *Re Copiapo Mining Co.*, [1899] W. N. 25; *Re Euphrates and Tigris Steam Navigation Co., Ltd.*, [1904] 1 Ch. 360.

(h) *Re North of England Iron Steamship Insurance Association*, [1900] 1 Ch. 481.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 9 (1) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 1 (5)]. Prior to the Act of 1890 many companies, having only very limited or meagre objects, had to resort to Parliament or to reconstruction in order to extend their

If the alteration is one required to enable the company to do any one of the five things enumerated, but not otherwise, the court may confirm it wholly or in part (*k*). The court need not, in exercising its discretion, consider the wisdom of the proposed alterations, but has only to decide whether it is unfair to any of the members, or fair and equitable as between different classes of members (*l*). As to the first two heads, it is probable a company may carry on its business more economically or more efficiently, or attain its main purpose by new or improved means, without altering the objects as stated in its memorandum of association. The court will only confirm an alteration under the second head where it will leave the business of the company substantially what it was before, with only changes in the mode of conducting it (*m*). As to the third head, the power has been allowed to be exercised, subject to or free from conditions (*n*). The statutory power as regards the fourth head to alter objects has been, as a rule, liberally interpreted, the court regarding as convenient and advantageous those things which experience and the opinion of traders show to be of that character (*o*). Thus, a telephone company has been allowed to extend its objects so as to supply electricity for other than telephonic purposes (*p*); a company formed to invest in a certain class of securities only has been allowed to extend its objects to investment in other securities (*q*); a marine insurance company has been allowed to extend its objects to other classes of insurance connected with ships and maritime matters (*r*); a reversionary interest company has been authorised to extend its borrowing powers (*s*). But a club, incorporated as

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Considerations guiding the court.

objects (*Re Jewish Colonial Trust (Juedische Colonialbank), Ltd.*, [1908] 2 Ch 287, 295).

(*k*) *Re Jewish Colonial Trust (Juedische Colonialbank), Ltd.*, *supra*, at p. 296.

(*l*) *Ibid.*, at p. 300. An earlier decision was to the effect that where sweeping changes were to be made a reconstruction was the proper mode of effecting them, and that in such a case the opposition of a single shareholder would be fatal to an application to confirm an application (*Re Bernicia Steamship, Ltd.*, [1900] W. N. 24). As to a narrow construction of the Act, see *Re Spiers and Pond, Ltd.*, [1895] W. N. 135; *Western Ranches, Ltd. v. Nelson's Trustees* (1899), 38 Sc. L. R. 576. The old decision in *Re Consett Iron Co., Ltd.*, [1901] 1 Ch. 236, that it is not within the scope of the Act simply to rewrite in modern and detailed form a statement of the objects has not been always approved (*Re Trust and Agency Co. of Australasia, Ltd.*, [1908] W. N. 229); but see *Re Fraser (D. & D. H.), Ltd.*, [1903] W. N. 73.

(*m*) *Re Cyclists' Touring Club*, [1907] 1 Ch. 269; *Re Governments Stock Investment Co.*, [1891] 1 Ch. 649, 655; compare *Re Bernicia Steamship Co., Ltd.*, *supra*.

(*n*) *Re Indian Mechanical Gold Extracting Co.*, [1891] 3 Ch. 538; *Re Trust and Agency Co. of Australasia, Ltd.*, *supra*.

(*o*) *Re National Boiler Insurance Co.*, [1892] 1 Ch. 306.

(*p*) *Re Oriental Telephone Co.*, [1891] W. N. 153.

(*q*) *Re Governments Stock Investment Co.*, *supra*; *Re Governments Stock Investment Co.*, (No. 2), [1892] 1 Ch. 597; *Re Foreign and Colonial Government Trust Co.*, [1891] 2 Ch. 395 (in each case conditions were imposed); compare *Re Empire Trust, Ltd.* (1891), 64 L. T. 221.

(*r*) *Re Alliance Marine Insurance Co.*, [1892] 1 Ch. 300 (conditions were imposed in this case); see also *Re Ulster Marine Insurance Co.* (1891), 27 L. R. Ir. 487.

(*s*) *Re Reversionary Interest Society, Ltd.*, [1892] 1 Ch. 615. In many cases

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a limited company, and formed to assist and protect members who were cyclists, was not allowed to alter its objects so as to admit motorists and other tourists as members (*t*).

As regards the fifth head the court has jurisdiction to confirm any alteration in the memorandum of association involving the abandonment of objects of a fundamental character and limiting the operations of the company from a world-wide area to a comparatively small prescribed region; but where the constitution of the company places it in the power of the controlling body of the company (who are in favour of such an alteration) to permit the extended powers of the company to lie dormant, and where a vast majority of the shareholders have given no indication of their wishes on the subject, the court will refuse to sanction the proposed alteration (*a*).

Where the company is a limited company, but without the word "Limited" as part of its name, the approval of the Board of Trade must be obtained to the proposed alterations (*b*).

Confirmation
by the court.

537. The alteration does not take effect until and except in so far as it is confirmed on petition by the court (*c*).

The petition is presented by the company, and must be supported by affidavit, to which a copy of the memorandum and articles and the original minute book must be made exhibits (*d*). Immediately after presentation of the petition a summons is taken out to have a day fixed for the hearing of the petition, and directions given for advertising the presentation of it (*e*).

Jurisdiction.

The court is the court having jurisdiction to wind up the company (*f*), but in the High Court the jurisdiction is exercised not only by the judge to whom the winding-up business is assigned, but also by the other judges of the Chancery Division (*g*). The High Court has jurisdiction in the cases of an unlimited company which has no shares and no capital (*h*), and of a company limited by guarantee (*i*). When the Palatine Court of Lancaster or Durham,

banks and insurance companies have been allowed to extend their objects. Thus, a company carrying on the ordinary business of bankers was allowed, on conditions, to take new powers to undertake the execution of trusts and to act as executors, administrators, trustees, or treasurers (*Re Munster and Leinster Bank*, [1907] 1 I. R. 237).

(*t*) *Re Cyclists' Touring Club*, [1907] 1 Ch. 269.

(*a*) *Re Jewish Colonial Trust (Juedische Colonialbank), Ltd.*, [1908] 2 Ch. 287.

(*b*) *Re St. Hilda's Incorporated College, Cheltenham*, [1901] 1 Ch. 556.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 9 (2) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 1].

(*d*) *Re Omnium Investment Co.*, [1895] 2 Ch. 127.

(*e*) *Re Munster and Leinster Bank*, *supra*.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285 [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 1].

(*g*) *Re Mining Shares Investment Co.*, [1893] 2 Ch. 660; *Re Ocean Queen Steamship Co.*, [1893] 2 Ch. 666; *Re Islington and General Electric Supply, Ltd.*, [1892] W. N. 81. The Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), has not affected the jurisdiction (*Re Essex and Suffolk Equitable Insurance Society, Ltd.*, [1909] W. N. 102).

(*h*) *Re North of England Iron Steamship Insurance Association*, [1900] 1 Ch. 481.

(*i*) *Re Monmouthshire and South Wales Employers Mutual Indemnity Society, Ltd.*, [1909] W. N. 6.

or a county court, has jurisdiction to wind up the company (*k*), that court has jurisdiction to confirm an alteration of objects (*l*).

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Company.

Notices and
consents
required.

538. Before confirming the alteration the court must be satisfied—(1) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the court, be affected by the alteration; and (2) that, with respect to every creditor who in the opinion of the court is entitled to object, and who signifies his objection in the manner directed by the court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the court; but the court may, in the case of any person or class, for special reasons, dispense with this notice (*m*).

539. The court may make an order confirming the alteration either wholly or in part (*n*), and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper (*o*). In several cases the court has imposed the condition that the company should change its name so as to make it accord with its objects as altered (*p*). A change of name will not be required even where the area of the company's business is enlarged, if it would occasion great expense and difficulty (*q*). The court may impose a condition that the extended powers of an assurance company are not to be exercised until existing policyholders have assented, or their policies have expired (*r*), or that debenture-holders should be given a floating charge (*s*).

Power to
impose
conditions.

The court may alter or modify the alterations proposed without sending the matter back to be passed as a fresh special resolution (*t*).

The court, in exercising its discretion, is to have regard to the rights and interests of the members of the company or of any

Discretion of
the court.

(*k*) See p. 391, *post*.

(*l*) *Re Rugeley Gas Co.*, [1899] W. N. 127, which see as to transferring the proceedings from the High Court to the court having jurisdiction.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 9 (3) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 1 (2)]. As to the form of notice, see *Re Governments Stock Investment Co.*, [1891] 1 Ch. 649; [1892] 1 Ch. 597; *Re Reversionary Interest Society, Ltd.*, [1892] 1 Ch. 615. In the case of a bank, notice to depositors has been dispensed with.

(*n*) For examples of partial confirmation, see *Re Spiers and Pond, Ltd.*, [1895] W. N. 135; *Re Fleetwood Estate Co.*, [1897] W. N. 20; *Re Ulster Marine Insurance Co.* (1891), 27 L. R. Ir. 487; *Re Ward (Marcus) & Co.*, [1897] 1 L. R. 435.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 9 (4) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 1 (3) (5)].

(*p*) *Re National Boiler Insurance Co.*, [1892] 1 Ch. 306; *Re Oriental Telephone Co.*, [1891] W. N. 153; *Re Foreign and Colonial Government Trust Co.*, [1891] 2 Ch. 395; *Re Alliance Marine Assurance Co.*, [1892] 1 Ch. 300; *Re Governments Stock Investment Co.* (No. 2), [1892] 1 Ch. 597; *Re Indian Mechanical Gold Extracting Co.*, [1891] 3 Ch. 538; *Re Egyptian Delta Land and Investment Co.* (1907), 51 Sol. Jo. 211.

(*q*) *Re Trust and Agency Co. of Australasia, Ltd.*, [1908] W. N. 229; *Re Kircaldy Steam Laundry Co.* (1904), 6 F. (Ct. of Sess.) 778.

(*r*) *Re National Boiler Insurance Co.*, *supra*.

(*s*) *Re Governments Stock Investment Co.* (No. 2), *supra*.

(*t*) *Re National Boiler Insurance Co.*, *supra*; *Re Spiers and Pond, Ltd.*, *supra*; *Re Fleetwood Estate Co.*, *supra*.

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class of them, as well as to the rights and interests of the creditors. It may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase of the interests of dissentient members (but otherwise than out of the capital of the company); and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement (a).

Registration
of order.

540. An office copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, must within fifteen days from the date of the order be delivered by the company to the registrar, who is to register the same and certify the registration under his hand. The certificate is conclusive evidence that all the statutory requirements with respect to the alteration and the confirmation thereof have been complied with; and thenceforth the memorandum so altered is the memorandum of association of the company (b).

It is not the usual practice to direct the order to be advertised, although the court may give such a direction in special circumstances (c). In some cases directions have been given for advertising the order in the same way as the petition has been advertised (d).

A company making default in delivering to the registrar any document so required to be delivered to him is liable to a fine not exceeding £10 for every day during which it is in default (e).

The court may by order at any time extend the time for the delivery of documents to the registrar for such period as the court may think proper (f).

Substitution
of memo-
randum and
articles for
deed of
settlement.

541. Subject to the provisions below stated, a company registered in pursuance of Part VII. of the Act of 1908 (g) may by special resolution alter the form of its constitution (h) by substituting a memorandum and articles of association for a deed of settlement (i).

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 9 (5) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 1 (4)].

(b) *Ibid.*, s. 9 (6) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 2 (1)].

(c) *Re Lancaster Banking Co.* (1897), 75 L. T. 647.

(d) *Re Copper Mines Tinplate Co.*, [1897] W. N. 20.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 9 (7) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 2 (2)].

(f) *Ibid.*, s. 9 (6). This provision is new. Before it was enacted the court occasionally extended the time for registration (*Re Brin's Oxygen Co.*, [1899] W. N. 44; *Re Reversionary Interest Society*, [1892] W. N. 60). If the copy order cannot be delivered in time, the registrar may, though the court cannot order him to, register it (*Re Criccieth Pier and Harbour Co.*, [1891] W. N. 15).

(g) See p. 61, *ante*.

(h) As to obtaining a declaration in an action that the proposed alteration will be a breach of contract with policy-holders, see *Baily v. British Equitable Assurance Co.*, [1904] 1 Ch. 374, C. A., reversed on another point, *sub nom. British Equitable Assurance Co., Ltd., v. Baily*, [1906] A. C. 35.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 264 (1) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 1 (1)]. The expression "deed of settlement" includes any contract of copartnership or other instrument constituting or regulating the company, not being an Act of Parliament, a royal charter, or letters patent (*ibid.*, s. 264 (4) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 3 (3)]). Where

Such an alteration may be made either with or without any alteration of the objects of the company (*j*).

The above stated statutory provisions, with respect to confirmation by the court and registration of an alteration of the objects of a company, apply so far as applicable to an alteration where the company has a deed of settlement, but with the following modifications—that there must be substituted for the printed copy of the altered memorandum required to be delivered to the registrar a printed copy of the substituted memorandum and articles; and that, the registration of the alteration being certified by the registrar, the substituted memorandum and articles are to apply to the company in the same manner as if it were a company registered under the Act of 1908 with that memorandum and those articles, and the company's deed of settlement ceases to apply to the company (*k*).

SECT. 12.
Powers and
Liabilities
of
Company.

SUB-SECT. 11.—*Arrangements and Compromises.*

542. A company has, as an incident to its existence, the same power of compromising claims made against it as an individual has (*l*). A power to compromise is only exercisable where there is some dispute or difficulty (*m*), but where there is a power to compromise and a dispute, the court has only to inquire whether the claim on one side and the defence on the other are respectively *bonâ fide* and truly made (*n*), and whether the compromise is honestly intended for the benefit of the company (*o*).

General
power to
compromise.

543. Where a compromise or arrangement is proposed between any company liable to be wound up under the Act and its creditors, or any class of them, or between the company and its members or any class of them, the court may, whether the company is in winding up or not, order a meeting of the creditors or class of creditors,

Compromise
with court's
sanction.

a company had been constituted by a deed of settlement, and the deed had been altered by private Acts of Parliament, and the company had then been registered under the Act of 1862, the objects could be extended under the Companies (Memorandum of Association) Act, 1890 (*Re Reversionary Interest Society, Ltd.*, [1892] 1 Ch. 615). The Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 1 (1), expressly allowed an alteration of the deed of settlement, besides an alteration of the constitution of the company by substituting a memorandum and articles for a deed of settlement. The Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), contains no such express provision, but by s. 263, subject to certain exceptions, where a company with a deed of settlement is registered under Part VII. all the provisions of the Act apply to the company in the same manner as if it had been formed under the Act.

(*j*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 264 (3) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 1 (1)].

(*k*) *Ibid.*, s. 264 (2) [Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 2 (1)].

(*l*) *Bath's Case* (1878), 8 Ch. D. 334, 340, C. A.; *Dixon v. Evans* (1872), L. R. 5 H. L. 606, 618. As to reference to arbitration, see p. 601, *post*.

(*m*) *Sneath v. Valley Gold, Ltd.*, [1893] 1 Ch. 477, 494 C. A.; *Mercantile Investment and General Trust Co. v. International Co. of Mexico* (1891), [1893] 1 Ch. 484, n., C. A.; and see *Mercantile Investment and General Trust Co. v. River Plate Trust Loan and Agency Co.*, [1894] 1 Ch. 578.

(*n*) *Dixon v. Evans* (1872), L. R. 5 H. L. 606.

(*o*) *Yates v. Cyclists' Touring Club* (1908), 24 T. L. R. 581. As to forfeiting shares by way of compromise, see *Spackman v. Evans* (1868), L. R. 3 H. L. 171.

SECT. 12. or of the members or class of members, as the case may be, to be summoned; and if a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the court, is binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company (*p*).

Compromises by liquidators. **544.** Where a company is being wound up by the court, the liquidator may, with the sanction either of the court or of the committee of inspection, make certain compromises with creditors or contributories. He has the same power where the winding up is under the supervision of the court, but only with the sanction of the court; or in a voluntary winding up, with the sanction of an extraordinary resolution of the company (*q*).

Compromises by creditors. **545.** An arrangement entered into between a company which is about to be, or is in the course of being, wound up voluntarily and the creditors is, subject to a right of appeal to the court, binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of them (*r*).

SECT. 13.—*Ownership and Disposition of Property.*

Company's power to hold lands. **546.** Any company incorporated under the Act of 1908, or any Act which it replaces, has a statutory power to hold lands (*s*), but a company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members, cannot, without the sanction of the Board of Trade, hold more than two acres of land, although the Board may, by licence, empower any such company to hold lands in such quantity and subject to such conditions as the Board thinks fit (*t*).

The fact that a company holds land does not make its shares an interest in land within the Statute of Frauds (*u*), or, where it is

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 120. As to compromises, see, further, pp. 602 *et seq.*, *post*.

(*q*) *Ibid.*, s. 214.

(*r*) *Ibid.*, s. 191.

(*s*) *Ibid.*, ss. 16, 245, 246, 263. As to colonial or foreign companies, see p. 753, *post*.

(*t*) *Ibid.*, s. 19 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 21]; and see *ibid.*, s. 20. The form of licence is given in *ibid.*, Sched. III, Form F. It may be that other companies cannot hold land which is not required as incidental to their objects as defined by its then memoranda of association. A company is not a "respectable and responsible person" within the meaning of a prohibition in a lease against assignments except to such persons (*Willmott v. London Road Car Co.*, [1910] 1 Ch. 754).

(*u*) The shares and other interest of any member of a company incorporated under the Act of 1908 or any Act which it replaces, is personal estate and not of the nature of real estate; see p. 121, *ante*. As to shares in other companies, see Lindley on Companies, 6th ed., p. 631. As to debentures, see pp. 345 *et seq.*, *post*.

established for charitable purposes, render it necessary to obtain the consent of the Charity Commissioners to the sale of its land (*w*).

SECT. 13.
Ownership
and
Disposition
of Property.
Personalty.

547. An incorporated company may hold personal property to any extent without licence from any Government department (*x*). Its powers in this respect may, however, be limited by its memorandum of association, and, whatever the memorandum says, it cannot purchase its own shares (*a*) or hold them except for the purpose of disposing of them under forfeiture clauses in the articles of association (*b*); but it may buy up its debentures for the purpose of redeeming or re-issuing them (*c*).

Where a person transfers property to a company for the purpose of defeating his creditors, its title to the property may in certain cases be displaced in favour of his trustee in bankruptcy (*d*). A bill of sale to a company must state its address and description (*e*).

548. A company which is a body corporate is capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual. Where it and an individual or two or more bodies corporate become entitled to any such property in circumstances, or by virtue of any instrument, which would, if the body corporate had been an individual, have created a joint tenancy, they are entitled to the property as joint-tenants. Such acquisition and holding, however, are subject to the like conditions and restrictions which attach to the acquisition and holding of property by a body corporate in severalty (*f*).

Joint
ownership.

549. The directors of a company have, generally, under the articles, duties as to maintaining and keeping in repair the property of the company (*g*).

Duties of
directors.

550. A company has large powers of selling its personal property as incidental to the management of its business (*h*), but a power to sell or purchase the business of a company will not be implied (*i*). Although it may, under an express power in its

Power of
sale.

(*w*) *Ex parte Church Army* (1906), 75 L. J. (CH.) 467; see *Re Society for Training Teachers of the Deaf and Whittle's Contract*, [1907] 2 Ch. 486.

(*x*) See title CORPORATIONS, Vol. VIII., p. 377.

(*a*) *Trevor v. Whitworth* (1887), 12 App. Cas. 409.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Sched. I., Table A, clause 27; see p. 200, *ante*.

(*c*) *Ibid.*, s. 104; and see p. 355, *post*.

(*d*) *Re Hirth, Ex parte Trustee*, [1899] 1 Q. B. 612; *Wheatley's Trustees v. Wheatley (H.), Ltd.* (1901), 85 L. T. 491; *Re Slobodinski, Ex parte Moore*, [1903] 2 K. B. 517.

(*e*) *Altree v. Altree*, [1898] 2 Q. B. 267.

(*f*) Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), s. 1 (1). On the dissolution of a body corporate which is a joint tenant the property devolves on the other joint tenant (*ibid.*, s. 1 (2)).

Re Floating Dock Co. of St. Thomas, Ltd., [1895] 1 Ch. 691.

Wilson v. Miers (1861), 10 C. B. (N. S.) 348, 366.

(*i*) *Ernest v. Nicholls* (1857), 6 H. L. Cas. 401; *Re European Society Arbitration Acts, Ex parte British Nation Life Assurance Association (Liquidators)* (1878), 8 Ch. D. 679, C. A.

SECT. 13.
Ownership
and
Disposition
of Property.

memorandum of association, sell practically the whole of its assets, including the goodwill (*k*), it cannot, even if its memorandum purports to give it power so to do, sell all its assets and undertaking and provide by resolution for the distribution of the proceeds on winding up taking place (*l*).

A sale of its property in exchange for shares which has been carried through will not be upset at the instance of a shareholder who has accepted the new shares (*m*). Part of an undertaking may be sold if the sale is authorised by the articles (*n*).

Bonus to
directors on
sale.

An agreement for sale is not necessarily bad on the ground that one of its terms is the payment of a bonus to the directors of the selling company, unless the bonus is in fact a bribe to the directors (*o*); but it is essential that this term should be specifically mentioned in the notice summoning the meeting to sanction the agreement (*p*).

(*k*) *Re Borax Co., Foster v. Borax Co.*, [1901] 1 Ch. 326, C. A.; disapproving *Re Borax Co., Foster v. Borax Co.*, [1899] 2 Ch. 130; and see *Mason v. Motor Traction Co., Ltd.*, [1905] 1 Ch. 419; *Loeffler v. Donna Thereza Christina Rail. Co., Ltd.* (1901), 18 T. L. R. 149; *Booth v. New Afrikander Gold Mining Co., Ltd.*, [1903] 1 Ch. 295, 313. As to what passes under a contract for the sale of a business, see *Hadley (Felix) & Co. v. Hadley*, [1898] 2 Ch. 680. A sale of the undertaking may amount to a breach of contract as regards third persons (*Ogden's, Ltd. v. Nelson*, [1905] A. C. 109; *Nathan v. Ogden's, Ltd.* (1905), 22 T. L. R. 57).

(*l*) *Bisgood v. Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 743, C. A., following *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308, and *Bisgood v. Nile Valley Co., Ltd.*, [1906] 1 Ch. 747, and overruling *Cotton v. Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454, and *Fuller v. White Feather Reward, Ltd.*, [1906] 1 Ch. 823; *Doughty v. Lomagunda Reefs, Ltd.*, [1902] 2 Ch. 837. In such a case the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), by s. 192 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161], provides a means by which such a sale can be effected on the company going into liquidation, and then makes provision for protecting the rights of dissentient shareholders (see p. 589, *post*). In *Bisgood v. Henderson's Transvaal Estates, Ltd.*, *supra*, the sale was for partly-paid shares in a new company with a liability of 2s. 6d. a share, and a provision differing from the statutory one was made for the sale of the dissentient shareholders' shares in the new company, and division among them of the proceeds. A scheme whereby the new partly-paid shares would be forfeited is *ultra vires* as an attempt to force holders of fully-paid shares to contribute more capital (*Manners v. St. David's Gold and Copper Mines, Ltd.*, [1904] 2 Ch. 593, C. A.). A company will be restrained from transferring its business and assets without making provision for a creditor (*Kearns v. Leaf* (1864), 1 Hem. & M. 681); and in *Greenwich Pier Co. v. Thames Conservators* (1905), 21 T. L. R. 669, a virtual amalgamation was held to be illegal. As to amalgamation and reconstruction, see pp. 584 *et seq.*, *post*.

(*m*) *Campbell's Case* (1873), 9 Ch. App. 1, where, however, the power of the purchasing and not of the selling company was impugned.

(*n*) *Grant v. United Kingdom Switchback Railways Co.* (1888), 40 Ch. D. 135, C. A.; *Re Vivian (H. H.) & Co., Ltd., Metropolitan Bank of England and Wales, Ltd. v. Vivian (H. H.) & Co., Ltd.*, [1900] 2 Ch. 654; *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A. As to the selling company agreeing to call up unpaid capital, see *New Zealand Gold Extraction Co. (Newbery-Lautin Process) v. Peacock*, [1894] 1 Q. B. 622, C. A.

(*o*) *Southall v. British Mutual Life Assurance Society* (1871), 6 Ch. App. 614.

(*p*) *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358, C. A. As to such payment not being lawful if made after liquidation commenced, see *Stroud v. Royal Aquarium and Summer and Winter Garden Society* (1903), 89 L. T. 145.

551. Where a company has no power to sell its undertaking, it is competent for it to wind up voluntarily and direct the liquidator to carry out the sale (*q*). If the sale is invalid, the purchaser will not be liable as a contributory (*r*), and is not concerned to see that shares given as the consideration are properly distributed amongst the members of the selling company (*s*).

SECT. 13.
**Ownership
and
Disposition
of Property.**

SECT. 14.—*Borrowing and Securing Money.*

SUB-SECT. 1.—*Power to Borrow.*

552. A trading or commercial company has an implied power to borrow, and to mortgage or charge all or any part of its property to secure the money so borrowed, although no express power to borrow or mortgage is given to it, provided that such borrowing or giving security is not expressly prohibited (*a*). No power of borrowing is implied when the company is not a trading or commercial undertaking (*b*), and in such a case a company can only borrow if authorised to do so by its memorandum of association.

When power
to borrow
implied.

553. If there is no power to borrow, a loan is irrecoverable as a debt, and any security given for the loan is void (*c*). If, however, the loan has been applied in payment of the debts or liabilities of the company duly incurred (whether accruing before or after the date of the loan (*d*)) the lender is entitled to recover the amount so paid (*e*) and to that extent may hold any securities given to himself (*f*), but he is not subrogated to any securities or priorities or rights as to the interest of any creditor paid off with his money (*g*).

Subrogation.

Where the lender is a company without power to lend and the borrower is a company without power to borrow, the latter

(*q*) *Southall v. British Mutual Life Assurance Society* (1871), 6 Ch. App. 614.

(*r*) *Re European Society Arbitration Acts, Ex parte British Nation Life Assurance Association (Liquidators)* (1878), 8 Ch. D. 679, C. A.

(*s*) *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.

(*a*) *Re Badger, Mansell v. Cobham (Viscount)*, [1905] 1 Ch. 568, 574; and see *Bank of Australasia v. Breillat* (1847), 6 Moo. P. C. C. 152 (banking company); *Australian Auxiliary Steam Clipper Co. v. Mounsey* (1858), 4 K. & J. 733 (shipping company); *Bryon v. Metropolitan Saloon Omnibus Co., Ltd.* (1858), 3 De G. & J. 123, C. A. (omnibus company); *Re Patent File Co., Ex parte Birmingham Banking Co.* (1870), 6 Ch. App. 83, 86, 88 (file-making company); *Gibbs and West's Case* (1870), L. R. 10 Eq. 312 (insurance company); *General Auction Estate and Monetary Co. v. Smith*, [1891] 3 Ch. 432 (auction etc. company). A mining company has no implied power of borrowing (*Burmester v. Norris* (1851), 6 Exch. 796; *Ricketts v. Bennett* (1847), 4 C. B. 686; *Re German Mining Co., Ex parte Chippendall* (1853), 4 De G. M. & G. 19, C. A.).

(*b*) *Re Badger, Mansell v. Cobham (Viscount)*, *supra*.

(*c*) *Troup's Case* (1860), 29 Beav. 353.

(*d*) *Wenlock (Baroness) v. River Dee Co.* (1887), 19 Q. B. D. 155, C. A.

(*e*) *Troup's Case*, *supra*; *Re Magdalena Steam Navigation Co.* (1860), John. 690, 694; *Re National Permanent Benefit Building Society, Ex parte Williamson* (1863), 5 Ch. App. 309; *Brooks & Co. v. Blackburn Building Society* (1884), 9 App. Cas. 857; *Owen and Ashworth's Claim, Whitworth's Claim*, [1901] 1 Ch. 115; and see title BUILDING SOCIETIES, Vol. III., pp. 376, 377.

(*f*) *Blackburn Building Society v. Cunliffe, Brooks & Co.* (1882), 22 Ch. D. 61, C. A., affirmed *sub nom. Brooks & Co. v. Blackburn Building Society*, *supra*.

(*g*) *Ibid.*; *Re Wrexham, Mold and Connah's Quay Rail.*, [1899] 1 Ch. 440, C. A.; *Hoare's Case* (1861), 30 Beav. 225.

SECT. 14.
Borrowing
and
Securing
Money.

What is a
 loan.

Limit on
 borrowing.

Borrowing
 when power
 of directors
 limited.

by borrowing is a party to a breach of trust, and the money lent is recoverable (*h*).

554. An overdraft at a company's bankers is a loan (*i*). A *bonâ fide* sale, by a railway company which has exhausted its borrowing powers, of part of its rolling stock, accompanied by an agreement on the part of the company to hire the stock from the purchaser at a rent which will repay the purchase-money and interest and enable the company at the end of the term to repurchase the stock for a nominal consideration, is not a borrowing (*k*).

555. The Act of 1908 does not impose any limit as to the amount which may be borrowed, but the memorandum or articles of the company often impose a limit, and the lender must see that the limit, if any, is not exceeded (*l*). If the memorandum of association expressly or impliedly limits the borrowing powers, any borrowing beyond that limit is *ultra vires* and therefore void; but if the limit is only imposed by the articles of association, they can be altered by a special resolution so as to extend or remove the limit (*m*).

Where the borrowing powers of a company are limited, any security given for any amount lent to the company beyond the limit is void, even though the limit is subsequently increased (*n*).

556. Where the borrowing power of directors is limited to a certain amount, they cannot borrow beyond that amount so as to bind the company (*o*). If, however, the borrowing, although in excess of their own powers, is not in excess of the powers of the company, the borrowing may be ratified by the company in general meeting (*a*). Ratification can be inferred (*b*), and an ordinary resolution is sufficient for that purpose (*c*). Where directors may

(*h*) *Ernest v. Croysdill* (1860), 29 L. J. (CH.) 580.

(*i*) *Brooks & Co. v. Blackburn Building Society* (1884), 9 App. Cas. 857, affirming *Blackburn Building Society v. Cunliffe, Brooks & Co.* (1882), 22 Ch. D. 61, C. A.; *Chambers v. Manchester and Milford Rail. Co.* (1864), 5 B. & S. 588; *Looker v. Wrigley* (1882), 9 Q. B. D. 397; *Blackburn and District Benefit Building Society v. Cunliffe, Brooks & Co.* (1885), 29 Ch. D. 902, C. A., overruling *Re Cefn Cilcen Mining Co.* (1868), L. R. 7 Eq. 88; and *Waterlow v. Sharp* (1869), L. R. 8 Eq. 501.

(*k*) *Yorkshire Railway Wagon Co. v. Maclure* (1882), 21 Ch. D. 309, C. A.; compare *Manchester, Sheffield, and Lincolnshire Rail. Co. v. North Central Wagon Co.* (1888), 13 App. Cas. 554.

(*l*) *Chapleo v. Brunswick Building Society* (1881), 6 Q. B. D. 696, 715, C. A.

(*m*) According to *Re Bansha Woollen Mills Co.* (1888), 21 L. R. Ir. 181, where the memorandum imposes no limit on the power to borrow, but the articles limit the power, a general meeting of the company cannot sanction any borrowing in excess of the limit, but probably a company can in such a case ratify a borrowing beyond the limit; see *Grant v. United Kingdom Switchback Railways Co.* (1888), 40 Ch. D. 135, C. A.

(*n*) *Fountaine v. Carmarthen Rail. Co.* (1868), L. R. 5 Eq. 316; and see *Re Companies Acts, Ex parte Watson* (1888), 21 Q. B. D. 301.

(*o*) *Re Worcester Corn Exchange Co.* (1853), 3 De G. M. & G. 180; *Re Pooley Hall Colliery Co.* (1869), 21 L. T. 690; *Fountaine v. Carmarthen Rail. Co.*, *supra*. As to the liability of the directors in such a case, see p. 295, *ante*. If the amount borrowed is not to exceed the amount of preference capital, and there is no such capital, there is no limit on borrowing (*Re Johnston Foreign Patents Co.*, [1904] 2 Ch. 234).

(*a*) *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366, P. C.

(*b*) See *Re Magdalena Steam Navigation Co.* (1860), John. 690.

(*c*) Compare *Grant v. United Kingdom Switchback Railways Co.*, *supra*.

borrow any sum not exceeding two-thirds of the uncalled capital of the company, they may borrow up to two-thirds of the nominal capital not called up, whether issued or unissued (*d*).

Where directors have power to borrow they can, unless otherwise provided by statute or the articles, borrow to such an amount and upon such terms and security and for such purposes for the benefit of the company as they think fit. Where directors have power to issue bonds or debentures to secure sums borrowed, they can also borrow on other securities (*e*).

Directors having power to mortgage may exercise it for such purposes as the following: to secure a past debt, if the mortgage is not given in such circumstances as to make it a fraudulent preference (*f*); to secure sums owing on a bill of exchange given by directors to secure a debt of the company, although they have no power to accept such bills (*g*); or to indemnify directors against loss on guarantees given by them to the company's creditors (*h*). They may issue debentures in satisfaction of the debts of an insolvent business which the company has taken over and against which it has agreed to indemnify the vendor of the business (*i*), and may give the vendor of a solvent business preference over unsecured creditors in respect of a part of the purchase price (*k*). When an action has been commenced to enforce a series of debentures, they may issue further debentures of the series, provided that a receiver has not been appointed (*l*).

A company may issue debenture stock by way of collateral security (*m*). An agreement, even by parol, to give security is valid (*n*).

557. The power to borrow must be exercised in good faith for the benefit of the company, and not for purposes other than those for which it has been conferred (*o*). If the power is not exercised for the purposes of the company, the loan cannot be recovered by a person lending with notice of the purpose for which it is to be applied (*p*). If he had no notice, he may recover although the

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Borrowing
and
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Money,

Purposes of
borrowing.

Collateral
security.

Good faith
in borrowing.

(*d*) *English Channel Steamship Co. v. Rolt* (1881), 17 Ch. D. 715.

(*e*) *Commercial Bank of Canada v. Great Western Rail. of Canada* (1865), 13 L. T. 105, P. C. As to perpetual debenture stock, see *Companies (Consolidation) Act*, 1908 (8 Edw. 7, c. 69), s. 103; and p. 346, *post*. As to borrowing on the security of a deposit of title deeds, see *Re Patent File Co., Ex parte Birmingham Banking Co.* (1870), 6 Ch. App. 83; *Re General Provident Assurance Co., Ex parte National Bank* (1872), L. R. 14 Eq. 507, 514.

(*f*) *Shears v. Jacob* (1866), L. R. 1 C. P. 513; *Re Inns of Court Hotel Co.* (1868), L. R. 6 Eq. 82; *Re Patent File Co., Ex parte Birmingham Banking Co., supra*.

(*g*) *Scott v. Colburn* (1858), 26 Beav. 276.

(*h*) *Re Pyle Works* (No. 2), [1891] 1 Ch. 173.

(*i*) *Seligman v. Prince & Co.*, [1895] 2 Ch. 617, C. A.

(*k*) *Salomon v. Salomon & Co.*, [1897] A. C. 22.

(*l*) *Re Hubbard & Co., Ltd., Hubbard v. Hubbard & Co., Ltd.* (1898), 68 L. J. (CH.) 54.

(*m*) *Robinson v. Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841.

(*n*) *Ross v. Army and Navy Hotel Co.* (1886), 34 Ch. D. 43, C. A.; *Re Tilbury Portland Cement Co.* (1893), 62 L. J. (CH.) 814; and see p. 352, *post*.

(*o*) *Re London and County Assurance Co., Wood's Claim and Brown's Claim* (1861), 30 L. J. (CH.) 373.

(*p*) *Moye v. Sparrow* (1870), 18 W. R. 400; *Davis's Case* (1871), L. R. 12 Eq. 516, where the directors borrowed money for the purpose of lending it to another society; and see *Bank of Ireland v. Cogry Spinning Co.*, [1900] 1 I. R. 219.

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and
Securing
Money.

Notice as to
 borrowing.

money was borrowed for an illegal purpose (a); and a lender is not bound to inquire how the money is intended to be applied (b).

If an agent of a company hands to a lender a fully-paid certificate of debenture stock on the security of which he borrows more than he was authorised, and appropriates the excess, a lender without notice may prove for the whole sum (c).

Where one company lends money to another, and one person is a director of both companies, the knowledge acquired by him as officer of one company is not imputed to the other company, unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice and some duty imposed on him by that company to receive it (d).

A director of a company may, unless prohibited by statute or by its articles, lend money to the company, provided that in so doing he is acting for the benefit of the company, although the loan is made on the security of a debenture issued at a discount (e).

A trader, when selling his solvent business to a company, even though it consists only of himself and members of his family, may as a general rule lawfully take debentures charged upon all the company's assets in satisfaction of the whole or part of his purchase-money (f).

558. Where two or more companies join in giving one debenture to secure a joint loan, and thereby purport to charge with payment of the amount advanced their several undertakings and assets, the charge is *ultra vires* so far as it purports to make one company's assets a security for moneys lent to the other company or companies; but the charge is good as to each company's assets to the extent of the moneys actually received by that company (g).

559. Where directors have power to borrow upon the security of debentures only after a certain proportion of the share capital has been subscribed, any debentures issued before such subscription will be invalid (h).

Borrowing
 by two
 companies
 jointly.

Condition
 precedent to
 borrowing.

(a) *Re Marseilles Extension Rail. Co., Ex parte Crédit Foncier and Mobilier of England* (1871), 7 Ch. App. 161 (money borrowed to buy shares of the company).

(b) *Re Payne (David) & Co., Ltd., Young v. Payne (David) & Co., Ltd.*, [1904] 2 Ch. 608, C. A.; *Re Standard Rotary Machine Co.*, [1907] 95 L. T. 829. It is not the duty of a bank to inquire into the state of accounts between a company and its directors (*Bank of New South Wales v. Goulburn Valley Butter Co. Proprietary*, [1902] A. O. 543). As to set-off between two banking accounts, see *Re Johnson & Co.*, [1902] 1 L. R. 439.

(c) *Robinson v. Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841.

(d) *Re Hampshire Land Co.*, [1896] 2 Ch. 743; *Re Payne (David) & Co., Ltd., Young v. Payne (David) & Co., Ltd.*, *supra*; see *Re Marseilles Extension Rail. Co., Ex parte Crédit Foncier and Mobilier of England*, *supra*.

(e) *Campbell's Case* (1876), 4 Ch. D. 470.

(f) *Salomon v. Salomon & Co.*, [1897] A. C. 22. As to the effect of selling an insolvent business for debentures, see *Re Slobodinsky, Ex parte Moore*, [1903] 2 K. B. 517.

(g) *Re Johnston Foreign Patents Co., Ltd., Re Johnston Die Press Co., Ltd., Re Johnstonia Engraving Co., Ltd., J. P. Trust Co., Ltd. v. The Above Co.'s*, [1904] 2 Ch. 234, C. A.

(h) *West Cornwall Rail. Co. v. Mowatt* (1848), 17 L. J. (CH.) 366. But where the borrowing powers of a company are only to arise upon completion of a portion of its railway, the company may before completion, in consideration of a present advance, validly agree to issue debentures to secure the same when it is completed (*Re Bagnallstown and Wexford Rail. Co.* (1870), 4 I. R. Eq. 505, C. A.).

Although as a general principle any condition precedent to the exercise of a power to borrow or mortgage should be performed, yet where the condition is a matter pertaining to the internal management of the company, its non-performance does not invalidate a loan by a person acting in good faith, without notice of such non-performance, nor any security given in respect thereof by the company (*i*) ; for a person dealing with a company is only affected with notice of the powers and limitations of powers contained in the general law and the memorandum and articles (*k*), and matters required to be registered, such as a special resolution (*l*). If the lender is a director, he may be taken to have notice of non-compliance with internal regulations (*m*) ; but a security transferred to him by a person who had no notice will be valid in his hands (*n*).

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Effect of non-performance.

Where the lender has notice of the non-performance of such a condition, he cannot recover his loan (*o*). The assignee of a security not transferable at law, and the equitable assignee of a security so transferable respectively, take it subject to any equities affecting the person to whom it was originally issued, although the assignment is taken for value, and without notice of the circumstances giving rise to such equities (*p*). Where the security is transferable at law and is legally transferred, an irregularity in the issue cannot be set up against a *bonâ fide* assignee for value without notice of the irregularity, although the original holder had notice

Position of assignee.

(*i*) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327, Ex. Ch.; *Agar v. Athenæum Life-Assurance Society* (1858), 3 C. B. (N. S.) 725; *Fountain v. Carmarthen Rail. Co.* (1868), L. R. 5 Eq. 316; *Re General Provident Assurance Co., Ex parte National Bank* (1872), L. R. 14 Eq. 507; *Landowners' West of England and South Wales Land Drainage and Inclosure Co. v. Ashford* (1880), 16 Ch. D. 411; *Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A. (powers of managing director relied on); *Re Hampshire Land Co.*, [1896] 2 Ch. 743, where the power to borrow and issue debentures required the consent of a general meeting of the company, which had not been given; *Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, C. A., where the execution of a mortgage was unauthorised; *Davies v. Bolton (R.) & Co.*, [1894] 3 Ch. 678, where the issue of debentures had not been duly authorised by the directors. In *Davies v. Bolton (R.) & Co.*, *supra*, the articles provided that any debenture bearing the common seal of the company issued for valuable consideration should be binding on the company, notwithstanding any irregularity touching the authority of the directors to issue the same. See also *Owen and Ashworth's Claim, Whitworth's Claim*, [1900] 2 Ch. 272; [1901] 1 Ch. 115, C. A.

(*k*) *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, 893; *Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, *supra*, at p. 633.

(*l*) *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366, 379, P. C.

(*m*) *Re Patent Ivory Manufacturing Co.*, *Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156, 170; *Re General Provident Assurance Co.* (1869), 38 L. J. (CH.) 320 (solicitor of the company).

(*n*) *Owen and Ashworth's Claim, Whitworth's Claim*, *supra*.

(*o*) *Re Magdalena Steam Navigation Co.* (1860), John. 690; *Re Patent Ivory Manufacturing Co.*, *Howard v. Patent Ivory Manufacturing Co.*, *supra*. As to non-registration, see pp. 364 *et seq.*, *post*.

(*p*) *Athenæum Life Assurance Society v. Pooley* (1858), 3 De G. & J. 294, C. A.; *Re Natal Investment Co., Financial Corporation's Claim* (1868), 3 Ch. App. 355; *Re Taunton, Delmard, Lane & Co., Christie v. Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175.

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Compliance
with power
to mortgage.

thereof (q); and where the security is not transferable at law, a company may, by the terms of issue of the security, or by its subsequent conduct, be estopped from denying the legality of the security as against a *bonâ fide* assignee for value without notice of any irregularity (r).

560. The terms of a power to mortgage must be strictly complied with. Thus, a charge on uncalled capital is not authorised by a power to charge the company's "funds or property" (s) or to charge its "works, hereditaments, plant, property, and effects" (t), or to charge its "property" (u); but such a power authorises a charge on calls already made or determined upon (a). Where a company with power to charge its uncalled capital issues debentures charging only its undertaking and its present and after-acquired property, the charge does not include uncalled capital (b), nor does a charge on "all the lands, tenements, and estates of the company and all their undertaking" (c), or on "their undertaking and property and receipts and revenues" (d), or on "their real and personal estate" (e). The property of a company does not include the liability of its members to contribute to its funds, but "assets" is a larger term and includes uncalled capital (f).

Mortgage of
future calls.

561. Where either by the memorandum of association or by the articles of association (whether original or amended (g)) there is express power to mortgage future calls, they may be validly mortgaged, and the mortgage may be enforced, while the company is a

(q) *Webb v. Herne Bay Commissioners* (1870), L. R. 5 Q. B. 642; *Re Romford Canal Co., Carew's Claim* (1883), 24 Ch. D. 85, 89.

(r) *Re Blakely Ordnance Co., Ex parte New Zealand Banking Corporation* (1867), 3 Ch. App. 154; *Dickson v. Swansea Vale Rail. Co.* (1868), L. R. 4 Q. B. 44; *Higgs v. Assam Tea Co.* (1869), L. R. 4 Exch. 387; *Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge* (1870), L. R. 11 Eq. 478; *Re Hercules Insurance Co., Brunton's Claim* (1874), L. R. 19 Eq. 302; *Re Romford Canal Co., Pocock's Claim, Trickett's Claim* (1883), 24 Ch. D. 85, 93; *Re Renshaw & Co., Ltd.*, [1908] W. N. 210. As to a Lloyd's bond, see *Re South Essex Estuary Co., Ex parte Chorley* (1870), L. R. 11 Eq. 157; *Landowners West of England and South Wales Land Drainage and Inclosure Co. v. Ashford* (1880), 16 Ch. D. 411; *Re Hansard Publishing Union* (1892), 8 T. L. R. 280, C. A.; *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555, C. A.

(s) *Re British Provident etc. Assurance Society, Stanley's Case* (1864), 4 De G. J. & Sm. 407, C. A.; *Bower v. Foreign and Colonial Gas Co.*, [1877] W. N. 222.

(t) *Re Sankey Brook Coal Co.* (No. 2) (1870), L. R. 10 Eq. 381, doubting *Re Colonial and General Gas Co., Lishman's Case* (1870), 19 W. R. 344.

(u) *Bank of South Australia v. Abrahams* (1875), L. R. 6 P. C. 265.

(a) *Re Sankey Brook Coal Co.* (1870), L. R. 9 Eq. 721; *Gibbs and West's Case* (1870), L. R. 10 Eq. 312.; *Re Humber Iron Works Co., Ex parte Warrant Finance Co.* (1868), 16 W. R. 474, 667.

(b) *Re Russian Spratts Patent, Ltd., Johnson v. Russian Spratts Patent, Ltd.*, [1898] 2 Ch. 149, C. A.; approving *Re Streatham and General Estates Co.*, [1897] 1 Ch. 15.

(c) *King v. Marshall* (1864), 33 Beav. 565.

(d) *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601.

(e) *Re Colonial Trusts Corporation, Ex parte Bradshaw* (1879), 15 Ch. D. 465.

(f) *Re Russian Spratts Patent, Ltd., Johnson v. Russian Spratts Patent, Ltd.*, *supra*.

(g) *Newton v. Anglo-Australian Investment Co. (Debenture-holders, etc.)*, [1895] A. C. 244, 248, P. C.; *Jackson v. Rainford Coal Co.*, [1896] 2 Ch. 340.

going concern, by appointing a receiver, and either ordering the directors to make calls and pay the proceeds over to the receiver or ordering him to make the calls (*h*). Such a charge can also be enforced after the company goes into liquidation (*i*); but generally speaking the liquidator only can make and enforce the calls, although, on an adequate indemnity being given, a receiver so appointed may obtain leave to use the liquidator's name in proceedings to enforce the calls (*k*). A charge upon uncalled capital may be made under a power to mortgage "the company's properties and rights" (*l*), "to receive money on loan . . . upon any security of the company or upon the security of any property of the company" (*m*), to borrow money on the security of "all or any of the real and personal assets . . . of the company" (*n*), or to borrow "in such other manner as the company may determine," when the first alternative power covers everything it could charge except uncalled capital (*o*). If a resolution has been passed under the Act (*p*), or the enactments which it replaces, prohibiting any portion of the uncalled capital being called up except in the event of and for the purpose of the company being wound up, directors cannot mortgage such uncalled capital, although the memorandum of association empowers them to mortgage uncalled capital (*q*). Where a temporary loan is made by bankers to a company upon the security of its uncalled capital, the charge made by a resolution of the board, that is, by parol, is good, subject to the provisions of the Act as to registration (*r*).

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Words
conferring the
power.

562. A charge upon future or after-acquired property, when sufficiently defined—that is to say, capable of identification when it is sought to enforce the security—is good (*s*), and directors when so empowered can effectually charge a company's future or after-acquired property (*a*). A company cannot, however, as against

After-
acquired
property.

(*h*) *Re Phoenix Bessemer Steel Co.* (1875), 44 L. J. (CH.) 683; see also *English Channel Steamship Co. v. Rolt* (1881), 44 L. T. 135; *Re Pyle Works* (1890), 44 Ch. D. 534, C. A.

(*i*) *Re Pyle Works*, *supra*; *Re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia*, [1891] 1 Ch. 536; [1892] 1 Ch. 219, C. A.; *Newton v. Anglo-Australian Investment Co. (Debenture-holders etc.)*, [1895] A. C. 244, P. C.; but a nominee of the debenture-holders will not be authorised to collect calls made by the liquidator (*Re Westminster Syndicate, Ltd.*, [1908] W. N. 236). An assignee of such a charge (invalid as to part) who takes with notice of the winding up, is in no better position than his assignor (*Re Gwelo etc. Co., Williamson's Claim*, [1901] 1 I. R. 38).

(*k*) *Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724; *Harrison v. St. Etienne Brewery Co.*, [1898] W. N. 108.

(*l*) *Re Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156.

(*m*) *Newton v. Anglo-Australian Investment Co. (Debenture-holders etc.)*, *supra*.

(*n*) *Re Pyle Works* (No. 2), [1891] 1 Ch. 173; see also *Page v. International Agency and Industrial Trust* (1893), 62 L. J. (CH.) 610.

(*o*) *Jackson v. Rainford Coal Co.*, [1896] 2 Ch. 340.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 58, 59.

(*q*) *Re Mayfair Property Co., Bartlett v. Mayfair Property Co.*, [1898] 2 Ch. 28; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93 (1).

(*r*) *Re Tilbury Portland Cement Co.* (1893), 62 L. J. (CH.) 814.

Tuillby v. Official Receiver (1888), 13 App. Cas. 523, 530; see title CHARGES

—ION, Vol. IV., p. 368.

Union Coal and Iron Co. (1873), L. R. 16 Eq. 383; *Anderson v. L.* (1872) 42 T. T. (CH.) 291. *Re Marine Mercantile Co.* (1893)

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Money.

Charges given
before 1909.

the liquidator, make a valid charge on any books or documents which the company is bound by statute to keep, such as registers of members and mortgages, minute books and share certificate books, or books which are required by the liquidator for the performance of his duties, such as letter books, cash books, bank books, ledger etc. (b).

563. Every conveyance, mortgage, or other deed, made before April 1, 1909, in pursuance of any enactment repealed by the Act of 1908 is of the same force as if that Act had not passed, and for the purposes of that deed the repealed enactment is deemed to remain in full force (c).

SUB-SECT. 2.—Commencement of Borrowing Powers.

When
borrowing
power
commences.

564. A company, other than a private company (d), or a company registered before January 1st, 1901, or a company registered before July 1st, 1908, which does not issue a prospectus inviting the public to subscribe for its shares, cannot exercise any borrowing powers unless and until it becomes entitled to commence business (e). Any contract made by a company before the date at which it is entitled to commence business is provisional only, and only becomes binding on the company on that date (f).

A company, although it is not entitled to commence business, may offer debentures and debenture stock for subscription simultaneously with shares and receive money payable on application therefor (g). If any such company purports to exercise borrowing

L. R. 4 Eq. 601; *Re Panama, New Zealand, and Australian Royal Mail Co.* (1870), 5 Ch. App. 318; *Re General South American Co.* (1876), 2 Ch. D. 337, C. A.; *Re Anglo-American Leather Cloth Co.* (1880), 43 L. T. 43, C. A., where a mortgage of business premises and the effects thereon included stock-in-trade for the time being, but not book debts. In *Re Florence Land and Public Works Co., Ex parte Moor* (1878), 10 Ch. D. 530, C. A., the question was suggested by the judges whether the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10 (see now Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 207), affected the power of companies to charge their after-acquired property as against their other creditors; but in *Re Dublin Drapery Co., Ex parte Cox* (1884), 13 L. R. Ir. 174, it was held that the corresponding section (28 (1)) of the Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), did not affect it. The provisions of the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10, and the Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), s. 28 (1), as to insolvent companies in England and Ireland respectively are now consolidated in s. 207 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

(b) *Engel v. South Metropolitan Brewing and Bottling Co.*, [1892] 1 Ch. 442; *Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, C. A.; *Re Clyne Tin Plate Co.* (1882), 47 L. T. 439; *Re Anglo-Maltese Hydraulic Dock Co.* (1885), 54 L. J. (CH.) 730.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 288 [Companies Act, 1862 (25 & 26 Vict. c. 89, s. 208)].

(d) For the definition of private company, see p. 73, *ante*.

(e) See p. 262, *ante*.

(f) See p. 263, *ante*; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 87 (3) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 6 (3); Companies Act, 1907 (7 Edw. 7, c. 50, s. 1 (2), and Sched. II.]. This sub-section applies to all contracts, whether provisional or final, and is of general application to all contracts (*Re "Otto" Electrical Manufacturing Co. (1905), Ltd., Jenkins' Claim*, [1906] 2 Ch. 390).

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 87 (4) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 6 (4)]. Directors borrowing or persons lending should require production of the certificate of the registrar that the company is entitled to commence business, which certificate is conclusive evidence of the fact (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69)).

powers in contravention of the above-mentioned enactment, every person who is responsible for the contravention is, without prejudice to any other liability, liable to a fine not exceeding £50 for every day during which the contravention continues (h).

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SUB-SECT. 3.—*Debentures and Debenture Stock.*

(i.) *Description and Contents of Instruments of Security.*

565. No accurate definition of the word “debenture” (i) can be found (j), but various forms of instruments are called debentures (k). A debenture means a document which either creates or acknowledges a debt (l). The term “debenture” is usually associated with a company of some kind, and most debentures are securities given by companies, but they are often granted by clubs and occasionally by individuals.

Meaning of
debenture.

The instrument need not describe itself as a debenture even to bring it within the Bills of Sale Acts, 1878 and 1882 (m), and the use or non-use of the word is not conclusive (n). But, although no security other than a promise to pay is given by the instrument, if it is described on the face of it as a debenture it is a debenture for stamping purposes (o).

566. A debenture, although it need not be (p), is generally issued under the company's seal; but the statutory right of a mortgagee to sell where the mortgage is by deed does not apply to debentures of a joint stock company (q). As a rule, a debenture contains a covenant to pay, generally at some named place, such as the

s. 87 (2)); see *Re Yolland, Husson and Birkett, Ltd., Leicester v. Yolland, Husson and Birkett, Ltd.*, [1907] 2 Ch. 471.

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 87, (5).

(i) A certificate or voucher certifying that a sum of money is owing to the person designated in it; a certificate of indebtedness (*New English Dictionary* (Murray), *sub voc.* Debenture).

(j) *British India Steam Navigation Co. v. Inland Revenue Commissioners* (1881), 7 Q. B. D. 165, 169, 172.

(k) *Ibid.* In the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), the expression “debenture” includes debenture stock, unless the context otherwise requires (*ibid.*, s. 235). As to whether a covering deed is a debenture, see *Richard v. Kidderminster Overseers*, [1896] 2 Ch. 212, 221; *City of London Brewery Co. v. Inland Revenue Commissioners*, [1899] 1 Q. B. 121, 139, C. A.

(l) *Levy v. Abercorris Slate and Slab Co.* (1887), 37 Ch. D. 260, 264, n.; *Edmonds v. Blaina Furnaces Co.* (1887), 36 Ch. D. 215; compare *Topham v. Greenside Glazed Fire-brick Co.* (1887), 37 Ch. D. 281, 290, 292. The word “debenture” is used in the Stamp Act, 1870 (33 & 34 Vict. c. 97); the Stamp Act, 1891 (54 & 55 Vict. c. 39); the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43); the Directors Liability Act, 1890 (53 & 54 Vict. c. 64); the Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4; the Companies Act, 1900 (63 & 64 Vict. c. 48); the Companies Act, 1907 (7 Edw. 7, c. 50); and the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

(m) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43; *Levy v. Abercorris Slate and Slab Co.*, *supra*. The debentures of a limited company registered in Guernsey charging its undertaking and all its property, both present and future, including uncalled capital, are exempted from the operation of the Bills of Sale Acts, 1878 and 1882 (41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43) (*Clark v. Balm, Hill & Co.*, [1908] 1 K. B. 667); see further title BILLS OF SALE, Vol. III., pp. 19, 20.

(n) *Speyer Brothers v. Inland Revenue Commissioners*, [1908] A. C. 92; *British India Steam Navigation Co. v. Inland Revenue Commissioners* (1881), 7 Q. B. D. 165.

(o) *Speyer Brothers v. Inland Revenue Commissioners*, *supra*.

(p) *British India Steam Navigation Co. v. Inland Revenue Commissioners*, *supra*.

(q) *Blaker v. Herts and Essex Waterworks Co.* (1889), 41 Ch. 399; Conveyancing and Law of Property Act, 1881 44 & 45 Vict. c. 41 . s. 19.

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provisions of
a debenture.

company's office (*r*), and this covenant is in most cases accompanied by some charge or security, in which case the instrument is usually called a "mortgage debenture" (*s*). A debenture is, as a rule, one of a series of documents each of which is for the same amount and all of which rank *pari passu* in point of priority, but it may consist, and often does of one document only (*t*). The charge given is generally by way of floating security (*a*) upon the property and undertaking of the company, including, as a rule, its uncalled capital; frequently a deed is executed by which property of the company is specifically mortgaged to trustees for the debenture-holders to further secure the payment of the moneys owing on the debentures (*b*).

Classes of
debentures.

567. Debentures may be (1) made payable to bearer (*c*), in which case interest coupons are attached and the principal and interest are payable respectively upon presentation and delivery of the debenture and coupons; or (2) registered debentures, in which case the principal and interest are only payable to the registered holders—unless they are issued with coupons payable to bearer, in which case the interest is payable on presentation and delivery of the coupons. A bearer debenture is recognised as a negotiable instrument (*d*). Where moneys are payable on "presentation" of a debenture or coupon, it must be delivered in order to obtain payment (*e*).

Perpetual
debenture.

568. A condition contained in any debenture, or in any deed for securing debentures, is not invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding (*f*).

Indorsed

569. It is usual to place most of the provisions relating to debentures in conditions indorsed thereon. They generally state debenture is one of a series of a certain limited number,

(*r*) *Edmonds v. Blaina Furnaces Co.* (1887), 36 Ch. D. 215, *per* CHITTY, J., at p. 219. For forms of debentures, see *Encyclopædia of Forms*, Vol. V., pp. 77 *et seq.* An opportunity must be given to the company to pay at the named place before any proceedings can be commenced to enforce the security (*Re Escalera Silver Lead Mining Co.* (1908), 25 T. L. R. 87).

(*s*) *British India Steam Navigation Co. v. Inland Revenue Commissioners* (1881), 77 Q. B. D. 165. As to what words are sufficient to constitute a charge, see *Re Florence Land and Public Works Co., Ex parte Moor* (1878), 10 Ch. D. 530, C. A.; *Re Colonial Trusts Corporation, Ex parte Bradshaw* (1879), 15 Ch. D. 465. As to the effect on foreign property of a charge given in England as against unsecured creditors abroad, see *Re Maudslay, Sons & Field*, [1900] 1 Ch. 602.

(*t*) See *Robson v. Smith*, [1895] 2 Ch. 118.

(*a*) See p. 348, *post*.

(*b*) For forms of trust deed, see *Encyclopædia of Forms*, Vol. V., pp. 66 *et seq.* The modern trust deed is too lengthy and elaborate to be described with accuracy, and its provisions might be considerably curtailed. Care should be taken that the remuneration of the trustees should be secured and not merely provided for; see *Re Accles, Ltd., Hodgson v. Accles, Ltd.*, [1902] W. N. 169.

(*c*) Bearer debentures are rarely issued, as the *ad valorem* duty payable thereon is larger than the duty payable upon registered debentures.

(*d*) See p. 357, *post*.

(*e*) Compare *Bartlett v. Holmes* (1853), 13 C. B. 630.

(*f*) *Companies (Consolidation) Act*, 1908 (8 Edw. 7, c. 69), s. 103 [*Companies Act*, 1907 (7 Edw. 7, c. 50), s. 14]; see *Re Southern Brazilian Rio Grande do Sul Rail. Co., Ltd.*, [1905] 2 Ch. 78.

each for a like amount of principal; that all the debentures of the series rank *pari passu* as a first or other charge, and that such charge (except as regards the property specifically mortgaged by the trust deed, if any) is to be a floating security (*g*), but so that the company is not to create any charge ranking in priority to or *pari passu* with the debentures of the series.

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The conditions also generally provide for registration of the debentures and of transfers thereof at the company's office, the non-recognition of equities (*h*), transfers, payment of interest (*i*) by warrant, requirements to be observed in the case of joint holders, acceleration of payment of principal in certain specified events (*j*), the service of notices, and the time and mode of repayment of the principal moneys secured. A power to appoint a receiver is often given, and his powers are defined, and provision is made as to the disposal of moneys which come into his hands. Power is also sometimes given to a specified majority of debenture-holders of a series to modify the rights of all the holders of the series (*k*).

If there is a trust deed, some reference to it in the debentures is advisable, and many of the provisions contained in the debenture conditions are then inserted in the trust deed.

570. Debentures and trust deeds often provide for redemption of debentures by drawings (*l*), and for the formation of a sinking fund, which is to be applicable to the redemption of the debentures either as they are drawn for redemption or *pari passu* in proportion to the amounts thereby secured. Occasionally provisions are made for enabling debentures originally payable to bearer to become registered debentures, or *vice versâ*, with rights varied in consequence of the change. Further changes are also involved where more than one series of debentures are issued and the company is only in a position to give to the holders of the later series a second or other puisne security on its assets.

Special
clauses in
debentures.

571. Debentures, not being stocks or shares, cannot be made the subject of a charging order under the Judgments Act, 1838, and the rules of procedure (*m*).

Debenture
stock.

572. Debenture stock is generally constituted and secured by a trust deed containing a charge upon the property of the company.

(*g*) See p. 348, *post*.

(*h*) See *Re Goy & Co., Ltd., Farmer v. Goy & Co., Ltd.*, [1900] 2 Ch. 149; *Re Palmer's Decoration and Furnishing Co.*, [1904] 2 Ch. 743; *Re Brown and Gregory, Ltd., Shephard v. Brown and Gregory, Ltd., Andrews v. Brown and Gregory Ltd.*, [1904] 2 Ch. 448, C. A.; *Re Rhodesia Goldfields, Ltd., Partridge v. Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239; *Re Smith & Co.*, [1901] 1 I. R. 73.

(*i*) As to interest payable out of net earnings, see *Heslop v. Paraguay Central Rail. Co.* (1910), 54 Sol. Jo. 234. Acceptance of a cheque for interest and failure to present it does not release the security (*Re Defries & Sons*, [1909] 2 Ch. 423).

(*j*) Such as falling into arrear with interest, winding up, and seizure in execution. As to what is seizure under a distress, see *Central Printing Works, Ltd. v. Walker and Nicholson* (1907), 24 T. L. R. 88. As to notice of an intention to pay off, see *First National Bank of China v. Orinoco Shipping Co.* (1905), 21 T. L. R. 39.

(*k*) See p. 360, *post*.

(*l*) Periodical drawings of this kind are not within the Lottery Acts (*Wallingford v. Mutual Society* (1880), 5 App. Cas. 685); compare *Sykes v. Beadon* (1879), 11 Ch. D. 170, 185. For a form, see *Encyclopædia of Forms*, Vol. V., p. 64.

(*m*) 1 & 2 Vict. c. 110, s. 2.

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A stock certificate is issued to each person being an allottee or transferee of stock stating, *inter alia*, in the case of registered stock, that the person named therein is the registered proprietor, or, in the case of bearer stock, that the bearer thereof is the proprietor of the amount of stock therein mentioned, and having printed thereon the conditions on which the stock is issued and held (n).

Where a debenture stock deed provides that the company will pay principal and interest direct to the stockholders, and the certificate delivered to each stockholder states the rate of interest and the dates for payment and certifies that the stockholder is the registered holder of the stock which is issued subject to the provisions contained in the deed, but does not contain any direct covenant with the stockholder to pay him interest, a stockholder whose interest is in arrear is not entitled to present a winding-up petition against the company as a creditor (o).

(ii.) *Floating Charge or Security.*

Meaning of
 "floating
 charge."

573. The terms "floating security" and "floating charge" are synonymous (p).

Mortgage debentures usually contain a charge upon the undertaking of the company and all its property (q), real or personal, whether present or future, and may or may not give a charge upon uncalled capital. The conditions usually provide that the charge so given shall be a floating security or charge. Where a series of debentures or debenture stock is secured by a trust deed, then, in addition to specific property of the company being thereby assigned to the trustees to secure the debentures or stock, a floating charge is generally given upon all the other property of the company, present or future, and its undertaking, and in some cases its uncalled capital.

Specific
 charge.

A specific charge is one that, without more, fastens on ascertained and definite property or property capable of being ascertained and defined, whereas a floating charge is ambulatory and shifting in its nature, hovering over, and so to speak floating with, the property which it is intended to affect, until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp (r). In the meantime the

Co., Ltd., [1904] 2 K. B. 446, C. A.; see title **EXECUTION**. As to what words in a will will pass debenture stock, see *Re Bodman, Bodman v. Bodman*, [1891] 3 Ch. 135; *Re Weeding, Armstrong v. Wilkins*, [1896] 2 Ch. 364; *Re Herring, Murray v. Herring*, [1908] 2 Ch. 493.

(n) For forms of trust deed and stock certificate, see *Encyclopædia of Forms*, Vol. V., pp. 50, 71, 74, C. A. As to the effect of possessions in such a trust deed that the security will become enforceable in certain events, see *Re Melbourne Brewery and Distillery*, [1901] 1 Ch. 453.

(o) *Re Dunderland Iron Ore Co., Ltd.*, [1909] 1 Ch. 446.

(p) *Illingworth v. Houldsworth*, [1904] A. C. 355, 358. It is of the essence of a floating charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may be suspended by agreement, but if there is no such agreement he may exercise his right whenever he pleases after default (*Governments Stock and other Securities Investment Co. v. Manila Rail. Co.*, [1897] A. C. 81, 86).

(q) "Goodwill" is "property," and "assets," and also "effects" (*Re Teas Hotel Co.*, [1902] 1 Ch. 332).

(r) See note (p), *supra*.

company is entitled in the ordinary course of business to deal with such assets as are subject only to a floating charge (s).

A general charge may be construed as a floating security, although the instrument does not expressly so describe it. Thus, a charge upon the undertaking of a company constitutes a floating charge upon all its property (t), and debentures given to bind a company and all its estate, property and effects (u), or its real and personal estate (w), constitute a floating security.

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General
charge.

574. A floating security being only a charge on the assets for the time being, the company may in the ordinary course of its business (a), unless it is otherwise agreed and until the security becomes fixed, sell (b), let, mortgage (c), or otherwise deal with any of its assets, and pay dividends out of profits (d), just as if the floating charge had not been created (e).

Effect of
floating
charge while
floating.

Even before a floating security becomes fixed or "crystallised," the debenture-holders are entitled to an injunction to restrain the

(s) *Illingworth v. Houldsworth*, [1904] A. C. 355.

(t) *Re Panama, New Zealand and Australian Royal Mail Co.* (1870), 5 Ch. App. 318; *Marshall v. Rogers & Co.* (1898), 14 T. L. R. 217; compare *Re New Clydach Sheet and Bar Iron Co.* (1868), L. R. 6 Eq. 514.

(u) *Re Florence Land and Public Works Co., Ex parte Moor* (1878), 10 Ch. D. 530, C. A.

(w) *Re Colonial Trusts Corporation, Ex parte Bradshaw* (1879), 15 Ch. D. 465.

(a) As to what acts or payments are considered to come within the ordinary course of business, see *Willmott v. London Celluloid Co.* (1886), 34 Ch. D. 147, C. A.; *Re Hubbard & Co., Ltd., Hubbard v. Hubbard & Co., Ltd.* (1898), 68 L. J. (CH.) 54; *Re Vivian (H. H.) & Co., Ltd., Metropolitan Bank of England and Wales, Ltd. v. Vivian (H. H.) & Co., Ltd.*, [1900] 2 Ch. 654; *Cox Moore v. Peruvian Corporation, Ltd.*, [1908] 1 Ch. 604; and compare *Re Borax Co., Foster v. Borax Co.*, [1901] 1 Ch. 326, C. A.; *Re Old Bushmills Distillery Co., Ex parte Brett*, [1897] 1 I. R. 489, C. A.; *Wallace v. Evershed*, [1899] 1 Ch. 891; *Cox v. Dublin Distillery Co.*, [1906] 1 I. R. 446. As to the right of set-off while the charge floats, see *Re Nelson (E.) & Co.*, [1903] 2 K. B. 367. As to acts in the ordinary course of business done without notice of a receiver's appointment, see *Re Arauco Co.* (1898), 79 L. T. 336.

(b) *Re Vivian (H. H.) & Co., Ltd., Metropolitan Bank of England and Wales, Ltd. v. Vivian (H. H.) & Co., Ltd.*, *supra*. A purchaser of land subject to a charge expressed to be a floating security until default in payment is entitled to evidence that there has been no default (*Re Horne and Hellard* (1885), 29 Ch. D. 736).

(c) *Re Florence Land and Public Works Co., Ex parte Moor*, *supra*; *Re Hamilton's Windsor Ironworks* (1879), 12 Ch. D. 707; *Ward v. Royal Exchange Shipping Co., Ex parte Harrison* (1887), 58 L. T. 174; *Re Hubbard & Co., Ltd., Hubbard v. Hubbard & Co., Ltd.*, *supra*; and in cases of deposit of title deeds (*Wheatley v. Silkstone and Haigh Moor Coal Co.* (1885), 29 Ch. D. 715; *Re Castell and Brown, Ltd., Roper v. Castell and Brown Ltd.*, [1898] 1 Ch. 315; *Re Valletort Sanitary Steam Laundry Co., Ltd., Ward v. Valletort Sanitary Steam Laundry Co., Ltd.*, [1903] 2 Ch. 654; *Re Standard Rotary Machine Co.* (1906), 51 Sol. Jo. 48).

(d) Dividends may be paid without making good interest paid out of capital in previous years on debentures (*Bosanquet v. St. John D'el Rey Mining Co.* (1897), 77 L. T. 206).

(e) *Robson v. Smith*, [1895] 2 Ch. 118, 124; *Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, 103, C. A.; even if the charge is described as a first charge (*Wheatley v. Silkstone and Haigh Moor Coal Co.*, *supra*; *Cox Moore v. Peruvian Corporation, Ltd.*, *supra*. But an express power to carry on business till default does not give creditors who have supplied goods any priority (*Re Anglo-American Leather Cloth Co.* (1880), 43 L. T. 43, C. A.).

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company from parting with its assets otherwise than in the ordinary course of its business, as, for instance, when, with a view to its ceasing to be a going concern, it agrees to sell all its property (*f*), or creates an equitable charge of such a kind as to prevent an execution creditor, by seizure under a judgment not perfected by sale, obtaining priority of charge in respect of the goods seized (*g*); but a distress levied, although not completed by sale, before a floating charge becomes fixed (*h*), or a distress for rates, even after a receiver has been appointed (*i*), has priority over the debenture-holders.

Restrictions
of operation
of charge.

575. It is usual to qualify the operation of a floating security by providing that the company shall not create a mortgage or charge on all or any of the assets, ranking in priority to or *pari passu* with the charge given by the debentures. Such a restriction does not prevent a solicitor from acquiring a lien having priority over the floating charge (*k*); or a subsequent mortgagee of an insurance policy, without notice of such provision, from acquiring priority by giving notice to the insurance company (*l*); or a person without notice from acquiring a charge upon specific property in priority to the debentures (*m*). Similarly, where the specific mortgagee, being a bank, knows that debentures have been issued, and even holds some of the same series as security for another company's account, the bank is not affected with notice of the restriction (*n*). Where such a restriction exists, and a company sells goods to creditors at a fair price to find money to carry on the company's business, the sale is valid as being in the ordinary course of its business, although the creditors are not dealers in the goods sold (*o*).

(*f*) *Hubbuck v. Helms* (1887), 56 L. J. (CH.) 536; compare *Re Vivian (H. H.) & Co., Ltd., Metropolitan Bank of England and Wales, Ltd., v. Vivian (H. H.) & Co., Ltd.*, [1900] 2 Ch. 654 (sale of a branch business); *Re Borax Co., Foster v. Borax Co.* (1900), 70 L. J. (CH.) 162, C. A., where nearly the whole assets were sold, but the company continued business as the holders of shares.

(*g*) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627, 641, C. A.; *Re Opera, Ltd.*, [1891] 3 Ch. 260, C. A.; *Taunton v. Warwickshire (Sheriff)*, [1895] 2 Ch. 319, C. A.; *Davey & Co. v. Williamson & Son*, [1898] 2 Q. B. 194; *Simultaneous Colour Printing Syndicate v. Fowleraker*, [1901] 1 K. B. 771; *Duck v. Tower Galvanizing Co.*, [1901] 2 K. B. 314, where the issue of the debentures was irregular; *Re London Pressed Hinge Co., Ltd., Campbell v. London Pressed Hinge Co. Ltd.*, [1905] 1 Ch. 576, where all the cases on this point are discussed.

(*h*) *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373, C. A.; *Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A. As to cases where the company is an undertenant, see Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53); and title DISTRESS, Vol. XI, pp. 143 *et seq.*

(*i*) *Re Marriage, Neave & Co., North of England Trustee Debenture and Assets Corporation v. Marriage, Neave & Co.*, [1896] 2 Ch. 663, C. A.; compare *Richards v. Kidderminster Overseers*, [1896] 2 Ch. 212; *Husey v. London Electric Supply Corporation*, [1902] 1 Ch. 411, C. A.; *Re British Fullers' Earth Co., Gibbs v. British Fullers' Earth Co.* (1901), 17 T. L. B. 232.

(*k*) *Brunton v. Electrical Engineering Corporation*, [1892] 1 Ch. 434. As to a vendor's lien, see *Wilson v. Kelland* [1910] W. N. 132.

(*l*) *English and Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700, C. A.

(*m*) *Re Castell and Brown, Ltd., Roper v. Castell & Brown, Ltd.*, [1898] 1 Ch. 315 (by deposit of title deeds).

(*n*) *Re Valletort Sanitary Steam Laundry Co., Ltd., Ward v. Valletort Sanitary Steam Laundry Co., Ltd.*, [1903] 2 Ch. 654.

(*o*) *Re Old Bushmills Distillery Co., Ex parte Brett*, [1897] 1 I. R. 489, C. A.

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When charge
becomes
fixed.

Effect of
garnishee
orders and
execution.

576. Although the security provides that a floating charge is to become a fixed charge upon the happening of a specified event, yet such a security continues to be a floating one after the happening of such event until a receiver is appointed for the debenture-holders, either by the court or under a power given to the debenture-holders or their trustees by the debentures or trust deed or until the company goes into liquidation (*p*). The mere issue of a writ asking for a receiver is not sufficient to affect the company's power of disposition (*q*). On the security ceasing to be a floating one it becomes a fixed charge, and the company cannot thereafter deal with any part of the property so charged except subject to such charge (*r*).

577. Where, after a judgment creditor has obtained and served on a company a garnishee order absolute, attaching debts due from the company to the judgment debtor, the company borrows money on the security of a debenture comprising all its assets, and execution is then levied to enforce the attachment on its goods, the title of a receiver subsequently appointed under the debenture prevails over that of the creditor (*s*). Where judgment is obtained against a company and the judgment creditor serves a garnishee order *nisi* on a person owing the company a debt which is at the time subject to a floating charge in a debenture, the title of the debenture-holder prevails over that of the creditor, although his receiver is appointed after the service of the order (*t*), and the receiver's title prevails even if the garnishee order is made absolute before he is appointed (*u*), unless the money has been actually paid over under the order (*w*). If debentures are irregularly issued, the rights of the holder, if he had no notice of the irregularity, prevail over those of an execution creditor (*x*).

(*p*) *Governments Stock and other Securities Investment Co. v. Manila Rail. Co.*, [1897] A. C. 81; *Re Florence Land and Public Works Co., Ex parte Moor* (1878), 10 Ch. D. 530, C. A.; *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681; *Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.; *Nelson (Edward) & Co., Ltd., v. Fabr & Co.*, [1903] 2 K. B. 367; *Illingworth v. Houldsworth*, [1904] A. C. 355; but see *Re Horne and Hellard* (1885), 29 Ch. D. 736. The mortgagor is a trustee of the business for the purposes of the security, but the trust remains dormant until the mortgagor calls it into operation (*Tailby v. Official Receiver* (1888), 13 App. Cas. 523, 541); as to the effect of winding up, see also p. 388, *post*.

(*q*) *Re Hubbard & Co., Ltd., Hubbard v. Hubbard & Co., Ltd.* (1898), 68 L. J. (CH.) 54.

(*r*) *Governments Stock and other Securities Investment Co. v. Manila Rail. Co.*, *supra*; *Hodson v. Tea Co.* (1880), 14 Ch. D. 859; *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547, C. A. As to the appointment of a receiver by the court where the security is in jeopardy, see p. 376, *post*; as to giving notice of the appointment to the persons carrying on the company's business, see *Re Arauco Co.* (1898), 79 L. T. 336.

(*s*) *Geisse v. Taylor*, [1905] 2 K. B. 658.

(*t*) *Norton v. Yates*, [1906] 1 K. B. 112; *Re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch. D. 99, C. A.; compare *Robson v. Smith*, [1895] 2 Ch. 118; *Re Watt, Ex parte Joselyne* (1878), 8 Ch. D. 327, 330, C. A.

(*u*) *Cairney v. Back*, [1906] 2 K. B. 746, where the money claimed was paid into court.

(*w*) *Robson v. Smith*, [1895] 2 Ch. 118, as explained in *Norton v. Yates*, [1906] 1 K. B. 112, 123.

(*x*) *Duck v. Tower Galvanizing Co.*, [1901] 2 K. B. 314.

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Where a company, after giving a floating charge on all its property, has its goods seized under a *fi. fa.* and, with the assent of the execution creditor, pays to the sheriff daily a sum out of its daily takings to avoid a sale and enable the business to go on, a receiver subsequently appointed on behalf of debenture-holders is not entitled to the moneys so received, even although they remain in the sheriff's hands (a).

Execution.

An execution creditor takes subject to all equities, including the rights given by a floating charge (b), and the holder of such a charge has priority over an execution creditor even where no receiver has been appointed (c).

Effect of
charge
becoming
fixed.

578. When a floating security upon all the property or assets of the company becomes fixed, it constitutes a charge upon all the property or assets then belonging to the company. It has priority over any subsequent equitable charges and over unsecured creditors (d), and over moneys advanced to the liquidator to carry on the business of the company, although the advances were made with the sanction of the court in the winding up, and over the costs of the liquidators other than costs of realisation (e); but it is subject to all then existing charges and to the payment of debts which by statute have been made payable out of property subject to a floating security in priority to the moneys thereby secured (f). A floating charge on all the undertaking and property of a company including uncalled capital constitutes a charge on moneys recovered by a liquidator in misfeasance proceedings as well as on calls got in by him (g).

(iii.) *Agreements to Issue.*

Enforcement
of agreement.

579. A contract with a company to take up and pay for debentures or debenture stock of the company may be enforced by an order for specific performance (h). But no action can be

(a) *Robinson v. Burnell's Vienna Bakery Co.*, [1904] 2 K. B. 624.

(b) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; *Re Opera, Ltd.*, [1891] 3 Ch. 260; *Re London Pressed Hinge Co.*, [1905] 1 Ch. 576, 581.

(c) *Davey v. Williamson & Sons*, [1898] 2 Q. B. 194; *Re London Pressed Hinge Co.*, *supra*.

(d) *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601; *Re Panama New Zealand and Australian Royal Mail Co.* (1870), 5 Ch. App. 318; *Re Anglo-American Leather Cloth Co.* (1880), 43 L. T. 43, C. A.; *Re General South American Co.* (1876), 2 Ch. D. 337, C. A.

(e) *Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411, C. A.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 107, 209; and see p. 518, *post*. The law was formerly otherwise (*Richards v. Kidderminster Overseers*, [1896] 2 Ch. 212).

(g) *Re Anglo-Austrian Printing and Publishing Union, Brabourne v. Sams*, [1895] 2 Ch. 891; *Re Regent's Canal Ironworks Co., Ex parte Grissell*, *supra*.

(h) Companies (Consolidation) Act, 1908, (8 Edw. 7, c. 69), s. 105 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 16]. Before the Companies Act, 1907, was passed an executory agreement for the allotment or issue of debentures or debenture stock could not be specifically enforced, but any damages which were proved to be the direct consequence of the breach of such an agreement could be recovered (*Western Wagon and Property Co. v. West*, [1892] 1 Ch. 271; *South African Territories v. Wallington*, [1898] A. C. 309). If, however, the person who had agreed to take the debentures or debenture stock had paid for

brought on an agreement to purchase debentures or debenture stock containing a charge, even if only a floating charge, on land, or any interest therein, unless the agreement or some memorandum thereof is in writing so as to satisfy the Statute of Frauds (i).

Where a company borrows money and agrees to give a debenture to secure the amount when called upon, the agreement is valid as an equitable security (k), subject to any statutory requirements as to registration (l) and to the law as to fraudulent preference (m). If, however, the lender does not press for the issue of the debentures until the company is insolvent and about to wind up, the debentures (n), although registered before winding up, may be set aside as fraudulent.

Under an agreement to issue debentures of a certain series to a creditor, he will be entitled to rank *pari passu* with the holders of the series although no debentures are issued to him (o).

Where directors of a company deposit incomplete mortgage bonds by way of security in pursuance of written agreements, a valid charge is created, independently of the bonds, upon the property which the bonds purport to charge (p).

(iv.) *Issue and Re-issue.*

580. An issue of debentures or debenture stock will not be valid unless all conditions precedent to the exercise of the power to issue them have been performed; when, however, any such condition relates to acts of internal management its non-observance does not invalidate the issue (q). Where a company has power to issue debentures or debenture stock, the issue may be made on such terms and for such amount and for such purposes as the company thinks fit, subject to any restrictions or prohibitions contained in

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Position of
lender.

Issue of
debentures.

them, he was treated in equity as the holder of the debentures (*Pegge v. Neath and District Tramways Co., Ltd.*, [1898] 1 Ch. 183; *Re Queensland Land and Coal Co., Davis v. Martin*, [1894] 3 Ch. 181; *Re Strand Music Hall Co.* (1865), 3 De G. J. & Sm. 147, C. A.).

(i) *Driver v. Broad*, [1893] 1 Q. B. 744, C. A.

(k) *Re Queensland Land and Coal Co., Davis v. Martin. supra*; *Pegge v. Neath and District Tramways Co., Ltd., supra*; *Simultaneous Colour Printing Syndicate v. Foweraker*, [1901] 1 K. B. 771; *Ross v. Army and Navy Hotel Co.* (1866), 34 Ch. D. 43, C. A.

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93; see pp. 364 *et seq.*, *post*.

(m) *Ibid.*, s. 210, and see p. 544, *post*.

(n) *Re Jackson and Bassford, Ltd.*, [1906] 2 Ch. 467; and see title **BILLS OF SALE**, Vol. III., p. 58.

(o) *Re Queensland Land and Coal Co., Davis v. Martin, supra*; *Pegge v. Neath and District Tramways Co., Ltd., supra*. Where a person subscribed for debentures on the terms of a prospectus, which stated that the debentures were first mortgage debentures and were to be secured upon the entire property of the company, it was held that he was entitled to a charge thereon *pari passu* with the other debenture-holders, although no debentures were issued and the company had gone into liquidation (*Re New Durham Salt Co., Stevenson's Case* (1890), 2 Meg. 360); but if the statement as to charge had been omitted from the prospectus he would have had no charge (*Quin's Case* (1890), 2 Meg. 360). As to the effect of scheduling creditors to a company's purchase agreement under which creditors are to have debentures, see *Re Harden Star, Lavis and Sinclair*, [1900] W. 17, 18.

p) *Re Strand Music Hall Co., supra*.

q) As to what are acts of internal management, see pp. 82, 301. *ante*

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its memorandum or articles of association, or deed of settlement. Sealing debentures without delivery is not sufficient to constitute an issue thereof (*r*), but sealing and delivering undated debentures in blank is issuing (*s*).

The issue of a writ in a debenture-holder's action does not of itself prevent the company from issuing unissued debentures of the series in respect of some of which the proceedings are taken (*t*).

Debenture
prospectus.

581. Any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription any debentures or debenture stock of a company, is a prospectus within the meaning of the Act of 1908 and subject to certain statutory requirements (*a*); but debentures cannot be interpreted by the light of a prospectus inviting subscriptions for them (*b*).

For the purpose of securing the subscription in full of an issue of debentures, debenture prospectuses generally state that application for debentures must be accompanied by a remittance, and that if any instalment payable in respect of the debentures is not punctually paid the payments already made may be forfeited. Where debentures or debenture stock are allotted upon the terms that the same shall be paid for by instalments, it is usual to issue provisional bearer scrip certificates to the subscribers, to be exchanged for definitive debentures or for stock certificates when all the instalments are paid, and to indorse upon the scrip certificates the payments of the several instalments. The bearer of the certificate, when the instalments are paid, is entitled to have the debentures or stock certificate issued to him (*c*). If the instalments are not fully paid before the company goes into liquidation, a holder may safely refuse to pay any further instalments without prejudicing his position as a secured creditor for previous instalments, although the certificate provides that failure to pay any instalment when due shall empower the company to forfeit previous instalments (*d*).

Issuing at
a discount

582. A company which has power to borrow on debentures can issue them at a discount (*e*). Thus, where a director takes some of the debentures at the rate of discount allowed to other persons he is not liable to account for the discount (*f*). A company cannot, however, issue debentures at a discount upon the terms that they shall be exchangeable, at the option of the holder, for paid-up shares in the

(*r*) *Mowatt v. Castle Steel and Iron Works Co.* (1886), 34 Ch. D. 58, C. A.

(*s*) *Re Perth Electric Tramways, Ltd., Lyons v. Tramways Syndicate, Ltd., and Perth Electric Tramways, Ltd.*, [1906] 2 Ch. 216; compare *A.-G. v. Liverpool Corporation*, [1902] 1 K. B. 411.

(*t*) *Re Hubbard & Co.*, [1908] W. N. 158.

(*a*) See pp. 120 *et seq.*, *ante*.

(*b*) *Re Chicago North West Granaries Co., Ltd.*, [1898] 1 Ch. 263.

(*c*) It is doubtful, however, whether duty must be paid under the Finance Act, 1899 (63 & 64 Vict. c. 9), s. 8, as amended by the Finance Act, 1907 (7 Edw. 7, c. 13), s. 10, before any scrip certificate is issued; see title **REVENUE**.

(*d*) *Re Consolidated Land Co., Ellerby's Claim* (1872), 20 W. R. 855.

(*e*) *Campbell's Case* (1876), 4 Ch. D. 470; *Re Anglo-Danubian Steam Navigation and Colliery Co.* (1875), L. R. 20 Eq. 339; compare *Re Regent's Canal Ironworks Co.* (1879), 3 Ch. D. 43, C. A.

(*f*) *Campbell's Case*, *supra*. As to commissions payable in respect of an issue of debentures, see *Powell and Thomas v. Evan Jones & Co.*, [1905] 1 K. B. 11.

company of the same amount as the face value of the debentures, where such an issue is capable of being used as a means of issuing shares at a discount (*g*).

The total amount of any sums paid by way of commission or allowed by way of discount, in respect of any debentures since the date of the last return, must be included in the particulars of the annual return of members and summary which every company has to make up and forward to the registrar (*h*), and in the particulars required on the registration of debentures (*i*).

SECT. 14.
Borrowing
and
Securing
Money.

583. Where a company redeems any debentures or debenture stock previously issued, then, unless its articles of association or the conditions of issue of the debentures or stock expressly otherwise provide, or unless the debentures or stock have or has been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assign), it may keep the debentures or stock alive for the purpose of re-issue (*j*). Where a company purports to exercise such a power it has power to re-issue the debentures or stock, either by re-issuing the same debentures or stock, or by issuing other debentures or stock in their or its place, and upon such a re-issue the person entitled to the debentures or stock has the same rights and priorities as if the debentures or stock had not previously been issued (*k*).

Re-issuing
debentures.

Where, with the object of keeping debentures alive for the purpose of re-issue, they have been transferred to a nominee of the company, a transfer from that nominee is deemed to be a re-issue for the purposes above mentioned (*l*).

Where a company has deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures are not deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited (*m*).

The re-issue of a debenture or the issue of another debenture in its place under the above-mentioned power is treated as the issue of a new debenture for the purpose of stamp duty, but not for the purpose of any provision limiting the amount or number of debentures to be issued (*n*). But any person lending money on the security of a debenture so re-issued, which appears to be duly stamped, may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or

Stamp on
re-issue.

(*g*) *Mosely v. Koffyfontein Mines, Ltd.*, [1904] 2 Ch. 108, C. A.; and see *Bury v. Pamatina Development Corporation, Ltd.*, [1909] 1 Ch. 754, C. A.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 26 (2) (f); see p. 263, *ante*.

(*i*) See p. 367, *post*.

(*j*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 104 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 15 (1)]; see note (o), p. 356, *post*. As to the meaning of redemption in pursuance of an obligation to do so, see *Fitzgerald v. Perse*, [1908] 1 I. R. 279.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 104 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 15 (1)].

(*l*) *Ibid.*, s. 104 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 15 (2)].

(*m*) *Ibid.*, s. 104 (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 15 (3)].

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any penalty in respect thereof, unless he had notice, or, but for his negligence, might have discovered, that the debenture was not duly stamped; in any case the company is liable to pay the proper stamp duty and penalty (o).

Under the usual modification power in a debenture trust deed, the deed may be altered so as to give a right to re-issue debentures (p).

(v.) *Priorities.*

Priorities of
debenture-
holders.

584. Where debentures contain a charge upon property, but nothing is stated as to their being a series or ranking *pari passu* in point of charge, they rank in priority in order of time of issue (q), even when all are issued on the same day (r). As a general rule, however, debentures provide that all the debentures constituting the series are to rank *pari passu* as a charge upon the property charged. When part of a series of first debentures remains unissued, and then there is another series of debentures expressed to be subject to the previous series, any of the first debentures issued after the second series ranks in priority to the second debentures (s).

If two successive securities are created by a company, both of which purport to give a first floating charge, then the security which is prior in date will take priority over that which is later in date, irrespective of whether or not the holders of the later security have notice of the earlier one (a). If a series of first debentures is not secured by legal mortgage, and a series of second debentures is secured by a legal mortgage of specific property, the first series giving only a floating charge, the second debentures, as to the specific property, rank in priority to the first debentures (b).

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 104 (4) [Companies Act, 1907 (7 Edw. 7, c. 50, s. 15 (4)]. The provision is retrospective and validates the re-issue whether the redemption took place before or after December 21st, 1908 (*ibid.*, s. 104 (5) [Companies Act, 1907 (7 Edw. 7 c. 50), s. 15 (5)]; *Fitzgerald v. Persse, Ltd.*, [1908] 1 I. R. 279); it also saves the operation of judgments and orders made before March 7th, 1907, as between the parties to the proceedings in which the judgment or order was pronounced or made, and preserves the right to appeal therefrom; see *Re New London and Suburban Omnibus Co., Appleyard v. New London and Suburban Omnibus Co.*, [1908] 1 Ch. 621. S. 15 of the Companies Act, 1907 (7 Edw. 7, c. 50), which the above section replaces, was passed in consequence of the decisions in *Re Routledge (George) & Sons, Ltd., Hummel v. Routledge (George) & Sons, Ltd.*, [1904] 2 Ch. 474; *Re Tasker (W.) & Sons, Ltd., Hoare v. Tasker (W.) & Sons, Ltd.*, [1905] 2 Ch. 587, C. A.; *Re Perth Electric Tramways, Ltd., Lyons v. Tramways Syndicate, Ltd., and Perth Electric Tramways, Ltd.*, [1906] 2 Ch. 216; see also *Re Russian Petroleum and Liquid Fuel Co., Ltd., London Investment Trust, Ltd. v. Russian Petroleum and Liquid Fuel Co., Ltd.*, [1907] 2 Ch. 540, C. A., decided after the Act of 1907 had been passed.

(p) *Re Kent Collieries, Ltd., Day v. Kent Collieries Co.* (1907), 23 T. L. R. 559, C. A. As to the power of modification, see p. 360, *post*. As to the registration of re-issued debentures, see *Re New London and Suburban Omnibus Co., Appleyard v. New London and Suburban Omnibus Co.*, *supra*.

(q) *James v. Boythorpe Colliery Co.* (1890), 2 Meg. 55.

(r) *Gartside v. Silkstone and Dodworth Coal and Iron Co.* (1882), 21 Ch. D. 762; *Re Patent Ivory Manufacturing Co., Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156, 171.

(s) *Lister v. Lister (Henry) & Son* (1893), 62 L. J. (CH.) 568.

(a) *Smith v. English and Scottish Mercantile Investment Trust*, [1896] W. N. 86 (6).

(b) See p. 350, *ante*, where the priority of a specific over a floating charge is fully dealt with.

(vi.) *Statutory Rights of Holders.*

SECT. 14.

**Borrowing
and
Securing
Money.**Debenture-
holders' right
of inspection.

585. Every register of holders of debentures or debenture stock of a company must, except when closed in accordance with the articles, during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures or stock, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection. Every such holder may require a copy of the register or any part thereof on payment of 6*d.* for every one hundred words required to be copied (*c*). If inspection is refused, the company is liable to a fine not exceeding £5, and to a further fine not exceeding £2 for every day during which the refusal continues; and every director, manager, secretary, or other officer of the company who knowingly authorises or permits the refusal incurs the like penalty (*d*).

A copy of any trust deed for securing any issue of debentures must be forwarded to every holder of any such debentures or debenture stock or stocks at his request on payment in the case of a printed trust deed of the sum of 1*s.* or such less sum as may be prescribed by the company, or, where the trust deed has not been printed, on payment of 6*d.* for every one hundred words required to be copied (*e*). In the case of the refusal or neglect to forward the copy the penalty is the same as in the case of refusal of inspection of the register (*f*).

Holders of debentures of a company, not being a private company or a company registered before July 1st, 1908, have also the same right to receive and inspect the balance-sheets of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company (*g*).

(vii.) *Transfer of Debentures.*

586. A bearer debenture, having become a negotiable instrument by the *lex mercatoria* (*h*), is transferable by delivery so as to pass the property therein to a *bonâ fide* holder for value, and entitle him, upon delivery thereof to the company, to obtain payment of the

Transfer by
delivery.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 102 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 18 (1)]. The right to inspect does not, apparently, carry the right to make copies; see *Re Balaghât Gold Mining Co.*, [1901] 2 K. B. 665, C. A.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 102 (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 18 (3)].

(*e*) *Ibid.*, s. 102 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 18 (2)].

(*f*) *Ibid.*, s. 102 (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 18 (3)].

(*g*) *Ibid.*, s. 114 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 23].

(*h*) *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144. Compare *Goodwin v. Roberts* (1876), 1 App. Cas. 476, apparently overruling *Crouch v. Crédit Foncier of England* (1873), L. R. 8 Q. B. 374, where it was held that the company might lawfully refuse to pay the *bonâ fide* transferee for value of a stolen debenture payable to bearer, although he had no notice of the theft; see *Bechuanaland Exploration Co. v. London Trading Bank*, *supra*, per KENNEDY, J., at pp. 69 *et seq.*, and title **BILLS OF EXCHANGE ETC.**, Vol. II., p. 568.

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Transfer by
instrument.

principal secured when due, and to sue in his own name upon the debenture (i).

587. According to the ordinary form, a registered debenture is only legally transferable by an instrument of transfer duly executed or signed, and by registration thereof in the books of the company. The conditions of registered debentures usually provide that the company shall keep a register of the debentures at its registered office, containing the names, addresses and descriptions of the registered holders, and particulars of the debentures held by them respectively, and that every transfer must be in writing under the hand of the registered holder, or his executors or administrators; and that upon delivery at the registered office of the transfer, with the prescribed fee and such evidence of identity of title as the company may reasonably require, the transfer is to be registered, and a note of such registration is to be indorsed on the debenture; and that the company shall be entitled to retain the transfer. When the principal and interest secured by the debenture are to be paid to the registered holder for the time being, without regard to any equities subsisting between the company and the original or any intermediate holder, and the conditions as to transfer are similar to those above mentioned, a liquidator is bound to register the transfer, although the same is made after the liquidation commenced, and after judgment in a debenture-holder's action, but before any notice of a claim of the company against the transferor (k). A company is entitled to set off a call made on a member against moneys owing to him on registered debentures, although prior to the date of the call he has equitably mortgaged his debentures, if no notice of the mortgage has been given to the company, but not calls made after such notice, although made in the winding up of the company (l). The provisions of the Forged Transfers Acts, 1891 and 1892 (m), apply to the debentures and debenture stock of a company, as well as to shares (n).

Registration
of transfers.

588. The directors, before registering a transfer of debentures or debenture stock, must take such precautions to ascertain that the transfer is valid as, *mutatis mutandis*, must be taken in reference to transfers of shares (o). If the company registers a forged transfer of debentures, the true owner can obtain a cancellation of

(i) This was not the case formerly (*Re Natal Investment Co., Financial Corporation's Claim* (1868), 3 Ch. App. 355); and its negotiability was affected by contracts (*Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge* (1871), L. R. 11 Eq. 478) contained in the conditions upon and subject to which it was issued.

(k) *Re Goy & Co., Ltd., Farmer v. Goy & Co., Ltd.*, [1900] 2 Ch. 149; but compare *Re Palmer's Decoration and Furnishing Co.*, [1904] 2 Ch. 743; *Re Brown and Gregory, Ltd., Shepherd v. Brown and Gregory, Ltd., Andrews v. Brown and Gregory, Ltd.*, [1904] 1 Ch. 627; *Re Smith & Co.*, [1901] 1 I. R. 73; *Re Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239.

(l) *Re Taunton, Delmard, Lane & Co., Christie v. Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175.

(m) 54 & 55 Vict. c. 43; 55 & 56 Vict. c. 36.

(n) See p. 195, *ante*. As to a distringas notice in the case of securities, see B. S. C., Ord. 46, rr. 3—14; and title EXECUTION.

(o) See pp. 186 *et seq.*, *ante*.

the registration and the delivery up of the debentures (*p*); or if the debentures are subsequently redeemed by the company, and the sums secured are paid to the transferee, the company is primarily liable to the true owner for the sums so paid, without prejudice to any rights it may have against the transferee (*q*). Where one of several trustees is in possession, with the consent of his co-trustees, of debentures registered in their names, the co-trustees are not thereby estopped from claiming the debentures as against a *bonâ fide* purchaser for value from the trustee, when he has forged his co-trustees' signatures to the transfer (*r*).

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Co-trustees.

A mortgage debenture of a company is a thing in action within the meaning of the Bankruptcy Act, 1883 (*s*), and therefore an equitable mortgage of a debenture is good as against the trustees in bankruptcy of the registered holder (*t*). The rules of law applicable to mortgages of shares apply to mortgages of debentures which are transferable by registration of an instrument of transfer in the company's books (*a*).

(viii.) *Equities affecting Debentures.*

589. Debenture conditions are usually so framed as to give the registered holder for the time being the absolute right to receive the moneys secured by the debentures, and similar conditions are used in the case of debenture stock (*b*). The usual conditions in the case of debentures make the principal money and interest payable to the registered holder without regard to any equities subsisting between the company and the original or any intermediate holder (*c*), and provide that the receipt of the registered holder shall be a good discharge for the moneys secured, and that the company shall not be bound to inquire into his title or to take notice of any trust affecting such moneys, or be affected by notice, express or implied, of the right, title, or claim of any other person to such moneys or instrument (*d*). In the absence of any special conditions the assignee of a debenture takes it subject to any equities subsisting between the company and the original holder, although the assignment was for value and the assignee had no notice of the circumstances giving rise to such equities. The company may, however, be estopped from setting up such equities against the assignee (*e*), as, for instance, by registering the transferee

Freedom
from equities.

(*p*) *Cottam v. Eastern Counties Rail. Co.* (1860), 1 John. & H. 243.

(*q*) Compare *Barton v. London and North Western Rail. Co.* (1888), 38 Ch. D. 144, C. A.

(*r*) *Cottam v. Eastern Counties Rail. Co.*, *supra*.

(*s*) 46 & 47 Vict. c. 52, s. 44 (2) (iii.); see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 174, 175.

(*t*) See *Re Pryce, Ex parte Rensburg* (1877), 4 Ch. D. 685 (a decision under s. 15 (5) of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71)).

(*a*) See p. 197, *ante*.

(*b*) As to bearer debentures being negotiable, see p. 357, *ante*.

(*c*) *Re Goy & Co., Ltd., Farmer v. Goy & Co., Ltd.*, [1900] 2 Ch. 149; and see the cases cited in note (*k*), p. 358, *ante*.

(*d*) *Re Blakely Ordnance Co., Ex parte New Zealand Banking Corporation* (1867), 3 Ch. App. 154.

(*e*) *Athenæum Life Assurance Society v. Pooley* (1858), 3 De G. & J. 294, C. A.;

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as the holder thereof (*f*); by accepting notice of assignment, although it does not register the transfer (*g*); by telling the transferee that registration is unnecessary (*h*); by representing that the debenture is legally transferable if the transferee relies on such representation (*i*); by a judgment previously recovered against the company for interest on the debentures (*k*); by issuing to a debenture stock-holder a stock certificate stating that the person therein named is the registered holder of the amount of stock therein mentioned (*l*).

Clogging the
equity of
redemption.

590. Subject to the enactment that perpetual debentures are to be valid (*m*), a mortgage by a company is in the same position as one by a private individual so far as regards the doctrine against clogging the equity of redemption (*n*). Thus, in the case of a loan to a company on the security of a mortgage of debenture stock, an option given to the lender to purchase the stock within a certain period at a discount is a clog on the equity of redemption and void (*o*).

(ix.) *Modification of Rights.*

Modification
clause.

591. There are commonly inserted in debenture trust deeds, and sometimes in the conditions indorsed on debentures, provisions for calling meetings of the debenture-holders and enabling a specified majority to bind the whole body of holders to a modification, compromise, or release of their rights against the company or the security (*p*). Under a power to sanction any "modification or compromise" of the rights of the debenture-holders, a mortgage may be given priority over the debentures (*q*), or the date of payment may be postponed (*r*). But extinction of rights against the

Re China Steamship Co., Ex parte Mackenzie (1869), L. R. 7 Eq. 240; *Re Natal Investment Co., Financial Corporation's Claim* (1868), 3 Ch. App. 355; *Re Taunton, Delmard, Lane & Co., Christie v. Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175; see *Re General Estates Co., Ex parte City Bank* (1868), 3 Ch. App. 758; *Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge* (1870), L. R. 11 Eq. 478.

(*f*) *Higgs v. Assam Tea Co.* (1869), L. R. 4 Exch. 387; *Re Northern Assam Tea Co., Ex parte Universal Life Assurance Co.* (1870), L. R. 10 Eq. 458; see *Re South Essex Estuary Co., Carvey's Claim*, [1873] W. N. 17.

(*g*) *Re Hercules Insurance Co., Brunton's Claim* (1874), L. R. 19 Eq. 302.

(*h*) *Re Colonial and General Gas Co., Lishman's Claim* (1870), 23 L. T. 40.

(*i*) *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85.

(*k*) *Re South Essex Gas Light and Coke Co., Hulett's Case* (1862), 2 John. & H. 306; *Re South Essex Estuary Co., Ex parte Chorley* (1870), L. R. 11 Eq. 157.

(*l*) *Robinson v. Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841.

(*m*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 103; and p. 346, *ante*.

(*n*) *Jarrah Timber and Wood Paving Corporation, Ltd. v. Samuel*, [1903] 2 Ch. 1, 11, C. A.; affirmed [1904] A. C. 323; and see *Noakes & Co., Ltd. v. Rice*, [1902] A. C. 24; *Browne v. Ryan*, [1901] 2 I. R. 653, C. A.; *Bradley v. Carritt*, [1903] A. C. 253; and title MORTGAGE.

(*o*) *Jarrah Timber and Wood Paving Corporation, Ltd. v. Samuel*, *supra*. As to clogging the equity, see further *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354.

(*p*) See Encyclopædia of Forms, Vol. V., pp. 59, 84.

(*q*) *Follit v. Eddystone Granite Quarries*, [1892] 3 Ch. 75; compare *Re Dominion of Canada Freehold Estate and Timber Co.* (1886), 55 L. T. 347.

(*r*) *Finlay v. Mexican Investment Corporation*, [1897] 1 Q. B. 517; see *Walker v. Elmore's German and Austro-Hungarian Metal Co.* (1901), 85 L. T. 767, C. A. As to the construction of a general power to modify etc., see *Spicer v. Hillingden* (1908), *Times*, May 14th, 20th, 1908.

company, as by accepting shares in a new company in exchange for the debentures, is not a "modification" of rights (*s*), nor a "compromise" of rights (*t*), unless there is some dispute or difficulty in enforcing those rights (*a*). A mere power to bind all the debenture-holders as if they had consented does not enable a majority to bind the whole body to an arrangement inconsistent with the rights declared by the trust deed (*b*).

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592. The rights of holders of debenture stock or debentures may be modified by a scheme sanctioned under the Act of 1908 (*c*). The court may also, in an action to administer the trusts of a deed securing debentures or debenture stock, approve a compromise and bind absent debenture-holders, if satisfied that the compromise is for their benefit, and that to require service on them would cause unreasonable expense or delay; but they are not to be bound if the order has been obtained by fraud or non-disclosure of material facts (*d*). Only non-assenting persons can be so bound; dissentients are not bound and are entitled to payment in full (*e*), but they may be compelled to claim within a certain time or be excluded (*f*).

Arrangements
and com-
promises.

(x.) *Redemption of Debentures.*

593. Debentures of a company become redeemable at the time or on the happening of any of the events specified in the debentures or debenture conditions, or in the trust deed securing the debentures. Provision is sometimes made for redemption by means of a sinking fund, and to prevent any preference the debentures to be redeemed are to be determined by drawings. Frequently an option is given to the company at any time after a specified date to redeem at a slight premium. Unless otherwise agreed, debentures are not redeemable before the date or event specified in the debentures (*g*). The word "redeemable," as used in debentures, implies an option, and not an obligation to redeem (*h*). If debentures are made payable at a particular place, they must be presented for payment at such place before there can be default in payment (*i*).

Redemption
of debentures.

The principal money becomes due at the commencement of a winding up, although the stipulated time for payment has not arrived (*j*).

Effect of
winding up

(*s*) *Mercantile Investment and General Trust Co. v. International Co. of Mexico* (1891), cited [1893] 1 Ch. 484, n., C. A.; compare *Re Labuan and Borneo, Ltd.* (1902), 18 T. L. R. 216. This power is not fiduciary and the debenture-holders may vote as they please (*Smith v. Kent Collieries, Ltd.* (1908), *Times*, April 3, 1908).

(*t*) *Ibid.*

(*a*) *Sneath v. Valley Gold, Ltd.*, [1893] 1 Ch. 477, C. A.; *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan and Agency Co.*, [1894] 1 Ch. 578.

(*b*) *Hay v. Swedish and Norwegian Rail. Co.* (1889), 5 T. L. R. 460, C. A.

(*c*) 8 Edw. 7, c. 69, s. 120; see pp. 602, 604, *post*.

(*d*) R. S. C., Ord. 16, r. 9 A; see title PRACTICE AND PROCEDURE.

(*e*) *Collingham v. Sloper, Foreign, American and General Investments Trust Co. v. Sloper*, [1894] 3 Ch. 716, C. A.

(*f*) *Saragossa and Mediterranean Railway v. Collingham*, [1904] A. C. 159.

(*g*) *Hooper v. Western Counties etc. Telephone Co.* (1892), 68 L. T. 78.

(*h*) *Re Chicago and North West Granaries Co., Ltd., Morrison v. Chicago and North West Granaries Co., Ltd.*, [1898] 1 Ch. 263.

(*i*) *Thorn v. City Rice Mills* (1889), 40 Ch. D. 357.

(*j*) *Hodson v. Tea Co.* (1880), 14 Ch. D. 859; *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547, C. A.

SECT. 14. Debentures may be issued which are irredeemable or redeemable only on a contingency (*k*).

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Money.

(xi.) *Duties and Stamps.*

Capital duty.

594. Where a company proposes to issue any loan capital, it must before the issue thereof deliver to the Commissioners of Inland Revenue a statement of the amount proposed to be secured by the issue for duty purposes (*l*). When default is made in delivering the statement or paying duties the company is liable to additional duty at the rate of 10 per cent. upon the amount of the duty payable, and a like sum for every month after the first month while the neglect or failure continues (*m*).

Trust deed.

595. Debenture stock is usually constituted and secured by a trust deed, which specifically mortgages the real and leasehold property of the company and creates a floating charge upon the residue of the company's property (*n*).

When the stock is secured by a trust deed, the deed is stamped with *ad valorem* duty at the rate of 2s. 6d. per cent. on the amount of the stock (*o*), unless under the Finance Act, 1899 (*p*), the duty has been paid upon the statement, which has to be delivered to the Inland Revenue Commissioners in the case of any company issuing a loan; and when the trust deed is properly stamped the stock certificates issued to holders of the stock under the seal of the company are not stamped (*q*).

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 103. As to how far irredeemable debentures or debenture stock could have been created before the Act, see *Jarrah Timber and Wood Paving Corporation, Ltd. v. Samuel*, [1903] 2 Ch. 1, C. A.; *Re Southern Brazilian Rio Grande do Sul Rail. Co., Ltd.*, [1905] 2 Ch. 78.

(*l*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8 (1). For form of statement, see *Encyclopædia of Forms*, Vol. V., p. 49. The duty is not charged to the extent to which the stamp duty payable in respect of a mortgage or marketable security has been paid on any trust deed or other document securing the loan capital proposed to be issued (Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8 (3)). For the increased duties now chargeable in respect of marketable securities, see Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 76. "Loan capital" includes any debenture stock or funded debt, by whatever name known, or any capital raised which is borrowed, or has the character of borrowed money, whether in the form of stock or in any other form, but not any overdraft at the bank or other loan raised for a merely temporary purpose for a period not exceeding twelve months (*ibid.*, s. 8 (5)). As to what is an issue, see *A.-G. v. Liverpool Corporation*, [1902] 1 K. B. 411; *Re Perth Electric Tramways, Ltd., Lyons v. Tramways Syndicate, Ltd., and Perth Electric Tramways, Ltd.*, [1906] 2 Ch. 216. As to the reduction of duty on loan capital issued for the purpose of converting or consolidating existing capital, see Finance Act, 1907 (8 Edw. 7, c. 13), s. 10; compare *A.-G. v. Regent's Canal and Dock Co.*, [1904] 1 K. B. 263, C. A.; and see generally title REVENUE.

(*m*) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8 (4).

(*n*) See p. 348, *ante*.

(*o*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.; Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8 (2).

(*p*) 62 & 63 Vict. c. 9, s. 8.

(*q*) Before the decision in *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627, C. A., it was the practice to omit the floating charge and instead thereof to issue to the trustees debentures to the amount of the stock to be held by them as collateral security. That practice has now fallen into disuse, as the effect of that case is that no charge on chattels given by a company governed by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), requires registration

Where the instrument is a collateral or auxiliary or additional or substituted security (other than an equitable mortgage), or is by way of further assurance, the duty is 6*d.* for every £100 or fraction of £100 (*r*), but the amount of the duty is limited to 10*s.* (*s*). The duty on an equitable mortgage, whether given as a primary or collateral security, is 1*s.* per £100 (*t*).

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and
Securing
Money.

Every scrip certificate must bear a penny stamp (*a*).

The stamp duty payable in respect of registered debentures is 2*s.* 6*d.* per cent., and bearer debentures 10*s.* per cent. If the debentures are so stamped, a trust deed securing the debentures only requires a 10*s.* stamp. In the case of a trust deed securing debenture stock, the duty is usually paid on the deed, and the stock certificates containing no charge do not require stamping. Where a company is bound to pay a bonus on redemption of a debenture, *ad valorem* duty is payable on the amount of the bonus in addition to the amount of the debenture (*b*); but such duty is not payable where the company has an option to redeem upon payment of a bonus (*c*).

Registered
debentures.

Where an issue of debenture stock is made for the purpose of providing funds to pay off a prior issue, the trust deed securing the new stock is not a substituted security (*d*), and so only liable to a duty of 6*d.* per cent., but is chargeable with the full duty of 2*s.* 6*d.* per cent. (*e*).

A debenture is liable to duty as a debenture (*f*) or a marketable security even though it contains no charge.

596. Where a company is formed to take over the assets and liabilities of an existing company having an issue of debentures, and the holders of such debentures deliver them up and accept new

Exchange for
debentures in
new company.

under the Bills of Sale Acts. As to the stamp duty on stock certificates to banks, see Finance Act, 1899 (62 & 63 Vict. c. 9), s. 5.

(*r*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I. Before the Finance Act, 1899 (62 & 63 Vict. c. 9), where *ad valorem* duty had been paid on debentures secured by a trust deed, no *ad valorem* duty was payable on the trust deed, although it contained a charge on the whole or part of the property charged by the debentures. The trust deed was not regarded as a collateral security.

(*s*) Revenue Act, 1903 (3 Edw. 7, c. 46), s. 7.

(*t*) Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), s. 15. As to the duty on an equitable charge not by, but on, debentures, see *Read v. Eley*, [1900] W. N. 57.

(*a*) Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.; see *London and Westminster Bank v. Inland Revenue Commissioners*, [1900] 1 Q. B. 166, C. A.

(*b*) *Rowell v. Inland Revenue Commissioners*, [1897] 2 Q. B. 194.

(*c*) *Knights Deep, Ltd. v. Inland Revenue Commissioners*, [1900] 1 Q. B. 217, C. A.

(*d*) See Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 86 (1), 87 (3), 88 (1), Sched. I. As to what is a substituted or auxiliary security, see *City of London Brewery Co. v. Inland Revenue Commissioners*, [1899] 1 Q. B. 121, C. A.; *British Oil and Cake Mills, Ltd. v. Inland Revenue Commissioners*, [1903] 1 K. B. 689, C. A.; *Mount Lyell Mining and Rail. Co. v. Inland Revenue Commissioners*, [1905] 1 K. B. 161, C. A.

(*e*) *City of London Brewery Co. v. Inland Revenue Commissioners*, *supra*.

(*f*) *Mount Lyell Mining and Rail. Co. v. Inland Revenue Commissioners*, *supra*; *British India Steam Navigation Co. v. Inland Revenue Commissioners* (1881), 7 Q. B. D. 165; *Speyer Brothers v. Inland Revenue Commissioners*, [1907] 1 K. B. 246, C. A.

SECT. 14. debentures of an equivalent amount in the new company in lieu thereof, the new debentures are not given in substitution for a like security so as to be only liable to duty at 6d. per cent., but are chargeable with the full duty (g).

Borrowing and Securing Money.

SUB-SECT. 4.—Registration of Mortgages and Charges.

(i.) *Registration at the Company's Office.*

Limited company's register of mortgages.

597. Every limited company must keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge, and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto (h). The property charged, not the instrument, is required to be registered (i).

The omission to register does not invalidate the security, even where it is given to a director or other officer of the company (k) or to a shareholder (l). If any director, manager, or other officer of the company knowingly and wilfully authorises or permits the omission of such entry in the company's register he is liable to a fine not exceeding £50 (m). The company's bankers are not officers (n); but the solicitor acting in the transaction is an officer (o). Where directors instruct the secretary to register the security and he omits to do so, they are not knowingly and wilfully authorising or permitting the omission (p).

Keeping copies of other charges.

598. Besides keeping a register of specific mortgages every company (q) which is registered in England or Ireland, whether limited by shares or by guarantee, or unlimited, must cause a copy

(g) See Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., "Marketable Securities" (4).

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 100 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 43].

(i) *Smith's Case* (1879), 11 Ch. D. 579, C. A., per JESSEL, M.R., at p. 585 (mortgage by deposit); but copies of the instruments creating the mortgage or charge are now open to inspection (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 102 (1)).

(k) *Re Globe New Patent Iron and Steel Co.* (1878), 48 L. J. (CH.) 295; *Wright v. Horton* (1887), 12 App. Cas. 371, where Lord HALSBURY, L.C., relied to some extent on the fact that only creditors and members of the company could inspect the register; but the register is now open to public inspection.

(l) *Re General South American Co.* (1876), 2 Ch. D. 337, C. A.

(m) Companies Act, 1908 (8 Edw. 7, c. 69), s. 100 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 43].

(n) *Re General Provident Assurance Co., Ex parte National Bank* (1872), L. R. 14 Eq. 507.

(o) *Re Patent Bread Machinery Co., Ex parte Valpy and Chaplin* (1872), 7 Ch. App. 289; *Re Hackney (Borough) Newspaper Co.* (1876), 3 Ch. D. 669; compare *Re Great Wheel Polgooth Co.* (1883), 53 L. J. (CH.) 42; *Re International Pulp and Paper Co., Knowles' Mortgage* (1877), 6 Ch. D. 556, 560; *Carter's Case* (1886), 31 Ch. D. 496; *Re Liberator Permanent Benefit Building Society* (1894), 71 L. T. 406; *Re Dublin Drapery Co., Ex parte Cox* (1884), 13 L. R. Ir. 174.

(p) *Re Hackney (Borough) Newspaper Co., supra.*

(q) As to the meaning of "company," see Companies (Consolidation) Act 1908 (8 Edw. 7, c. 69), s. 285; and p. 36, *ante*.

of every instrument creating any mortgage or charge requiring registration with the registrar (*r*) to be kept at its registered office; in the case of a series of uniform debentures, a copy of one such debenture is sufficient (*s*).

**SECT. 14.
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Inspection of
register of
mortgages etc.

599. Copies of such instruments requiring registration with the registrar, and the register of specific mortgages to be kept as above mentioned, must be open at all reasonable times to the inspection of any creditor or member of the company without fee, and of any other person on payment of such fee, not exceeding 1s. for each inspection, as the company may prescribe. If inspection of the copies or register is refused, any officer of the company refusing inspection, and every director and manager of the company authorising or knowingly and wilfully permitting the refusal, is liable to a fine not exceeding £5, and to a further fine not exceeding £2 for every day during which the refusal continues. In addition to the above penalty any judge of the High Court sitting in chambers, or the judge of the court exercising the stannaries jurisdiction in the case of companies subject to that jurisdiction, may by order compel an immediate inspection of the copies or register (*a*).

(ii.) *Registration and Inspection at the Office of the Registrar.*

600. Every mortgage or charge created after July 1st, 1908 (*b*), by a registered company being (1) a mortgage or charge for the

Charges
required to be
registered.

(*r*) See *infra*. As to the register of holders of debentures or of debenture stock, see p. 358, *ante*.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw 7, c. 69), s. 93 (9) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 108].

(*a*) *Ibid.*, s. 101 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 43; Companies Act, 1907 (7 Edw. 7, c. 50), ss. 10 (8), 17]. As to where the right to inspect includes a right to take copies, and as to a solicitor, accountant, or other competent person being appointed to inspect, see *Nelson v. Anglo-American Land Mortgage Agency Co.*, [1897] 1 Ch. 130, 134; *Re Credit Co.* (1879), 11 Ch. D. 256; *Bevan v. Webb*, [1901] 2 Ch. 59, 75, C. A.; *Norey v. Keep*, [1909] 1 Ch. 561; *Re Balaghât Gold Mining Co.*, [1901] 2 K. B. 665, C. A. The power to order inspection under s. 101 ceases when the company goes into liquidation, and in that case the only inspection which a creditor or contributory has is in conformity with an order of the winding-up court under s. 221 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) (*Somerset v. Land Securities Co.*, [1897] W. N. 29).

(*b*) Prior to the coming into operation, on January 1st, 1901, of the Companies Act, 1900 (63 & 64 Vict. c. 48), none of the mortgages or charges referred to (except a specific mortgage or charge on property of the company) required any registration under the Companies Acts. And debentures of any mortgage, loan, or other incorporated company, and deeds of charge on assets of companies to cover debentures, did not require registration as bills of sale (Bills of Sale Act (1878), Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 17; *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627, C. A.; *Richards v. Kidderminster Overseers*, [1896] 2 Ch. 212). It was held that debentures issued by a society registered under the Industrial and Provident Societies Acts, and creating a security on the society's chattels, must be registered as bills of sale (*Great Northern Rail. Co. v. Coal Co-operative Society*, [1896] 1 Ch. 187; but compare *Read v. Joannon* (1890), 25 Q. B. D. 300; *Clark v. Balm, Hill & Co.*, [1908] 1 K. B. 667). As to the meaning of "company," see p. 36, *ante*. As to the time of the creation of the charge, see *Re Columbian Fireproofing Co.*, [1910] W. N. 95.

S. 14 of the Companies Act, 1900 (63 & 64 Vict. c. 48), required that every such mortgage or charge as is referred to in the text (except those on land, interests in land, and book debts, which were not mentioned) created on or after

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purpose of securing any issue of debentures or debenture stock (c) (2) or a mortgage or charge on uncalled share capital of the company (d); or (3) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale (e); or (4) a mortgage or charge on any land, wherever situate, or any interest therein (the holding of debentures or debenture stock entitling the holder to a charge on land not being an interest in land (f)); or (5) a mortgage or charge on any book debts of the company (not including the deposit for the purpose of securing an advance to the company of a negotiable instrument to secure payment of any book debts of the company (g); or (6) a floating charge (h) on the undertaking (i) or property (j) of the company, is, so far as any security on the company's property or undertaking is thereby conferred, void against the liquidator in the winding up of the company and any creditor of the company,

January 1st, 1901, should be registered substantially in the manner now required. There were some differences between that section and the provision now in force as regards registration of a series of debentures, or of debentures affecting property outside the United Kingdom. Particulars of commissions etc. on the issue of debentures at a discount were not required to be registered, and a person other than the company who registered was not given the right to recover the fees. There was no provision that the money purporting to be secured by the invalidated security should become immediately payable. The provisions of s. 14 still affect the securities referred to in it which were created between December 31st, 1900, and April 28th, 1907, at which latter date the section was repealed (see Companies Act, 1907 (7 Edw. 7, c. 50), ss. 10 (9), 51, and Sched. IV.), and s. 10 of the Companies Act, 1907 (7 Edw. 7, c. 50), was substituted for it. The general effect of s. 14 of the Companies Act, 1900 (63 & 64 Vict. c. 48), and the meaning in particular of the provisions of it as to registration in case of a series of debentures was stated in *Re Harrogate Estates, Ltd.*, [1903] 1 Ch. 498. S. 93 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), practically re-enacts the provisions of s. 10 of the Companies Act, 1907 (7 Edw. 7, c. 50); see *Cunard Steamship Co., Ltd. v. Hopwood*, [1908] 2 Ch. 564. Mortgages and charges of the nature required to be registered by s. 10 of the Companies Act, 1907 (7 Edw. 7, c. 50), but created before that Act (other than those within the Companies Act, 1900 (63 & 64 Vict. c. 48)), were by s. 12 of the Companies Act, 1907 (7 Edw. 7, c. 50), required to be registered within three months after August 28th, 1907, under penalty not exceeding £50 for each day of default. This section was repealed by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286, and its provisions were not re-enacted, but the application of s. 38 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), is expressly preserved by the repealing section, and where default has been made in complying with the Companies Act, 1907 (7 Edw. 7, c. 50), the fine may still be imposed. As to how far registration is notice of a charge, see *Wilson v. Kelland*, [1910] W. N. 132; *Re Standard Rotary Machine Co.* (1906), 95 L. T. 829.

(c) For the definition or description of debentures or debenture stock, see pp. 345, 348, *ante*. Unless the context of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), otherwise requires, "debenture" includes debenture stock (*ibid.*, s. 285).

(d) As to what uncalled capital is, and how and to what extent it may be incumbered, see pp. 89, 342, *ante*. The fact that uncalled capital has been charged does not prevent the company from forfeiting shares (*Re Agency, Land and Finance Co. of Australia* (1904), 20 T. L. R. 41).

(e) See title *BILLS OF SALE*, Vol. II., pp. 5—20.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93 (1) (iv.). Registration with the registrar of securities on land or book debts was first required by the Companies Act, 1907 (7 Edw. 7, c. 50).

(g) *Ibid.*, s. 93 (1) (iii.).

(h) As to the meaning of a "floating charge" or "floating security," see p. 348, *ante*.

(i) As to what is the "undertaking" of a company, see p. 342, *ante*.

(j) As to what is a company's "property," see p. 342, *ante*.

unless the particulars prescribed by the Board of Trade of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar for registration in the manner required by the Act of 1908 within twenty-one days after the date of its creation (*k*). The omission to register does not prejudice any contract or obligation for repayment of the money secured, and where the mortgage or charge becomes void for want of registration the money secured thereby immediately becomes payable (*l*).

The provisions above stated are not confined to limited companies, to which the provisions as to registration of specific mortgages and charges solely apply (*m*).

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601. Where any commission, allowance, or discount has been paid or made, either directly or indirectly, by the company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures or debenture stock of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures or debenture stock the particulars must include particulars as to the amount or rate per cent. of the commission, discount, or allowance paid or made, but an omission to do this does not affect the validity of the debentures issued; and the deposit of any debentures as security for any debt of the company is not for the purposes of this enactment to be treated as the issue of the debentures at a discount (*n*).

Statements
as to
commission
and discount.

602. Where a company creates a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of the series are entitled *pari passu*, it is sufficient if, within twenty-one days after execution of the deed (if any) containing the charge, or, if none, after the execution of any debentures of the series, the following particulars are delivered to or received by the registrar, namely, the total amount secured by the whole series; the date of the resolutions authorising the issue of the series and the date of the covering deed, if any, by which the security is created or defined; a general description of the property charged; and the names of the trustees (if any) for the debenture-holders, together with the deed containing the charge, or, if there is no such deed, one of the debentures of the series; and the registrar, on payment of his fee, is to enter the particulars in the register. Where, however, more than one issue is made of debentures in the series particulars must be registered

Registration
of a series.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (1)], which made the money secured immediately repayable if the security was invalidated. For forms of particulars, see Board of Trade Order, March 29, 1909, Forms 47, 47a, and 48.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (1)].

(*m*) See p. 364, *ante*.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93 (4) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (4)].

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Borrowing
and
Securing
Money.

Charge on
foreign
property.

When a
charge is
created.

of the date and amount of each issue, although omission to do this does not affect the validity of the debentures issued (o).

603. Where the mortgage or charge is created in the United Kingdom but comprises property outside it, the instrument creating or purporting to create the mortgage or charge may be sent for registration although further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate (p). Where a mortgage or charge created out of the United Kingdom comprises solely property situate outside the United Kingdom, the delivery to and receipt by the registrar of a copy of the instrument by which the mortgage or charge is created or evidenced, verified in the prescribed manner (q), has the same effect for the purposes of registration as the delivery and receipt of the instrument itself. In this case the particulars and instrument or copy are to be delivered to the registrar within twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in the United Kingdom (r).

604. The mortgage or charge is created when it is executed, not when it is issued to the incumbrancer (s). Where, however, a company having power to exchange and vary its debentures has under agreement sealed but not issued or registered debentures, it can cancel them and issue to the lender other debentures, which, if registered within twenty-one days after they were sealed, are valid (a).

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93 (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (3)]; compare s. 14 (4) of the Companies Act, 1900 (63 & 64 Vict. c. 48); *Re Harrogate Estates, Ltd.*, [1903] 1 Ch. 498; *Cunard Steamship Co., Ltd. v. Hopwood*, [1908] 2 Ch. 564. The series of debentures includes all those which, whenever issued, are entitled to the *pari passu* charge; compare *Re Yolland, Husson and Birkett, Ltd., Leicester v. Yolland, Husson and Birkett, Ltd.*, [1908] 1 Ch. 152, C. A. The registration of the particulars mentioned in the sub-section protects the debentures of the series issued not more than twenty-one days before registration and all other debentures of the series subsequently issued (*Re Spiral Globe, Ltd.* (No. 2), *Watson v. Spiral Globe, Ltd.*, [1902] 2 Ch. 209). The sealing of debentures is not an issue (*Re Defries (N.) & Co., Ltd., Bowen v. Defries (N.) & Co., Ltd.*, [1904] 1 Ch. 37); but a contract to issue is an issue (*Re Perth Electric Tramways, Ltd., Lyons v. Tramways Syndicate, Ltd., and Perth Electric Tramways, Ltd.*, [1906] 2 Ch. 216). As to the effect of non-registration in the case of an agreement to issue debentures, see *Re Jackson and Bassford, Ltd.*, [1906] 2 Ch. 467; and p. 352, *ante*. Where debentures have been sealed but not issued they may be cancelled and re-sealed, and the re-sealed debentures can be issued, and if registered within twenty-one days of re-sealing they are valid (*Re Defries (N.) & Co., Ltd., Bowen v. Defries (N.) & Co., Ltd.*, *supra*).

(p) Companies (Consolidation) Act, 1908 (7 Edw. 7, c. 50), s. 93 (1) (ii.) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (1) (ii.)].

(q) The copy must be certified to be a true copy under the seal of the company, or under the hand of some person interested therein otherwise than on behalf of the company (Board of Trade Order, March 29th, 1909).

(r) Companies (Consolidation) Act, 1908 (7 Edw. 7, c. 50), s. 93 (1) (i.) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (1) (i.)].

(s) *Re Spiral Globe, Ltd.* (No. 2), *Watson v. Spiral Globe, Ltd.*, *supra*; *Re New London and Suburban Omnibus Co.*, [1908] 1 Ch. 621.

(a) *Re Defries (N.) & Co., Ltd., Bowen v. Defries (N.) & Co., Ltd.*, *supra*.

Debentures created before the date when registration was required, but validly re-issued (*b*) after that date, are not within the provisions as to registration (*c*).

Where property subject to a mortgage is sold and the proceeds are invested in other property which is conveyed to the company, and by it, pursuant to the security, conveyed to the incumbrancer and subjected to his incumbrance, the latter conveyance requires registration (*d*); but if there is a direct conveyance to the incumbrancer registration is unnecessary, at any rate if the company is not a party to the conveyance (*e*). The registration of a trust deed securing debenture stock which contains specific equitable charges on property is sufficient to cover subsequent statutory mortgages of that property, and also the mortgages of further property substituted under the powers of the deed for property comprised in the original charge (*f*).

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Sale of
property
subject to
charge.

605. It is the duty of the company to send for registration the particulars of every mortgage or charge created by it, and of the issues of debentures of a series requiring registration with the registrar. The registration of any such mortgage or charge may, however, be effected on the application of any person interested therein. Where the registration has been effected on the application of some person other than the company, he can recover from it the amount of any fees properly paid by him to the registrar on registration (*g*).

Company's
duty to
register
charges.

If any company makes default in sending to the registrar for registration the particulars of any mortgage or charge created by it, and of the issues of debentures of a series, so requiring registration with the registrar, then, unless the registration has been effected on the application of some other person, the company, and every director, manager, secretary, or other person who is knowingly a party to the default, is on conviction liable to a fine not exceeding £50 for every day during which the default continues (*h*).

Penalty on
default.

Subject as aforesaid, if any company makes default in complying with any of the statutory requirements as to registration with the registrar of any mortgage or charge created by it, the company, and every director, manager, and other officer of the company who knowingly and wilfully authorised or permitted the default,

(*b*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 104 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 15].

(*c*) *Re New London and Suburban Omnibus Co.*, [1908] 1 Ch. 621. It seems to follow that when a debenture is validly reissued no registration is necessary on the reissue.

(*d*) *Cornbrook Brewery Co., Ltd. v. Law Debenture Corporation, Ltd.*, [1904] 1 Ch. 103, C. A.

(*e*) *Bristol United Breweries, Ltd. v. Abbot*, [1908] 1 Ch. 279.

(*f*) *Cunard Steamship Co., Ltd. v. Hopwood*, [1908] 2 Ch. 564 (a case under the Companies Act, 1900 (63 & 64 Vict. c. 48)).

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93 (7) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (6)].

(*h*) *Ibid.*, s. 99 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (6)].

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and
Securing
Money.

Register of
charges and
index.

is, without prejudice to any other liability, liable on summary conviction to a fine not exceeding £100 (i).

606. The registrar must keep, with respect to each company, a register of the mortgages and charges created by it after July 1st, 1908, and requiring registration with him. On payment of a fee he must enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge (k). He must also keep a chronological index (in the form and with the particulars prescribed by the Board of Trade) to the mortgages or charges registered with him (l).

The register kept by the registrar is to be open to inspection by any person on payment of such a fee, not exceeding 1s. for each inspection, as is prescribed by the Board of Trade (m).

Certificate of
registration.

607. The registrar must certify under his hand the registration of any mortgage or charge so registered with him, stating the amount thereby secured. His certificate is conclusive evidence that the statutory requirements as to registration have been complied with (n). Thus, it is immaterial, after the certificate has been obtained, that the date of the resolution creating stock is omitted from the particulars filed on registration (o). The court will refuse to go into the question whether the requirements as to registration have been complied with (p).

Indorsement
of certificate.

608. The company must cause a copy of the registrar's certificate to be indorsed on every debenture or certificate of debenture stock issued by the company, the payment of which is secured by the mortgage or charge registered, not being a debenture or certificate of debenture stock issued by the company before the mortgage or charge was created (q).

If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate of debenture stock requiring registration with the registrar without a copy of the certificate of registration being indorsed upon it, he is, without prejudice to any

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 99 (2) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 18].

(k) *Ibid.*, s. 93 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (2)]; see Board of Trade Order, March 29, 1909, Form 91.

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 98 [Companies Act, 1900 (63 & 64 Vict. 48), s. 17].

(m) *Ibid.*, s. 93 (8) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (7)]. As to the right to take copies, see *Nelson v. Anglo-American Land Mortgage Agency Co.*, [1897] 1 Ch. 130. As to the effect of winding up, see *Somerset v. Land Securities Co.*, [1897] W. N. 29. As to notice by registration, see *Re Standard Rotary Machine Co.* (1907), 95 L. T. 829.

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93 (5) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (5)].

(o) *Cunard Steamship Co., Ltd. v. Hopwood*, [1908] 2 Ch. 564.

(p) *Re Yolland, Husson and Birkett, Ltd., Leicester v. Yolland, Husson and Birkett, Ltd.*, [1908] 1 Ch. 152, C. A.

(q) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 93 (6) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 10 (5)].

other liability, liable on summary conviction to a fine not exceeding £100 (*r*).

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609. The registrar may, on evidence being given to his satisfaction that the debt for which any registered mortgage or charge was given has been paid or satisfied, order that a memorandum of satisfaction be entered on the register, and must, if required, furnish the company with a copy thereof (*s*).

(iii.) *Extending Time for Registration.*

610. A judge of the High Court, on being satisfied that the omission to register a mortgage or charge within the time required by the statute, or the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental (*t*), or due to inadvertence (*u*) or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the judge just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified (*w*). When granted.

An "accident" is a mishap or untoward event not expected or designed (*a*). "Inadvertence" includes ignorance of the provisions requiring registration (*b*). The words "some other sufficient cause" extend to cover difficulties arising through the property charged being situate abroad (*c*) and (in the case of debentures) delay at the Stamp Office (*d*).

611. The application is usually made *ex parte* by originating motion, supported by affidavits (*e*). The court will not decide on motion whether the security requires registration, but will require an action to be brought (*f*). If the application is in the Chancery Division, the name of the judge by whom the motion, whether Procedure.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 99 (3) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 18].

(*s*) *Ibid.*, s. 97 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 16].

(*t*) *Fenton v. Thorley & Co., Ltd.*, [1903] A. C. 443; and see *Brintons, Ltd. v. Turvey*, [1905] A. C. 230, and other decisions under the Workmen's Compensation Acts in title MASTER AND SERVANT.

(*u*) *Re Jackson & Co., Ltd.*, [1899] 1 Ch. 348 (a case decided under the Companies Act, 1898 (61 & 62 Vict. c. 26), s. 1 (1), where the same words occur); compare *Re Beattie (E. & F.), Ltd.*, [1901] W. N. 152.

(*w*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 96 [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 15].

(*a*) *Fenton v. Thorley & Co. Ltd.*, *supra*.

(*b*) *Re Mendip Press* (1901), 18 T. L. R. 38.

(*c*) *Re Tingri Tea Co., Ltd.*, [1901] W. N. 165.

(*d*) *Re Bootle Cold Storage and Ice Co.*, [1901] W. N. 54; and see *Re Abrahams (S.) & Sons*, [1902] 1 Ch. 695.

(*e*) *Re Beattie (E. & F.), Ltd.*, *supra*; *Re Tingri Tea Co., Ltd.*, *supra*.

(*f*) *Re Cunard Steamship Co., Ltd.*, [1908] W. N. 160.

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on notice or *ex parte*, is to be heard must be balloted for and marked with his name by the proper officer (*g*).

There is usually inserted in an order granting an extension of time for registration a proviso that the order is to be without prejudice to any rights acquired prior to actual registration against the persons entitled to the mortgage or charge (*h*). The usual form of proviso will not protect ordinary unsecured creditors unless, before actual registration, either they have acquired rights against or affecting the property charged by the debentures (*i*) or a winding up has commenced (*k*); and no express words for their protection will in ordinary cases be inserted (*l*). The ordinary form of proviso will be inserted in an order on an application made before the winding up of the company has commenced (*m*).

SUB-SECT. 5.—Remedies for enforcing Securities.

(i.) *Remedies under the Security.*

Remedies of
debenture-
holders.

612. If the debenture gives no security on the assets of the company, the debenture-holder, being an unsecured creditor, has only the rights against the company which any unsecured creditor has against an individual debtor, and also the right to present or support a petition for the winding up of the company (*n*). As a general rule, however, the holder of a debenture or debenture stock of a company has a security, and he or the mortgagee of specific assets of the company may enforce his rights as a legal or equitable mortgagee or incumbrancer against the company in the same manner as if it were an individual (*o*). One of these rights is to have a sale of the property subject to the security, either under the power given by the security or by statute, or with the assistance of the court. If the company goes into liquidation the rights of a secured creditor under his security are not affected (*p*), and the

(*g*) R. S. C., Ord. 5, r. 9; *Re Legal and General Investment Co.*, [1901] W. N. 72.

(*h*) *Re Joplin Brewery Co., Ltd.*, [1902] 1 Ch. 79; *Re Johnson (I. C.) & Co., Ltd.*, [1902] 2 Ch. 101, C. A., where the form of proviso settled by the Court of Appeal was as follows: "Provided always that this order is to be without prejudice to any right which may have been or may be acquired against the holders of the said debentures prior to the time when such debentures shall be actually registered." The order in that case referred to some only of a series of debentures, the remainder having been registered in due time. And see *Crew v. Cummings* (1888), 21 Q. B. D. 420, C. A.; *Re Parsons, Ex parte Furber*, [1893] 2 Q. B. 122, C. A.; and title **BILLS OF SALE**, Vol. III., pp. 74, 75.

(*i*) *Re Ehrmann Brothers, Ltd.*, [1906] 2 Ch. 697, C. A.

(*k*) *Ibid.*; *Re Anglo-Oriental Carpet Manufacturing Co.*, [1903] 1 Ch. 914.

(*l*) *Re Cardiff Workmen's Cottage Co., Ltd.*, [1906] 2 Ch. 627.

(*m*) *Ibid.*, where it was suggested that in a case of sufficient magnitude it would be well to give notice of the application to some of the unsecured creditors of substantial amount to give them an opportunity of being heard.

(*n*) *Re Spiral Globe, Ltd.*, [1902] 1 Ch. 396; but an order has been refused after winding up has commenced on the ground that with the protecting proviso it could have no beneficial effect (*Re Abrahams (S.) & Sons*, [1902] 1 Ch. 695); and see *Re Ehrmann Brothers, Ltd.*, *supra*.

(*o*) See p. 375, *post*.

(*p*) *Re Longdendale Cotton Spinning Co.* (1878), 8 Ch. D. 150; see title **MORTGAGE**.

liquidator cannot obtain an injunction to restrain a sale by the secured creditor except on the usual terms of paying the amount due, or, if it is not agreed, paying the amount claimed, into court (*q*).

613. The instrument of security, whether it is a specific mortgage or a debenture or a trust deed, often gives power to appoint a receiver or receiver and manager in specified events. When such a power is given in debentures of a series, it is a discretionary power in the nature of a trust, and if an appointment is made which is not for the benefit of the debenture-holders, but with a view to the benefit of the company or third persons, the court will interfere and appoint its own receiver (*r*).

The power of the secured creditor to appoint a receiver under his security can be exercised after the company has gone into liquidation (*s*), and where a receiver has been so appointed the court will not, if the appointment is valid, displace the receiver by appointing the liquidator (*t*). The receiver must apply in the winding up for leave, which is given as a matter of course, to take possession of the company's property, unless he has done so before the winding-up order was made.

If any person appoints a receiver or manager of the property of a company under any powers contained in any instrument, he must, within seven days from the date of the appointment, give notice of the fact to the registrar, who on payment of the prescribed fee is to enter the fact in the register of mortgages and charges (*a*).

614. If uncalled capital is included in the security, the liquidator is the proper person to get it in, and what he receives, less the expenses of making and enforcing the call, is paid to the receiver; but the court can authorise the receiver, on giving a proper indemnity to get in the calls in the name of the liquidator (*b*).

615. Where the security provides that the person appointed receiver is to be the agent of the company, and that the company is alone to be answerable for his acts, contracts, and defaults, neither the trustees nor the debenture-holders are personally liable in respect of contracts entered into by him, even although after his

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Appointment
of receiver or
manager.

After wind-
ing up.

Notice to
registrar.

Getting in
uncalled
capital.

Liability for
receiver's
contracts.

(*q*) *Re Lloyd (David) & Co., Lloyd v. Lloyd (David) & Co.* (1877), 6 Ch. D. 339, C. A.

(*r*) *Re Maskelyne British Typewriter, Ltd., Stuart v. Maskelyne British Typewriter, Ltd.*, [1898] 1 Ch. 133, C. A. The power of the debenture-holders to appoint a receiver is generally subject to control under the modification clauses of the security; see p. 360, *ante*.

(*s*) *Re Pound (Henry), Son and Hutchins* (1889), 42 Ch. D. 402, C. A.

(*t*) *Ibid.*; *Re Stubbs (Joshua), Ltd., Barney v. Stubbs (Joshua), Ltd.*, [1891] 1 Ch. 475, C. A.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 94 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 11]. Any person making default in complying with this requirement is liable to a fine not exceeding £5 for every day during which the default continues (*ibid.*, s. 94 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 11]). For forms of notice, see Board of Trade Order, March 29th, 1909, Form 53.

(*b*) *Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724; see p. 500, *post*. A mere nominee of the debenture-holders will not be allowed to recover calls in the liquidator's name (*Re Westminster Syndicate, Ltd.*, [1908] W. N. 236).

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appointment the company has gone into liquidation (c). Where there is no such provision, he will be the agent primarily of the debenture-holders, and they will be liable on his contracts (d).

When he is declared to be the agent of the company, then, until the company goes into liquidation, the receiver appointed by the debenture-holders, unlike a receiver appointed by the court (e), is not personally liable upon contracts which he enters into as such receiver (f) unless he agrees to be so liable. After the company has gone into liquidation he may be personally bound by any contracts entered into by him (g), and if he contracts in the name of the company he may be liable for breach of warranty of authority.

A receiver, incurring liability in respect of proper contracts, is entitled to be indemnified out of the property, subject to the security (h).

A liquidator cannot successfully apply in a winding up to have the receiver's remuneration fixed; but if the receiver has improperly paid himself remuneration, the liquidator must by action recover the amount so paid (i).

Filing
account.

616. Every receiver or manager of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, must once in every half-year while he remains in possession, and also on ceasing to act as receiver or manager, file with the registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates. On ceasing to act as receiver or manager he must file with the registrar notice to that effect, which notice the registrar is to enter on the register of mortgages and charges. Every receiver or manager who makes default in complying with this requirement is liable to a fine not exceeding £50 (k).

Payment of
preferential

617. Where, in the case of a registered company, either a receiver is appointed on behalf of the holders of any of its debentures secured by a floating charge, or possession is taken by, or on behalf of, those debenture-holders of any property comprised in

(c) *Gosling v. Gaskell*, [1897] A. C. 575, disapproving the *dictum* of Lord ESHER, M. R., in *Owen & Co v. Cronk*, [1895] 1 Q. B. 265, 272, C. A., that the receiver is the agent of the trustees. Compare Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 24 (1), (2).

(d) *Robinson Printing Co., Ltd. v. Chic, Ltd.*, [1905] 2 Ch. 123; *Re Vimbos, Ltd.*, [1900] 1 Ch. 470.

(e) See *Burt, Boulton and Hayward v. Bull*, [1895] 1 Q. B. 276, C. A., and p. 379, *post*.

(f) *Owen & Co. v. Cronk*, *supra*; *Gosling v. Gaskell*, *supra*.

(g) *Gosling v. Gaskell*, *supra*.

(h) *Burt, Boulton and Hayward v. Bull*, *supra*; *Strapp v. Bull, Sons & Co.*, [1895] 2 Ch. 1, C. A.; *Batten v. Wedgwood Coal and Iron Co.* (1884), 28 Ch. D.

317. As to a receiver appointed by the court, see p. 379, *post*.

(i) *Re Vimbos, Ltd.*, *supra*.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 95 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 41]. A receiver or manager appointed by the court renders accounts under the ordinary practice; see R. S. C.; Ord. 50, rr. 18, 20; and title RECEIVERS. For forms of notice and receiver or manager ceasing to act, see Board of Trade Order, March 29th, 1909, Form 57a.

or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the Act of 1908 (l) to be paid in priority to all other debts must be paid forthwith out of the assets coming to the hands of the receiver or other person taking possession, in priority to any claim for principal or interest in respect of the debentures (m). Any payments made in respect of such preferential debts must be recouped so far as may be out of the assets of the company available for the payment of general creditors (n).

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(ii.) *Remedies on Application to the Court.*

(a) *In Case of Specific Mortgages and Charges.*

618. A company's specific legal mortgage or equitable charge can be enforced in the same manner as the securities given by individuals (o). Specific mortgage.

(b) *Remedies of Debenture-holders in General.*

619. A debenture-holder may obtain the appointment of a receiver or receiver and manager (p). He may also sue for the recovery of his principal or interest if in arrear; or present a petition for the winding up of the company (q); or enforce his security by obtaining an order for sale, or, in some instances, for foreclosure (r); or, where, as is sometimes the case, the principal moneys and interest are guaranteed by some other company or person, enforce the guarantee. The passing of a resolution for voluntary winding up does not prevent a debenture-holder from commencing proceedings to enforce his security (s), and the court will not upon the liquidator's application restrain the action (t). Remedies of debenture-holders.

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209; see p. 516, *post*.

(m) *Ibid.*, s. 107 (1) [Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), s. 3].

(n) *Ibid.*, s. 107 (3) [Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), s. 3]. The Act of 1908 does not affect specific charges. As to the change of occupancy in such cases when the receiver takes possession, see *Richards v. Kidderminster Overseers*, [1896] 2 Ch. 212; *Re Marriage, Neave & Co., North of England Trustee, Debenture and Assets Corporation v. Marriage, Neave & Co.*, [1896] 2 Ch. 663, C. A. The Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), was not retrospective (*Re Waverley Typewriter, D'Esterre v. Waverley Typewriter*, [1898] 1 Ch. 699; *Weeks v. Kent, Sussex, and General Land Society*, [1898] W. N. 40). The Act of 1908 applies where a receiver appointed by the debenture-holders takes possession although no appointment has been made by the court (*Re Barnby's, Ltd., Fallows v. Barnby's, Ltd.*, [1899] W. N. 103). The periods of time mentioned in s. 209 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), are, in the case of a receiver, reckoned from the date of his appointment or taking possession, as the case may be (*ibid.*, s. 107 (2)).

(o) See title MORTGAGE.

(p) See pp. 376, 380, *post*.

(q) See p. 389, *post*.

(r) See p. 382, *post*.

(s) *Re Longdendale Cotton Spinning Co.* (1878), 8 Ch. D. 150; *Re Pound (Henry), Son and Hutchins* (1889), 42 Ch. D. 402, C. A.; *Re Lloyd (David) & Co., Lloyd v. Lloyd (David) & Co.* (1877), 6 Ch. D. 339, C. A.

(t) *Re Longdendale Cotton Spinning Co.*, *supra*.

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Where a compulsory order or a supervision order has been made, a debenture-holder's action cannot be commenced or proceeded with except with the leave of the winding-up court; but such leave is granted as a matter of course unless the same relief is given to the debenture-holder in the winding up as he would obtain in the action (a)

(c) *Appointment of Receiver.*

How
appointed.

620. Whether debentures or trust deeds do or do not expressly give power to appoint a receiver, the holders of the debentures or debenture stock can generally obtain from the court the appointment of a receiver (b), and in many cases of a receiver and manager of the company's business (c).

Application
to court.

621. The appointment of a receiver or a receiver and manager by the court may be obtained upon an originating summons, but it is generally obtained by motion in an action. The originating summons or writ, in addition to claiming the appointment of a receiver and manager, usually claims to have the debentures enforced by foreclosure or sale (d), and asks for accounts and inquiries, which will include an account of what is due to the debenture-holders upon the security of the debentures, and an inquiry as to what property is comprised in or charged by the debentures (e).

When
appointed
by court.

622 A receiver or receiver and manager will be appointed by the court where the principal (f) or interest (g) is in arrear; or, if neither is in arrear, where the security is in jeopardy (h); or where the company has sold the whole, or substantially the whole, of its undertaking and assets otherwise than in the ordinary course of business, and has ceased to be a going concern (i); or on an order being made

(a) See p. 539, *post*. As to proof by debenture-holders and other secured creditors, see p. 519, *post*.

(b) *Perry v. Oriental Hotels Co.* (1870), 5 Ch. App. 420; *McMahon v. North Kent Ironworks Co.*, [1891] 2 Ch. 148.

(c) See p. 380, *post*.

(d) See p. 382, *post*.

(e) As to debenture-holders' actions generally, see pp. 384 *et seq.*, *post*. As to the inquiries where no other incumbrances are known to exist, see *Re Addressograph, Ltd.*, *Backhouse v. Addressograph, Ltd.*, [1909] W. N. 260.

(f) *Hopkins v. Worcester and Birmingham Canal Proprietors* (1868), L. R. 6 Eq. 437.

(g) *Bissill v. Bradford Tramways Co.*, [1891] W. N. 51. If the writ in a debenture-holder's action is issued before the principal is payable or the interest is in default the court has jurisdiction to and will appoint a receiver as soon as the money becomes payable (*Re Carshalton Park Estate, Ltd.*, *Graham v. Carshalton Park Estate Ltd.*, *Turnell v. Carshalton Park Estate, Ltd.*, [1908] 2 Ch. 62).

(h) *McMahon v. North Kent Ironworks Co.*, *supra*; *Thorn v. Nine Reefs, Ltd.* (1892), 67 L. T. 93, C. A.; *Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574, where the sheriff had seized; *Re Victoria Steamboats, Ltd.*, *Smith v. Wilkinson*, [1897] 1 Ch. 158; *Re London Pressed Hinge Co., Ltd.*, *Campbell v. London Pressed Hinge Co., Ltd.*, [1905] 1 Ch. 576.

(i) *Hubbuck v. Helms* (1887), 56 L. J. (Ch.) 536; and see *Re Borax Co.*, *Foster v. Borax Co.*, [1901] 1 Ch. 326, C. A., disapproving *Re Borax Co.*, *Foster v. Borax Co.*, [1899] 2 Ch. 130.

or a resolution being passed for the winding up of the company (*j*); or, even if a winding-up petition has been presented, where the company is insolvent (*k*), although the security contains no provision making the principal money then immediately payable (*l*).

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Who may be appointed.

623. The person appointed receiver by the court is usually the person nominated by the plaintiff in an action to enforce the security (*m*). The usual practice is to make the appointment upon an affidavit of fitness on the hearing of the motion asking for the appointment (*n*), and not on a reference of the matter to chambers. Where the notice of motion does not ask for the appointment of any particular person, or an affidavit of fitness is not forthcoming, an order is made for the appointment of a receiver, and it is referred to chambers to determine who is to be appointed.

624. The receiver's appointment is usually made conditional on his giving security, the amount and nature of which are settled in chambers. If it is important that the receiver should act at once, application is made for liberty for him so to act, and an immediate appointment is made on the plaintiff undertaking to be personally answerable, pending the completion of the security, for all the liabilities of the receiver which would be covered by the security when completed (*o*). Where the applicant is a limited company, an undertaking from the company is not usually accepted, but must be given by some responsible person who signs an undertaking in the registrar's book. Where such an undertaking is not given, the appointment is conditional, taking effect only upon his giving security in chambers, and any disposition of the mortgaged assets pending completion of the security is not a contempt of court (*p*). If the receiver is appointed with power to take possession, but the order does not direct security to be given, the appointment takes effect on the making of the order (*q*). Where a receiver is appointed until judgment or further order and is continued after judgment, he must give further security (*r*).

Security of receiver.

Premiums paid by a receiver to a guarantee society for joining

(*j*) *Hodson v. Tea Co.* (1880), 14 Ch. D. 859; *Re Panama, New Zealand and Australian Royal Mail Co.* (1870), 5 Ch. App. 318, 323.

(*k*) *Re Victoria Steamboats, Ltd., Smith v. Wilkinson*, [1897] 1 Ch. 158.

(*l*) *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547, C. A.

(*m*) See *Budgett v. Improved Patent Forced Draught Furnace Syndicate, Ltd.*, [1901] W. N. 23, where the plaintiff was appointed.

(*n*) When a receiver appointed by the court has sold property of the company the overseers are not entitled to an order that in default of distress the receiver shall pay the rates out of the proceeds of sale (*Re British Fullers' Earth Co., Gibbs v. British Fullers' Earth Co.* (1901), 17 T. L. R. 232).

(*o*) With reference to the point of time from which a receiver appointed by the court is deemed to be in possession, see *Morrison v. Skerne Ironworks Co.* (1889), 60 L. T. 588; *Edwards v. Edwards* (1876), 2 Ch. D. 291, C. A.; *Re Marriage, Neave & Co., North of England Trustee, Debenture, and Assets Corporation v. Marriage, Neave & Co.*, [1896] 2 Ch. 663, 671, C. A.

(*p*) As to when interference with a receiver is contempt of court, see title CONTEMPT OF COURT, Vol. VII., p. 289.

(*q*) *Morrison v. Skerne Ironworks Co.*, *supra*.

(*r*) *Brinsley v. Lynton and Lynmouth Hotel and Property Co.*, [1895] W. N. 53.

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Official
 receiver
 as receiver.

in his security are allowed in his accounts if he is appointed without remuneration (s).

625. Where an application is made to the court to appoint a receiver on behalf of the debenture-holders or other creditors of a company which is being wound up by the court, the official receiver may be so appointed (t). Although the debenture-holders cannot insist upon their own nominee being appointed or retained in office as against the official receiver or liquidator, the court will not as a rule displace a receiver appointed by the debenture-holders or mortgagees under their special powers, and the Court of Appeal will not, except under special circumstances, interfere when the court below has refused to displace a receiver by a liquidator (u). The court sometimes appoints the liquidator as receiver in respect of some or all of the assets (a); and he may be appointed in the place of a receiver appointed by the court (b) where the assets are of an unusual character. In such a case the official receiver may be appointed receiver of part of them, leaving the receiver originally appointed to receive the other assets (c). The liquidator cannot obtain the discharge of the receiver unless with a view to his being appointed receiver in his place (d).

In a purely voluntary winding up no preference as to the appointment as receiver is given to the liquidator over the nominee of the secured creditors (e).

Receiver of
 land abroad.

626. A receiver may be appointed of land out of the jurisdiction (f); but, until what is necessary has been done in accordance with foreign law to put the receiver in possession of such property, no one, whether a British subject or a foreigner, is, by taking proceedings in a foreign country with reference to such property, guilty of contempt of court (g).

Notice of
 appointment
 to registrar.

627. If any person obtains an order for the appointment of a receiver or manager of the property of a company, he must within seven days from the date of the order give notice of the fact to the

(s) *Harris v. Sleep*, [1897] 2 Ch. 80, C. A.

(t) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 162 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (6)]; see *British Linen Co. v. South American and Mexican Co.*, [1894] 1 Ch. 108, C. A.

(u) *Re Stubbs (Joshua), Ltd., Barney v. Stubbs (Joshua), Ltd.*, [1891] 1 Ch. 475, C. A.; *Re Pound (Henry), Son and Hutchins* (1889), 42 Ch. D. 402, C. A.

(a) *Ibid.*; *Willmott v. London Celluloid Co.* (1885), 52 L. T. 642, C. A.

(b) *Perry v. Oriental Hotels Co.* (1870), 5 Ch. App. 420; *Re Compagnie Générale de Bellegarde, Campbell v. Compagnie Générale de Bellegarde* (1876), 2 Ch. D. 181; *Tottenham v. Swansea Zinc Ore Co.* (1884), 53 L. J. (CH.) 776; *Bartlett v. Northumberland Avenue Hotel Co.* (1885), 53 L. T. 611, C. A.

(c) *British Linen Co. v. South American and Mexican Co.*, [1894] 1 Ch. 108, C. A.

(d) *Strong v. Carlyle Press*, [1893] 1 Ch. 288.

(e) *Boyle v. Bettus Llantwit Colliery Co.* (1876), 2 Ch. D. 726.

(f) *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan, and Agency Co.*, [1892] 2 Ch. 303.

(g) *Re Maudslay, Sons and Field, Maudslay v. Maudslay, Sons and Field*, [1900] 1 Ch. 602. As to a receiver obtaining possession, see *Savage v. Bentley*, [1904] W. N. 89; and see *Re Derwent Rolling Mills Co.* (1905), 21 T. L. R. 701.

registrar, who, on payment of the prescribed fee, is to enter the fact in the register of mortgages and charges (*h*).

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628. A receiver appointed by the court is an officer of the court, and any interference with him as such receiver is a contempt of court (*i*).

Position of
receiver.

The receiver must collect, get in, and realise the property subject to the security, except uncalled capital (*j*). If the company is in liquidation, the liquidator is the proper person to make and enforce the calls the proceeds of which he pays over to the receiver; leave, however, may be given to the receiver on giving a proper indemnity to take proceedings in the name of the liquidator to enforce such calls (*k*). The order appointing a receiver directs him forthwith, out of any assets coming to his hands, to pay the preferential debts of the company having priority over the claims of the debenture-holders (*l*), and provides that he is to be allowed all such payments in his accounts (*m*).

A receiver appointed by the court is personally liable upon the contracts made by him as receiver, subject to his right to be indemnified out of the property subject to the debentures (*n*). He is not the agent of the company, at any rate before it is in winding up, or of the court, or of anyone else (*o*). He is not liable, by reason of his having taken possession of other property let to the company on a hiring agreement, to pay rent to the lessor (*p*).

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 94 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 11 (1)]. Any person making default in complying with this requirement is liable to a fine not exceeding £5 for every day on which the default continues (*ibid.*, s. 94 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 11]). For form of notice, see Board of Trade Order, March 29th, 1909. Form 53. The fee is 5s.

(*i*) See *Ames v. Birkenhead Docks (Trustees)* (1855), 20 Beav. 332; *Russell v. East Anglian Rail. Co.* (1850), 3 Mac. & G. 104, and title CONTEMPT OF COURT, Vol. VII., p. 291. As to actions against receivers and claims to property in their possession, see *Re Maidstone Palace of Varieties, Ltd.*, [1909] 2 Ch. 283; and title CONTEMPT OF COURT, Vol. VII., p. 291.

(*j*) As to giving the receiver possession of the title deeds, see *Re Ind, Coope & Co.* (1909), 26 T. L. R. 11.

(*k*) *Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724; *Harrison v. St. Etienne Brewery Co.*, [1893] W. N. 108; *Re Westminster Syndicate, Ltd.*, [1908] W. N. 236. As to applications to the court, see *Parker v. Dunn* (1845), 8 Beav. 497; and title RECEIVERS.

(*l*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 107, 209; and p. 516, *post*.

(*m*) See *Re Debenture-holders' Actions*, Practice Note, [1900] W. N. 58. As to what rates the receiver is bound to pay, see *Re Mannesmann Tube Co., Ltd.*, *Von Siemens v. Mannesmann Tube Co., Ltd.*, [1901] 2 Ch. 93. As to what are wages, see *Re Earle's Shipbuilding and Engineering Co.*, *Barclay & Co. v. Earle's Shipbuilding and Engineering Co.*, [1901] W. N. 78.

(*n*) *Owen & Co. v. Cronk*, [1895] 1 Q. B. 265, C. A.; *Burt, Boulton, and Hayward v. Bull*, [1895] 1 Q. B. 276, C. A.; *Re Glasdir Copper Mines, Ltd.*, *English Electro-Metallurgical Co., Ltd. v. Glasdir Copper Mines, Ltd.*, [1906] 1 Ch. 365, 368, C. A. As to costs where a receiver is given leave to appeal in proceedings against the company, see *Re Griffiths Cycle Corporation* (1902), 85 L. T. 776.

(*o*) *Burt, Boulton, and Hayward v. Bull*, *supra*, at pp. 279, 374; *Re Glasdir Copper Mines, Ltd.*, *English Electro-Metallurgical Co., Ltd. v. Glasdir Copper Mines, Ltd.*, *supra*.

(*p*) *Hay v. Swedish and Norwegian Rail. Co.* (1892), 8 T. L. R. 775.

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Where leaseholds are mortgaged by sub-demise to the trustees for debenture-holders a receiver appointed by the court is not liable for rent or outgoings to the head lessor, who cannot require payment thereof out of the moneys received by the receiver while in occupation of the mortgaged premises; and even if the receiver has, by order of the court, sold goods upon which the head lessor might have distrained, the court will not order him to pay the head lessor out of the proceeds (q). He must not pay rates in default of distress (r).

(d) *Appointment of Manager.*

Where
receiver and
manager
appointed.

629. Where a company, on whose assets debentures are charged, is a going concern, the court will, at the instance of the holders of debenture or debenture stock, appoint not merely a receiver, but a receiver and manager (s). To justify his appointment the goodwill of the company must, expressly or by implication, be charged (t). In the case, however, of a company incorporated for purposes of a public nature, and having statutory powers and duties, whether incorporated by a special Act or by charter, or under the Act of 1908, a holder of mortgages, debentures, or debenture stock cannot obtain the appointment of a manager thereof (a); but an order may be made appointing a receiver of the tolls or sums charged by the mortgages, debentures, or debenture stock, without prejudice to the right to recover by action the principal and interest in arrear upon the mortgages or debentures, or the interest on the debenture stock (b).

Where the company is carrying on a business which it is advisable to continue in the interests of the debenture-holders for the more beneficial realisation of their security, the court will appoint a receiver and manager, even where the charge does not in terms include the goodwill, if it includes all the property of the company (c). A special case must be made out for the appointment of a manager by the affidavit in support of the application, and a manager is only appointed for a limited period (usually three months); any extension of time required must be applied for

(q) *Hand v. Blow*, [1901] 2 Ch. 721, C. A.

(r) *Re British Fullers' Earth Co.*, *Gibbs v. British Fullers' Earth Co.* (1901), 17 T. L. R. 232.

(s) *Reid v. Explosives Co.* (1887), 19 Q. B. D. 264, C. A.

(t) *Re Leas Hotel Co.*, *Salter v. Leas Hotel Co.*, [1902] 1 Ch. 332; as to the words which are sufficient to include goodwill, see *Peek v. Trinsmaran Iron Co.* (1876), 2 Ch. D. 115; *Makins v. Ibotson (Percy) & Sons*, [1891] 1 Ch. 133; *Whitley v. Challis*, [1892] 1 Ch. 64, C. A.; *Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, C. A.; *Jennings v. Jennings*, [1898] 1 Ch. 378; *Re David and Mathews*, [1899] 1 Ch. 378. As to registration of the manager's appointment, see pp. 373, 378, *ante*.

(a) *Gardner v. London, Chatham and Dover Rail. Co.* (No. 1), *Drawbridge v. London, Chatham and Dover Rail. Co.*, *Gardner v. London, Chatham and Dover Rail. Co.* (No. 2), *Imperial Mercantile Credit Association v. London, Chatham and Dover Rail. Co.* (1867), 2 Ch. App. 201; *Blaker v. Herts and Essex Waterworks Co.* (1889), 41 Ch. D. 399; *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, C. A.

(b) *Re Mitchell's Estate*, *Mitchell v. Moberly* (1877), 6 Ch. D. 655; *Holdsworth v. Davenport* (1876), 3 Ch. D. 185; *Attree v. Hawe* (1878), 9 Ch. D. 337, C. A.

(c) *Peek v. Trinsmaran Iron Co.*, *supra*; *Makins v. Ibotson (Percy) & Sons*, *supra*; *Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574; see

before the period expires (*d*). Where no business is being carried on, or it is not in the interests of the debenture-holders to continue it, a receiver only is appointed.

Jeopardy justifies the appointment of a manager of the company's business (*e*).

The appointment of a receiver and manager operates as a dismissal of the servants of the company (*f*); they do not on his appointment become his servants (*g*).

630. The court sometimes empowers a receiver and manager to borrow money for the purpose of carrying on the company's business or preserving its property, and to secure it by creating a charge having priority to the charge created by the debentures (*h*).

Liberty to raise money by a charge having priority over the debentures in order to preserve property in the receiver's possession is only granted where special urgency is shown, unless all the parties interested are before the court (*i*). Where a receiver is authorised to borrow to a fixed amount, and he has borrowed a part of the amount and repaid it, his original borrowing power is not diminished (*k*).

631. Where advances are made by a party to the action, the receiver or receiver and manager is entitled to take his costs and expenses out of the assets in priority to the sums advanced, if the true bargain is that the assets are to be realised by him for the benefit of all concerned. It is doubtful whether the same rule applies where a stranger makes the advance; and the order ought to state whether the charge to be given by him is to be subject to or free from his right to indemnity. Where orders are made giving the receiver liberty, in order to preserve the company's property and carry on the business, to borrow in priority, and the moneys are borrowed by him from the plaintiffs on first charges, not expressly reserving his right to indemnity, and the assets when sold are insufficient to satisfy both the plaintiffs' prior lien charges and the receiver's costs and expenses (including remuneration), the costs and expenses have priority over the prior lien charges (*l*).

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Dismissal of
servants.

Prior lien
securities.

Right of
indemnity.

Campbell v. Lloyd's, Barnett's and Bosanquet's Bank, Ltd. (1889), cited [1891] 1 Ch. 136, n., where a manager was appointed on the application of a mortgagee; *Whitley v. Challis*, [1892] 1 Ch. 64, C. A.

(*d*) *Day v. Sykes, Walker & Co* (1886), 55 L. T. 763; *Re Victoria Steamboats, Ltd., Smith v. Wilkinson*, [1897] 1 Ch. 158. As to appointing a director as receiver and manager, see *Budgett v. Improved Patent Syndicate*, [1901] W. N. 23. For form of order, see *Davies v. Vale of Evesham Preserves, Ltd.*, [1895] W. N. 105.

(*e*) *Re Victoria Steamboats, Ltd., Smith v. Wilkinson*, *supra*.

(*f*) *Reid v. Explosives Co.* (1887), 19 Q. B. D. 264, C. A.

(*g*) *Re Marriage, Neave & Co., North of England Trustee, Debenture and Assets Corporation v. Marriage, Neave & Co.*, [1896] 2 Ch. 663, C. A.

(*h*) *Greenwood v. Algeiras (Gibraltar) Rail. Co.*, [1894] 2 Ch. 205, C. A.

(*i*) *Securities and Properties Corporation, Ltd. v. Brighton Alhambra, Ltd.* (1893), 62 L. J. (CH.) 566.

(*k*) *Milward v. Avill and Smart, Ltd.*, [1897] W. N. 162.

(*l*) See *Strapp v. Bull, Sons & Co., Shaw v. London School Board*, [1895] 2 Ch. 1, C. A.; *Re Glasdir Copper Mines, Ltd., English Electro-Metallurgical Co., Ltd. v. Glasdir Copper Mines, Ltd.*, [1906] 1 Ch. 365; *Re New Zealand Midland Rail. Co., Smith v. Lubbock*, [1901] W. N. 105, C. A. As to set-off when the receiver and manager is carrying out a contract entered into by the company, see *Forster v. Nixon's Navigation Co.* (1906), 23 T. L. R. 138.

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Money.

Extent of
 indemnity.

Expenses and liabilities *bonâ fide* incurred by a manager in the ordinary course of business are, *primâ facie*, properly incurred and within the rules as to indemnity, and where he is authorised to borrow a sum not exceeding a certain limit for the general purposes of the business, the effect is to provide, at the expense of the parties interested, a special fund out of which the manager can indemnify himself. He is not, however, entitled without any further authority to incur expenses and liabilities to an unlimited extent, and to require them to be met out of the assets, his duty being, if he finds that the fund provided by the court is not sufficient, to cause the matter to be brought before the court, so that the court may increase it or give him leave to incur further expenses and liabilities. If without such an application he incurs expenses and liabilities exceeding the limit, he is not entitled to be indemnified against them, unless he can show special circumstances, to be determined in each particular case, justifying him in incurring such expenses and liabilities without first obtaining leave. It is not enough to show that the expenses or liabilities were incurred *bonâ fide* and in the ordinary course of business (*m*).

Where debts are properly incurred by a receiver and manager appointed by the court in carrying on the company's business, the court will see that such debts are satisfied either by the receiver himself, or in the case of his bankruptcy, or if for any other reason it is deemed advisable so to do, by payment direct to the creditors out of the funds in court available for the purpose (*n*).

A receiver and manager may not be able to require a continuation of the supply of gas or electric current to the premises without paying sums due for past supply (*o*).

(e) *Foreclosure or Sale.*

Right
 qualified by
 trust deed.

632. Although a debenture-holder, where his principal is due and default has been made in payment, is entitled in some cases to commence an action to enforce the debentures by foreclosure or

(*m*) *Re British Power Traction and Lighting Co., Ltd., Halifax Joint Stock Banking Co., Ltd. v. British Power Traction and Lighting Co., Ltd.* (1), [1906] 1 Ch. 497; *Re British Power Traction and Lighting Co., Ltd., Halifax Joint Stock Banking Co., Ltd. v. British Power Traction and Lighting Co., Ltd.* (No. 2), [1907] 1 Ch. 528; compare *Lathom v. Greenwich Ferry Co.* (1895), 72 L. T. 790. Subject as above stated, where the assets are insufficient, the order of priority of payment is as follows: (1) Costs of realisation of the property, including costs of an abortive sale; (2) the balance due to the receiver and manager (including his remuneration and his costs of suit); (3) the costs, charges and expenses of the trustees of a debenture trust deed; (4) plaintiff's costs of action (*Batten v. Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317; and see *Re London United Breweries, Ltd., Smith v. London United Breweries, Ltd.*, [1907] 2 Ch. 511. But moneys borrowed by a receiver on security of a first charge on the assets are not repayable where the assets are deficient, until after payment of the plaintiff's costs of action as between solicitor and client and the receiver's remuneration (*Re Boynton (A.), Ltd., Hoffman v. Boynton (A.), Ltd.*, [1910] 1 Ch. 519).

(*n*) *Re London United Breweries, Ltd., Smith v. London United Breweries, Ltd.*, *supra*.

(*o*) *Paterson v. Gas Light and Coke Co.*, [1896] 2 Ch. 476, C. A. *Husey v. London Electric Supply Corporation*, [1902] 1 Ch. 411. As to allowing a distress for gas supplied, see *Re Crosbie (Adolphe), Ltd.* (1910), 74 J. P. 26. As to the rights of overseers in respect of poor rates, see *Re British Fuller's Earth Co.* (1901), 17 T. L. R. 232.

sale, his right to sue may be qualified by the trust deed or conditions (*p*).

Where debentures or debenture stock are secured by a trust deed, and the security has become enforceable, the court will, in an action for that purpose, make an order for administration by the court of the trusts of the deed, and grant the ordinary relief given in an action for enforcing debentures. Where the objects for which the money was raised by the issue of debentures cannot be carried into effect, and part of it remains in the hands of the trustees, the court will, on the application even of a minority of the debenture-holders, order the unspent portion to be distributed among the debenture-holders after payment of expenses of saving and realising the property charged and costs (*q*).

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633. Foreclosure may be obtained in an action or in proceedings commenced by originating summons (*r*). As a rule, foreclosure is the remedy available where there are mortgage debentures which are not secured by a trust deed. Where there is a trust deed it is not generally available, the claim in the latter case being for a declaration of a charge, execution of the trusts, an account, and enforcement of the charge by sale. Where there is no trust deed, even when proceedings are commenced by writ of summons, foreclosure cannot be ordered in the absence of any one debenture-holder (*s*); but a foreclosure may be ordered where all the debenture-holders are before the court and concur (*t*).

(1) Fore-
closure.

The judgment should give liberty to the defendant company, at any time before foreclosure absolute, to apply to the judge in chambers for payment and transfer to the plaintiff, on account of the moneys due to him, of any money or securities in court to the credit of the action, or in the hands of the receiver (*u*).

An order for sale may also be obtained in the above proceedings. As a rule, however, it is not made until after judgment has been obtained in the action, and notice has been given to all the debenture-holders by circular or letter or by advertisement. Where the debenture-holders are entitled to a charge by virtue of the debentures, or if a trust deed or otherwise, and the plaintiff is suing on behalf of himself and other debenture-holders, and where the judge is of opinion that there must eventually be a sale, he may direct a sale before judgment, and also after judgment before all the persons interested are ascertained whether served or not (*a*). Where

(*p*) See *Rogers & Co. v. British and Colonial Colliery Supply Association* (1898), 68 L. J. (q. b.) 14, where he had the right only if the trustees failed to take steps.

(*q*) *Collingham v. Sloper, Foreign American and General Investments Trust Co. v. Sloper*, [1893] 2 Ch. 96; [1894] 3 Ch. 716, C. A.; *National Bolivian Navigation Co. v. Wilson* (1880), 5 App. Cas. 176. As to the power of the court to limit a time within which the holders of the debentures, if payable to bearer, are to come in and claim, see *Saragossa and Mediterranean Railway v. Collingham*, [1904] A. C. 159, reversing *Collingham v. Sloper*, [1901] 1 Ch. 769, C. A.; and compare *Elkins v. Capital Guarantee Society* (1900), 16 T. L. R. 423, C. A.

(*r*) *Oldrey v. Union Works, Ltd.*, [1895] W. N. 77; *Sadler v. Worley*, [1894] 2 Ch. 170.

(*s*) *Re Continental Oxygen Co., Elias v. Continental Oxygen Co.*, [1897] 1 Ch. 511.

(*t*) *Sadler v. Worley*, *supra*.

(*u*) *Cumming v. Metcalfe's London Hydro* (1895), 2 Mans. 418.

(*a*) R. S. C., Ord. 51, r. 1B.

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the action is not a representative one the above rule does not apply (b). Where the order is asked for on motion for judgment on admissions in the pleadings, an affidavit of the facts is required (c). On such a motion an immediate sale will be ordered where the property is in jeopardy; but the order will be for sale with the approbation of the judge unless all the subsequent debenture-holders are parties, so that the absent parties may be brought in on the application to approve the conditional contract for sale (d).

(2) Sale.

634. Where an order is made for the sale of the property charged by the debentures, the sale must generally be carried out under the direction of the court and the purchase-money paid into court to the credit of the action. The court or a judge may also authorise a sale to be carried out by laying proposals before the judge in chambers for his sanction, or by proceedings altogether out of court, if he is satisfied by evidence that all the persons interested in the property to be sold are before the court or are bound by the order for sale. Every order authorising such proceedings altogether out of court must be prefaced by a declaration that the judge is so satisfied, and a statement of the evidence upon which such declaration is made (e).

A sale will not be ordered in the case of a company incorporated for purposes of a public nature and having statutory powers and duties (f).

(f) *Practice in Debenture-holder's Action.*

Commence-
ment of
action.

635. The writ in a debenture-holder's action must be intituled "In the matter of (*the particular company*)" and where a winding-up order has been made before writ, the action must be assigned to the judge then exercising the winding-up jurisdiction of the court (g). Where a winding-up order is made after writ, any action or proceeding by a mortgagor or debenture-holder of the company against the company for the purpose of realising his security, or by any other person to enforce a claim against its assets or property, which is pending in the High Court or before any judge thereof, is without further order to be transferred to the judge who for the time being exercises the winding-up jurisdiction of the High Court (h). Where a winding-up order is made either before or after the writ, the action can only be begun or proceeded with, as the case may be, by leave of the court having jurisdiction to wind up the company (i), but in either case leave will be given very much as of course.

(b) *Parkinson v. Wainwright & Co.* (1895), 64 L. J. (CH.) 493.

(c) *Re Day and Night Advertising Co., Upward v. Day and Night Advertising Co.* (1900), 48 W. R. 362.

(d) *Re Crigglestone Coal Co., Stewart v. Crigglestone Coal Co.*, [1906] 1 Ch. 523.

(e) R. S. C., Ord. 51, r. 1A. An order for sale out of court generally requires the reserved bidding and the auctioneer's remuneration to be fixed by the master, and the purchase-money to be paid directly into court.

(f) See cases cited in note (a), p. 380, *ante*.

(g) Practice-Masters' Rules.

(h) Companies (Winding-up) Rules, 1909, rr. 2, 42.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 142, 203 (2); see p. 39.

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Parties.

Representa-
tive action

636. Usually the plaintiff is a debenture-holder, suing on behalf of himself and all other debenture-holders of the class to which he belongs, and the company, and also any other incumbrancers on the same property as in the case of proceeding to enforce ordinary mortgages, are defendants (*j*).

If there is a trust deed securing the debentures, the trustees must also be made parties to the action (*k*), and the relief claimed must include a claim that the trusts of the deed be carried into execution under the direction of the court.

In a foreclosure action by the holder of a mortgage of specific assets of a company which has subsequently given a floating charge by debentures on all its assets, the debenture-holders should be made defendants, even when the principal money secured to them is not yet payable (*l*).

637. A plaintiff suing on behalf of himself and other debenture-holders cannot, without the leave of the court, compromise or give up any of the rights of those he represents (*m*); but after judgment, if he has been paid off, and there is evidence that no other debentures have been issued, all further proceedings in the action will be stayed (*n*).

If the plaintiff becomes bankrupt, his estate vests in his trustee in bankruptcy, and unless the trustee goes on with the action it will be stayed (*o*).

Where a debenture-holder is sued in a representative capacity an order may sometimes be obtained authorising him to defend in that capacity (*p*).

If any debenture-holder objects to being represented by the plaintiff or any defendant appointed to represent his class, he may apply in the action and be added as a defendant, but at his own risk as to costs (*q*).

Trustees represent their beneficiaries where the action is to enforce a security (*r*). Where there are no trustees and the

(*j*) *Re Wilcox & Co. (late Fox (W. H.) & Co.), Ltd., Hilder v. Wilcox & Co. (late Fox (W. H.) & Co., Ltd.)*, [1903] W. N. 61; see *Re Crigglestone Coal Co., Stewart v. Crigglestone Coal Co.*, [1906] 1 Ch. 523.

(*k*) *Mortgage Insurance Corporation, Ltd. v. Canadian Agricultural Coal and Colonization Co., Ltd.*, [1901] 2 Ch. 377.

(*l*) *Wallace v. Evershed*, [1899] 1 Ch. 891; see *Griffith v. Pound* (1890), 45 Ch. D. 553; *Fairfield Shipbuilding and Engineering Co. v. London and East Coast Express Steamship Co.*, [1895] W. N. 64.

(*m*) *Re Calgary and Medicine Hat Land Co., Ltd., Pigeon v. Calgary and Medicine Hat Land Co., Ltd.*, [1908] 2 Ch. 652, 659, 662, C. A.; see R. S. C., Ord. 16, r. 9A.

(*n*) *Re Alpha Co., Ltd., Ward v. Alpha Co., Ltd.*, [1903] 1 Ch. 203.

(*o*) *Wolff v. Van Boelen* (1906), 94 L. T. 502; and see R. S. C., Ord. 16, rr. 9, 9A; *Collingham v. Sloper, Foreign, American and General Investments Trust Co. v. Sloper*, [1894] 3 Ch. 716, O. A.

(*p*) *Fairfield Shipbuilding and Engineering Co. v. London and East Coast Express Steamship Co.*, [1895] W. N. 64. But see *Re Cadogan and Hans Place Estate (No. 2), Ltd., Graham v. Cadogan and Hans Place Estate (No. 2), Ltd.*, [1906] W. N. 112, where it was said that such an order was unnecessary in the case of second debenture-holders being defendants.

(*q*) *Watson v. Cave* (No. 1) (1881), 17 Ch. D. 19, C. A.; *Fraser v. Cooper, Hall & Co.* (1882), 21 Ch. D. 718; *Debenture Corporation v. de Murietta & Co.* (1892), 8 T. L. R. 496.

(*r*) R. S. C., Ord. 16, r. 8.

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debenture-holders are puisne incumbrancers they must all be made parties if foreclosure is sought against them (s). It is not sufficient to make some of them parties as representing the whole (a). As regards a sale, however, if there is a security, and an action is brought to enforce it, then, whether there is or is not a trust deed, the court may direct a sale before judgment, and also after judgment before all the persons are ascertained whether served or not (b).

Short cause.

638. Frequently, on the hearing of a motion for the appointment of a receiver, all the parties to the action appear, and agree to treat the hearing of the motion as the trial of the action, and a judgment by consent is then taken. If, however, this is not done, a statement of claim should be delivered, and if there is not any defence delivered, or if the parties agree upon the form of the judgment, the action can then be disposed of as a short cause (c).

Default of
appearance.

In case there is no appearance within time, the action may, on the filing of an affidavit of service and a statement of claim, proceed as if the party had appeared (d). A master cannot dispense with a statement of claim against a defendant who does not appear, even when there are other defendants who do appear (e).

Declaration
of charge.

639. At the hearing of an action, the court sometimes declares that the debenture-holders are entitled to a charge (f).

A declaration of charge will be omitted from a judgment if there are debenture-holders other than those of the series which the plaintiff represents who are not parties to the action (g), or if there

(s) *Wallace v. Evershed*, [1899] 1 Ch. 891.

(a) *Griffith v. Pound* (1890), 45 Ch. D. 553.

(b) See p. 383, *ante*. If all debenture-holders subsequent to the plaintiffs are not parties, the order will be for sale subject to the judge's approval, so that absent parties may be brought in on the application for approval (*Re Crigglestone Coal Co.*, *Stewart v. Crigglestone Coal Co.*, [1906] 1 Ch. 523).

(c) *Re Dupont, Ltd.*, *Dupont v. Dupont, Ltd.*, [1906] W. N. 14. As to setting down as a short cause and the papers required, see Practice Note, [1901] W. N. 78. Proposed minutes of judgment must always be left even if a common-form judgment only is required (*Re Automatic Machines (Haydon and Urry's Patents), Ltd.*, *Graafe v. Automatic Machines (Haydon and Urry's Patents), Ltd.*, [1902] W. N. 236, *per* SWINFEN EADY, J.).

(d) R. S. C., Ord. 13, r. 12.

(e) *Re Norman, Norman v. Norman*, [1900] W. N. 159. As to entering appearance, summons for directions, delivery of defence, and motion for judgment in default of defence, see title PRACTICE AND PROCEDURE. On the summons for directions the order ought to direct the evidence to be taken on affidavit, and with the defendant's consent the action can then be tried on the earliest short cause day, but if this is not done a statement of claim should be directed; but the evidence filed on the application for a receiver and additional evidence may be allowed to be used (*Re Gutta Percha Corporation, Ltd.*, *Thornton v. Gutta Percha Corporation, Ltd.*, [1899] W. N. 251). As to setting down with affidavit evidence without consent, compare *Re Pringle & Co.*, [1903] W. N. 207; *Re Kitson Empire Lighting Co.* (1910), not reported, May 30, 1910 (PARKER, J.).

(f) *Marwick v. Thurlow (Lord)*, [1895] 1 Ch. 776; *Re Crigglestone Coal Co.*, *Stewart v. Crigglestone Coal Co.*, *supra*; *Brinsley v. Lynton and Lynmouth Hotel and Property Co.*, [1895] W. N. 53; *Parkinson v. Watnwright & Co., Ltd.*, [1905] W. N. 63; but VAUGHAN WILLIAMS, J., would not, when he was the winding-up judge, make such a declaration in a short cause on motion for judgment unless the company by its liquidator appeared and consented; see *Marwick v. Thurlow (Lord)*, *supra*.

(g) *Re Prince and Baugh, Ltd.*, *Bedell v. Prince and Baugh, Ltd.*, [1902] W. N. 96.

is a question of priorities to be decided (*h*). There is no power to make the declaration in chambers (*i*).

If in a representative action by a debenture-holder a personal judgment against the company is asked for in order to reach property not charged, the court will declare that the debenture-holders are entitled to stand in the position of judgment creditors and appoint a receiver of the uncharged property (*k*).

There is an ordinary form of judgment to be used in debenture-holders' actions which is now believed to be under revision (*l*).

Special inquiries are sometimes ordered, for example, as to determining priorities between claims of debenture-holders. Under an inquiry directed by the judgment in a representative action as to the property charged by the debentures the master may certify what uncalled capital, if uncalled capital is subject to the security, is due from the several shareholders, notwithstanding that no calls can actually be made in such an action; and where the plaintiff is himself a shareholder and is found indebted in a sum of uncalled capital, he, being a party to the action, is bound by that finding unless it is varied by the judge (*m*).

SECT. 14.
Borrowing
and
Securing
Money.

Form of
judgment.
Special
inquiries.

640. In ordinary cases the judgment in a debenture-holders' action should not be served on the debenture-holders, but notice should be given to them by circular or letter, or by advertisement if the case so requires. Notice of judgment must, however, be formally served if the court thinks it desirable and so orders (*n*).

641. The plaintiff, where the debentures do not rank *pari passu*, *Costa*.

(*h*) *Re Ehrmann Brothers, Ltd., Albert v. Ehrmann Brothers, Ltd.*, [1904] W. N. 48.

(*i*) *Halifax and Huddersfield Union Banking Co. v. Radcliffe, Ltd.*, [1895] W. N. 63.

(*k*) *Hope v. Croydon and Norwood Tramways Co.* (1887), 34 Ch. D. 130.

(*l*) See the form in *Re Wolverhampton District Brewery, Ltd., Downes v. Wolverhampton District Brewery, Ltd.*, [1899] W. N. 229, as varied by the Practice Note in *Re Debenture-holders' Action*, [1900] W. N. 58. The same form has been adopted where no sum was presently due, but the security was in jeopardy (*Wissner v. Levison and Steiner*, [1900] W. N. 152; *Re Day and Night Advertising Co., Upward v. Day and Night Advertising Co.* (1900), 48 W. R. 362; compare *Re British Railway Carriage Metal Fittings etc. Co., Mason v. British Railway Carriage Metal Fittings etc. Co.*, [1898] W. N. 173 (judgment on admissions). As to inquiries as to other incumbrances, see *Re Addressograph, Ltd., Backhouse v. Addressograph, Ltd.*, [1909] W. N. 260. Where, as is usually the case, interest on debentures is payable before principal, the fact that orders have been made for applying proceeds of sale in payment of principal will not be regarded as a final appropriation of the sums paid to principal, and the court will make the proper appropriation by a subsequent order (*Re Calgary and Medicine Hat Land Co., Ltd., Pigeon v. Calgary and Medicine Hat Land Co., Ltd.*, [1908] 2 Ch. 652, O. A.). As to the inquiries directed where some of the debenture-holders have not been registered in time, see *Re Ehrmann Brothers, Albert v. Ehrmann Brothers, Ltd.*, *supra*. As to the effect on liability for income tax of appropriating moneys as principal or interest by orders in an action to administer the trusts of a debenture trust deed, see *Smith v. Law Guarantee and Trust Society, Ltd.*, [1904] 2 Ch. 569, O. A.

(*m*) R. S. O., Ord. 51, r. 1A; see *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 92. No special provision is made for the case of a debenture-holders' action; but see R. S. C., Ord. 51, r. 1B.

(*n*) *Ibid.*, Ord. 16, r. 40; Ord. 55, rr. 35, 35A.

SECT. 14.
Borrowing
and
Securing
Money.

is entitled to his costs even where in the event nothing is payable in respect of his debentures (o).

As a general rule, the plaintiff in a representative action is only entitled to party and party costs (p); but where the assets are insufficient for the payment of the debentures in full, the plaintiff is entitled to solicitor and client costs (q). If the plaintiff is too poor to pay the difference between solicitor and client and party and party costs, and property has been recovered or preserved more than enough to pay the debenture-holders, the solicitor is entitled to a charging order for the difference on so much of the property as belongs to the debenture-holders (r).

Trustees of a debenture trust deed are entitled to be paid their costs before the funds are distributed among the debenture-holders, even when they and the company appear by the same solicitor (s). The defendant company is not entitled to costs unless the whole action fails, nor are second debenture-holders who are made defendants; both must look to the surplus (t).

SUB-SECT. 6.—*Effect of Winding up.*

Effect of
winding up

642 Where a company is being wound up, a floating charge on its undertaking or property created within three months of the commencement of the winding up is, unless it is proved that the company immediately after the creation of the charge was solvent, invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of 5 per cent. per annum (u). A payment made shortly before and in anticipation of the charge, and in reliance on a promise to execute it, is made at the time of its creation (a).

(o) *Carrick v. Wigan Tramways Co.*, [1893] W. N. 98.

(p) *Re Queen's Hotel Co., Cardiff, Ltd.*, *Re Vernon Tin Plate Co., Ltd.*, [1900] 1 Ch. 792.

(q) *Re New Zealand Midland Rail. Co.*, *Smith v. Lubbock*, [1901] 2 Ch. 357, C. A., where parties attending by leave were given party and party costs. And see *Re Boynton (A.), Ltd.*, *Hoffman v. Boynton (H.), Ltd.*, [1910] 1 Ch. 519.

(r) *Re Horne (W. C.) & Sons, Ltd.*, *Horne v. Horne (W. C.) & Sons, Ltd.*, [1906] 1 Ch. 271.

(s) *Mortgage Insurance Corporation, Ltd v. Canadian Agricultural Coal and Colonization Co., Ltd.*, [1901] 2 Ch. 377; and see *Batten v. Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317.

(t) *Re Clayton Engineering and Electrical Construction Co., Ltd.*, *Boddington v. Clayton Engineering and Electrical Construction Co., Ltd.*, [1904] W. N. 28. As to charging orders for the receiver's costs of recovering and preserving assets, see *Re Horne (W. C.) & Sons, Ltd.*, *Horne v. Horne (W. C.) & Sons, Ltd.*, *supra*.

(u) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 212 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 13]. As to when the giving of debentures is a fraudulent preference, see p. 544, *post*. As to the effect of winding up on the right to transfer debentures, see *Re Goy & Co., Ltd.*, *Farmer v. Goy & Co. Ltd.*, [1900] 2 Ch. 149; *Re Palmer's Decoration and Furnishing Co.*, [1904] 2 Ch. 743; *Re Brown and Gregory, Ltd.*, *Shepherd v. Brown and Gregory, Ltd.*, [1904] 1 Ch. 627; [1904] 2 Ch. 448, C. A., and see *Re Rhodesia Goldfields, Ltd.*, *Partridge v. Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239.

(a) *Re Columbian Fireproofing Co.*, [1910] 1 Ch. 758, affirmed [1910] W. N. 142, C. A.

On a winding up taking place a floating charge on property of a company ceases to be floating and is said to crystallise (*b*). Even where the debentures secured by such a charge are not by their terms payable till a future date, the security can be at once realised (*c*).

SECT. 14.
**Borrowing
and
Securing
Money.**

643. Holders of debentures or debenture stock are entitled to dividends on the face value of their securities *pari passu* with the other creditors, when they are mortgagees of the debentures or debenture stock, until their mortgage moneys have been paid in full (*d*). Holders of debentures may prove although the moneys secured by the debentures are not according to their terms due till a future date (*e*).

Proof in
winding up.

SUB-SECT. 7.—*Interest on Securities.*

644. If payment of interest on debentures has been guaranteed by a person who is subsequently adjudicated bankrupt, the estimated value of the future interest may be proved for in the bankruptcy, although the company has been dissolved (*f*).

Interest on
securities.

Although the debenture does not so provide, the principal money, if not paid on the appointed day, will continue to carry interest at the rate agreed on (*g*). Interest payable on debentures, although payable half-yearly, accrues *de die in diem* (*h*).

If the debenture-holder has obtained a judgment for the amount of his principal, he is usually from the date of the judgment only entitled to interest at the rate of 4 per cent. per annum (*i*).

A debenture-holder who, in payment of interest, accepts cheques which are by arrangement not presented, is not thereby prevented from claiming to be a secured creditor in respect of that interest (*k*). If in a debenture-holders' action the amount of the principal only is certified, in the belief that the security is insufficient, and payment is made on this footing, this does not prevent the full interest being payable if the security proves sufficient (*l*).

(*b*) See p. 351, *ante*.

(*c*) *Hodson v. Tea Co.* (1880), 14 Ch. D. 859; *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547, C. A.

(*d*) *Re Regent's Canal Ironworks Co.* (1876), 3 Ch. D. 43, C. A.; *Robinson v. Montgomeryshire Brewery Co.*, [1896] 2 Ch. 841. As to adjusting cross-claims between two companies both of which are in liquidation, the first being indebted to the second in respect of debentures, and the second owing to the first moneys ordered to be paid in misfeasance proceedings, see *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1904] 2 Ch. 45. As to proofs generally, on debenture and other securities, in a winding up, see p. 519, *post*.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 206 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 188]; see *Wallace v. Universal Automatic Machines Co.*, *supra*.

(*f*) *Re Fitzgeorge, Ex parte Robson*, [1905] 1 K. B. 462.

(*g*) *Price v. Great Western Rail. Co.* (1847), 16 M. & W. 244.

(*h*) *Re Rogers' Trusts* (1860), 1 Drew. & Sm. 338.

(*i*) *Re European Central Rail. Co., Ex parte Oriental Financial Corporation* (1876), 4 Ch. D. 33, C. A. But on the construction of the instrument he may be entitled to interest at a higher rate (*Economic Life Assurance Society v. Uaborne*, [1902] A. C. 147).

(*k*) *Re Defries & Sons, Ltd., Eichholz v. Defries & Sons, Ltd.*, [1909] 2 Ch. 423.

(*l*) *Re Calgary and Medicine Hat Land Co., Ltd., Pigeon v. Calgary and*

SECT. 15.

Winding up
in General.

How com-
pany can be
extinguished.

SECT. 15.—*Winding up in General.*

645. There is no provision for extinguishing a registered company (*m*) by any formal application analogous to a *scire facias* to repeal the charter of a chartered company (*n*); it can only be extinguished by winding up on certain specified grounds (*o*), which differ according to the mode in which the winding up is to be brought about (*p*), or in certain cases by being struck off the register without any winding-up proceedings being taken (*q*).

Different
kinds of
winding up.

646. The winding up of a company may be either (1) by the court (*r*); or (2) voluntary (*s*); or (3) subject to the supervision of the court (*t*).

The provisions of the Act of 1908 with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these three modes (*u*), different provisions, as a rule, relating to each particular mode.

Provisions
generally
applicable.

647. The following provisions are of general application, namely, those relating to the liabilities as contributories of past and present members of the company (*a*); the meaning of the term "contributory" (*b*); the nature of a contributory's liability (*c*); the death, bankruptcy or marriage of a contributory (*d*); the proof of debts of all descriptions (*e*); the application of bankruptcy rules in the case of insolvent companies (*f*); the preferential payment of certain kinds of debts (*g*); fraudulent preference (*h*); the effect of floating

Medicine Hat Land Co., Ltd., [1908] 2 Ch. 652, C. A. For the position where in a winding up the assets are sufficient to pay the principal of the debt, but not the interest, see *Re Whitaker, Whitaker v. Palmer*, [1904] 1 Ch. 299.

(*m*) As to unregistered companies, see p. 394, *post*.

(*n*) See title CORPORATIONS, Vol. VIII., p. 400.

(*o*) *Reuss (Princess) v. Bos* (1871), L. R. 5 H. L. 176, 193, 197, 202; *Salomon v. Salomon & Co.*, [1897] A. C. 22, 30.

(*p*) See pp. 391 *et seq.*, 569 *et seq.*, 594 *et seq.*, *post*.

(*q*) *Re Wallasey Brick and Land Co.* (1894), 63 L. J. (CH.) 415.

(*r*) See pp. 391 *et seq.*, *post*.

(*s*) See pp. 569 *et seq.*, *post*.

(*t*) See pp. 594 *et seq.*, *post*.

(*u*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 122 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 31 (2)]. The provisions of the Act of 1908, with respect to winding up do not apply to any company of which the winding up commenced before April 1st, 1909, but every such company must be wound up in the same manner and with the same incidents as if the Act had not passed, and, for the purposes of the winding up, the Act or Acts under which the winding up commenced remain in full force (*ibid.*, s. 287). The practice in winding up is, for the most part, regulated by the Companies (Winding-up) Rules, 1909, as to which see further pp. 552 *et seq.*, *post*.

(*a*) *Ibid.*, s. 123; see p. 487, *post*.

(*b*) *Ibid.*, s. 124; see p. 487, *post*.

(*c*) *Ibid.*, s. 125; see p. 492, *post*.

(*d*) *Ibid.*, ss. 126—128; see pp. 489, 490, *post*.

(*e*) *Ibid.*, s. 206; see p. 507, *post*.

Ibid., s. 207; see p. 512, *post*.

Ibid., s. 209; see p. 516, *post*.

Ibid., s. 210; see p. 544, *post*.

charges (i); paying classes of creditors in full and entering into compromises or arrangements (k); misfeasances by officers of the company (l); falsification of books (m); perjury (n); company's books being evidence (o); disposal of books and papers (p); setting aside the dissolution of the company (q); information as to pending liquidations (r); and the company's liquidation account (s).

SECT. 15.
Winding up
in General.

A winding up under the supervision of the court is for many purposes deemed to be a winding up by the court (t); and in a voluntary winding up, on application duly made, the court may exercise any powers which are incident to its own jurisdiction to wind up (u).

Supervision
proceedings.

SECT. 16.—*Winding up by the Court.*

SUB-SECT. 1.—*Jurisdiction.*

(i.) *In General.*

648. The courts having jurisdiction to wind up companies registered in England (w) are the High Court of Justice, the Chancery Courts of the Counties Palatine of Lancaster and Durham, and certain county courts (a), and each court has for the purposes of that jurisdiction all the powers of the High Court (b), and every prescribed officer of the court must perform any duties which an officer of the High Court may discharge by order of the judge thereof or otherwise in relation to the winding up of a company (c). A county court cannot, however, issue a writ of *fiery facias* addressed to the sheriff of the county for the purposes of enforcing an order which directs payment of money to a liquidator (d); nor can it decide a question as to title to property which arose before the winding up (e).

Courts
which have
winding-up
jurisdiction.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 212; see p. 348, *ante*.

(k) *Ibid.*, s. 214; see p. 602, *post*.

(l) *Ibid.*, s. 215.

(m) *Ibid.*, s. 216.

(n) *Ibid.*, s. 218.

(o) *Ibid.*, s. 220; see p. 505, *post*.

(p) *Ibid.*, s. 222; see p. 563, *post*.

(q) *Ibid.*, s. 223; see p. 567, *post*.

(r) *Ibid.*, s. 224; see p. 455, *post*.

(s) *Ibid.*, ss. 229, 230; see p. 451, *post*.

(t) *Ibid.*, s. 203.

(u) *Ibid.*, s. 193; see p. 582, *post*.

(w) As to unregistered companies, see pp. 394, 650, *post*.

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1]. As to the jurisdiction to wind up building societies and industrial and provident societies, see p. 394, *post*.

(b) The High Court cannot issue a writ of prohibition to a county court wrongly exercising this jurisdiction; the remedy is by appeal (*Re New Par Consols* (No. 2), [1898] 1 Q. B. 669, C. A.); compare *Skinner v. Northallerton County Court Judge*, [1899] A. C. 439.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (6)].

(d) *Re Bassett's Plaster Co.*, [1894] 2 Q. B. 96.

(e) *Re Ilkley Hotel Co.*, [1893] 1 Q. B. 248.

SECT. 16.

Winding up
by the
Court.High Court
or Palatine
courts.Judges of
High Court
who can
wind up
companies.

(ii.) Courts and Officers exercising Jurisdiction.

649. Where the amount of a company's share capital, paid up or credited as paid up, exceeds £10,000, the jurisdiction is in the High Court, or, in the case of a company whose registered office is situate within the jurisdiction of either of the Palatine courts, either in the High Court or in that Palatine court (*f*).

A guarantee company having no share capital, or an unlimited company without such capital, may be wound up by the High Court (*g*).

Subject to general rules and to orders of transfer made under the Judicature Acts, the winding-up jurisdiction of the High Court is, as the Lord Chancellor from time to time by general order directs, exercised, either generally or in specified classes of cases, either by such judge or judges of the Chancery Division as the Lord Chancellor assigns to exercise that jurisdiction, or by the judge who, for the time being, exercises the bankruptcy jurisdiction of the High Court (*h*).

Where the amount of the company's share capital, paid up or credited as paid up, does not exceed £10,000, the jurisdiction is (subject as stated below) in the county court in the district of which the registered office of the company is situated (*i*). The Lord Chancellor may, however, by order exclude a county court from having winding-up jurisdiction, and for the purposes of that jurisdiction may attach its district, or any part thereof, to the High Court or to any other county court, and may revoke or vary any such order. In exercising these powers the Lord Chancellor must provide that a county court shall not have jurisdiction unless it has for the time being jurisdiction in bankruptcy; but his order does not affect any jurisdiction or powers vested in any county court exercising the stannaries jurisdiction (*k*). Under existing rules and orders neither the City of London Court nor any county courts within the London bankruptcy jurisdiction have winding-up jurisdiction, even where the paid-up capital of the company does not exceed £10,000;

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (2)]. As to unregistered companies, see p. 647, *post*.

(*g*) *Re Monmouthshire and South Wales Employers' Mutual Indemnity Society* [1909] W. N. 6; *Re North of England Iron Steamship Insurance Association*, [1900] 1 Ch. 481.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 132 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 2]. The jurisdiction is at present exercised by SWINFEN EADY and NEVILLE, JJ.

(*i*) *Ibid.*, s. 131 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (3)]. The expression "registered office" means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up (*ibid.*, s. 131 (8) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 32 (3)]).

(*k*) *Ibid.*, s. 131 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (5)]; see *Re New Terras Tin Mining Co.*, [1894] 2 Ch. 344.

and outside that area only some county courts have jurisdiction in such cases (*l*).

SECT. 18.
Winding up
by the
Court.

Stannaries
cases.

651. Where a company is formed for working mines within the stannaries and is not shown to be actually working mines beyond the limits of the stannaries, or to be engaged in any other undertaking beyond those limits, or to have entered into a contract for such working or undertaking, the jurisdiction to wind up is in the court exercising the stannaries jurisdiction, whatever may be the amount of the capital of the company, and wherever its registered office is situate (*m*).

652. Nothing in the provisions above stated invalidates a proceeding by reason of its being taken in a wrong court (*n*).

Commencing
proceedings
in wrong
court.

The winding up or any proceedings therein may at any time and at any stage be transferred from one court to another, or may be retained in the court in which the proceedings were commenced, although it may not be the court in which they ought to have been commenced (*o*).

653. The officers of the court are the registrars (*p*), the official receivers (*q*), and, for most purposes, the liquidators (*r*).

Officers of
the court.

(iii.) *Companies which may be wound up by the Court.*

654. The Act of 1908 provides for the winding up of the following companies (*s*), namely, (1) companies formed and registered under the Act of 1908; or (2) existing companies (*a*); or (3) companies registered but not formed under the Joint Stock Companies Acts (*b*) or the Companies Act, 1862 (*c*); or (4) companies registered but not formed under the Act of 1908 (*d*), although the registration has taken place with a view to the winding up (*e*); or (5) unregistered companies (*f*).

Winding up
under the
Act of 1908.

(*l*) *Re Court Bureau* (No. 2), [1891] W. N. 15; *Re Real Estates Co.*, [1893] 1 Ch. 398.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (4)]; see p. 659, *post*.

(*n*) *Ibid.*, s. 131 (7) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (7)].

(*o*) *Ibid.*, s. 133 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 3 (1)]; see p. 541, *post*.

(*p*) See note (*t*), p. 541, *post*.

(*q*) See p. 423, *post*.

(*r*) See p. 428, *post*.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 122; see p. 36, *ante*.

(*a*) For the definition, see p. 36, *ante*.

(*b*) See p. 36, *ante*.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 246.

(*d*) *Ibid.*, ss. 245, 263 (ii.).

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 249 (1); *Southall v. British Mutual Life Assurance Society* (1871), 6 Ch. App. 614. A railway company incorporated under a special Act, which has voluntarily registered under Part VII. of the Act of 1908 (see p. 61, *ante*), may be wound up by the court (*Re Ennis and West Clare Rail. Co.* (1879), 3 L. R. Ir. 94); see *Re London Indiarubber Co.* (1866), 1 Ch. App. 329; *Bowes v. Hope Life Assurance Society* (1865), 11 H. L. Cas. 389; *Re Bank of London and National Provincial Insurance Association* (1871), 6 Ch. App. 421.

(*f*) See p. 647, *post*.

SECT. 16.
Winding up
by the
Court.

Companies
barred
under the
Act of 1908.

There are also certain companies and societies which, by statutes other than the Act of 1908, may be wound up under that Act, namely, unregistered assurance companies (*g*), registered building societies (*h*), registered industrial and provident societies (*i*).

655. There is no power under the Act of 1908 to wind up such non-trading bodies as literary or scientific institutions (*k*), or ordinary or non-proprietary clubs (*l*); or illegal companies (*m*); or foreign companies with no assets in England (*n*); or trade unions (*o*); or companies registered in Scotland or Ireland, even though they have branch offices in England (*p*).

A company which has been dissolved cannot be wound up unless it is an unregistered company (*q*) or the dissolution has been declared to have been void (*r*). Nor can it be wound up if it has been dissolved by being struck off the register as defunct, except, perhaps, where the dissolution has been obtained by fraud (*s*).

An abortive company which has not, in fact, been formed cannot be wound up as an unregistered company (*t*).

If, however, the court does make an order to wind up a company without having jurisdiction, the order cannot be treated as a nullity, and, unless and until it is discharged on appeal, it is binding

(*g*) *Re Great Britain Mutual Life Assurance Society* (1880), 16 Ch. D. 246, C. A.; and see Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 15; pp. 624, 633, *post*.

(*h*) Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 8; see title BUILDING SOCIETIES, Vol. III., pp. 394—397.

(*i*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 58; see *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102.

(*k*) *Re Bristol Athenæum* (1889), 43 Ch. D. 236.

(*l*) *Re St. James's Club* (1852), 2 De G. M. & G. 383. If a club is inadvertently wound up, a member's name will be taken off the list of contributories (*Re Neucombe (A. Martin)* (1908), *Times*, October 21, 1908); and see title CLUBS, Vol. IV., p. 437.

(*m*) *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, C. A.; compare *Re South Wales Atlantic Steamship Co.* (1876), 2 Ch. D. 763, C. A.; and see *Re Arthur Average Association for British, Foreign and Colonial Ships, Ex parte Hargrove & Co.* (1875), 10 Ch. App. 542; *Hume v. Record Reign Jubilee Syndicate* (1899), 80 L. T. 404. But it is no ground of objection that the company is carrying on an illegal business (*Re Brinsmead (Thomas Edward) & Sons*, [1897] 1 Ch. 406, C. A.; *Re International Securities Corporation*, 25 T. L. R. 31, C. A.); and see p. 398, *post*.

(*n*) *Re Lloyd Generale Italiano* (1885), 29 Ch. D. 219.

(*o*) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 5; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 68), s. 294.

(*p*) *Re Scottish Joint Stock Trust*, [1900] W. N. 114.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (iii.) (a); see p. 650, *post*.

(*r*) *Ibid.*, s. 223 (1).

(*s*) *Ibid.*, s. 242; *Re Pinto Silver Mining Co.* (1878), 8 Ch. D. 273, C. A.; *Re London and Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140, C. A.; and see p. 667, *post*.

(*t*) *Re Imperial Anglo-German Bank* (1872), 26 L. T. 229, C. A. As to the jurisdiction of the High Court, independently of any statute, to wind up the affairs of a company, see *Jones v. Charlemont (Lord)* (1848), 16 Sim. 271; *Clements v. Bowes* (1852), 17 Sim. 167, 171; *Ward v. Sittingbourne and Sheerness Co.* (1874), 9 Ch. App. 488.

on the creditors and contributories of the company (*u*), but not on strangers (*w*).

SECT. 16.
Winding up
by the
Court.

SUB-SECT. 2.—*Grounds for Winding up.*

656. A company (not being an unregistered company) (*x*) may be wound up by the court—

Grounds for
winding up
by court.

(1) If the company has by special resolution (*y*) resolved that the company be wound up by the court;

(2) If default is made in filing the statutory report or in holding the statutory meeting (*a*);

(3) If the company does not commence its business within a year from its incorporation (*b*), or suspends its business for a whole year;

(4) If the number of members is reduced, in the case of a private company (*c*), below two, or, in the case of any other company, below seven (*d*);

(5) If the company is unable to pay its debts;

(6) If the court is of opinion that it is just and equitable that the company should be wound up (*e*);

(7) If the court is satisfied that an existing voluntary winding up, or a winding up subject to supervision, cannot be continued with due regard to the interests of creditors or contributories (*f*).

(8) If the company, being an assurance company, makes default in compliance with any of the requirements of the Assurance Companies Act, 1909, for three months after notice of default by the Board of Trade (*g*).

657. Non-commencement, within a year, of business refers to actually setting to work, not merely allotting shares (*h*). An

Non-
commence-
ment of
business.

(*u*) *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, O. A.; *Re London Marine Insurance Association, Andrews' and Alexander's Case, Chatts' Case, Cook's Case, Crew's Case* (1869), L. R. 8 Eq. 176, 189, 193; *Re Arthur Average Association* (1876), 3 Ch. D. 522.

(*w*) *Re Bowling and Welby's Contract*, [1895] 1 Ch. 663, O. A.; *Re Newcombe (A. Martin)* (1908), *Times*, October 21, 1908.

(*x*) As to the meaning of unregistered company, see note (*l*) p. 647, *post*; as to the grounds of winding up an unregistered company, see p. 650, *post*.

(*y*) As to a special resolution, see p. 259, *ante*.

(*a*) As to the statutory report and meeting, see p. 248, *ante*. The petition in this case cannot be presented before the expiration of fourteen days after the last day on which the meeting ought to have been held, and then only by a shareholder (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (1) (b)).

(*b*) The date of incorporation is stated in the certificate of incorporation (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 16 (2)).

(*c*) As to private companies, see p. 73, *ante*.

(*d*) "Members" means actual members, and does not include past members, or representatives of deceased members, or trustees of bankrupt members (*Re Bowling and Welby's Contract*, [1895] 1 Ch. 663, O. A.).

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 129 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 79; Companies Act, 1900 (63 & 64 Vict. c. 48), s. 12 (8); Companies Act, 1907 (7 Edw. 7, c. 50), s. 37 (4)].

(*f*) *Ibid.*, s. 137 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 14]. S. 14 of the Act of 1890 only expressly gave the official receiver the right to petition in this case. An order ought not to be made at his instance except in a strong case, as where a public examination is absolutely necessary (*Re Jubilee Sites Syndicate*, [1899] 2 Ch. 204).

(*g*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 23; see p. 642, *post*.

(*h*) *Re South Luipaards Vlei Gold Mines* (1897), 13 T. L. R. 504, O. A.; *Re Caementium (Parents) Co., Ltd.*, [1908] W. N. 257.

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order on this ground may be made although the majority of the shareholders oppose (i). An order will not be made, however, where the company has commenced business abroad within the year and a *bonâ fide* intention is shown to commence business in this country (j). Nor will an order be made on the ground that the company has suspended its business for a year if a shareholder petitioning is opposed by a large majority of the shareholders and there is a *bonâ fide* intention to proceed with the business (k). A company does not cease to carry on business because it has given up part of its business (l). An order may be made, although nothing has been paid on the shares and there are no debts (m).

Inability to
pay debts.

658. A company (not being an unregistered company) is deemed to be unable to pay its debts—

(1) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding £50 then due, has served on the company, by leaving the same at its registered office (n), a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(2) If execution or other process, issued on a judgment decree or order of any court in favour of a creditor of the company, is returned unsatisfied in whole or in part; or

(3) If it is proved to the satisfaction of the court that the company is unable to pay its debts; in determining whether a company is unable to pay its debts, the court is to take into account the contingent and prospective liabilities of the company (o).

In the case of failure to satisfy the statutory demand the petition must not be presented before the three weeks have expired (p). Omission by a company *bonâ fide* disputing the debt is not neglecting to comply with the statutory demand (q). Default in

(i) *Re Tumacacori Mining Co.* (1874), L. R. 17 Eq. 534.

(j) *Re Capital Fire Insurance Association* (1882), 21 Ch. D. 209; and see *Re Petersburg and Viborg Gas Co.*, [1874] W. N. 196; *Reuss (Princess) v. Bos* (1871), L. R. 5 H. L. 176.

(k) *Re Middlesborough Assembly Rooms Co.* (1880), 14 Ch. D. 104, C. A.; *Re Metropolitan Railway Warehousing Co.* (1867), 36 L. J. (CH.) 827, C. A.; *Re Tomlin Patent Horse Shoe Co.* (1886), 55 L. T. 314.

(l) *Norwegian Titanic Iron Co., Ltd.* (1865), 35 Beav. 223; *Re New Gas Co.* (1877), 5 Ch. D. 703, C. A.

(m) *Re Tumacacori Mining Co.*, *supra*; *Re Caementium (Parent) Co., Ltd.*, [1908] W. N. 257; compare *Re New Gas Co.* *supra*, where the order was refused.

(n) As to the case where there is no registered office, see *Re British and Foreign Gas Generating Apparatus Co.* (1865), 13 W. R. 649.

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 130 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 80; Companies Act, 1907 (7 Edw. 7, c. 50), s. 28]. As to the law before 1907 relating to contingent and prospective liabilities, see *Re Melbourne Brewery and Distillery*, [1901] 1 Ch. 453; *Re European Life Assurance Society* (1869), L. R. 9 Eq. 122, 127. As to when an unregistered company is deemed to be unable to pay its debts, see p. 651, *post*.

(p) *Re Catholic Publishing and Bookselling Co.* (1864), 2 De G. J. & Sm. 116 C. A.

(q) *Re London and Paris Banking Corporation* (1874), L. R. 10 Eq. 444. As

complying with the statutory demand of a creditor gives not only him, but other creditors and contributories the right to petition for a winding up (r).

Inability to pay debts may be shown in other ways than by proof of non-compliance with the statutory demand, as, for instance, where a bill or note has been dishonoured at maturity (s), or a judgment creditor has not issued execution because the company's solicitor has told him that there are no assets, or no unmortgaged assets, on which he can levy (t).

A company, not being a life assurance company (a), may also be wound up on the ground of inability to pay debts when it is commercially insolvent, namely, unable to pay its debts as they become due, although its assets when realised, including uncalled capital, exceed its liabilities (b).

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by the
Court.

659. The words as to its being "just and equitable" to wind up are not to be read as being *ejusdem generis* with the preceding words of the enactment (c).

Meaning of
"just and
equitable."

It is just and equitable to wind up a company where its substratum is gone, as where its main object is to acquire and work a mine, or patent, or concession which cannot be obtained, or the mine is worthless or the patent is invalid, or the concession has lapsed (d); or where the company is a bubble company (e); or where its only business is *ultra vires* of the company (f); or where it is a bank,

to default in paying a demand in excess of what is due, see *Cardiff Preserved Coal and Coke Co. v. Norton* (1867), 2 Ch. App. 405.

(r) *Re Anglesea Coal and Coke Co., Ex parte Owen* (1861), 4 L. T. 684.

(s) *Re Globe New Patent Iron and Steel Co.* (1875), L. R. 20 Eq. 337; *Re Great Northern Copper Mining Co. of South Australia* (1869), 20 L. T. 264.

(t) *Re Flagstaff Silver Mining Co. of Utah* (1875), L. R. 20 Eq. 268; *Re Yate Collieries and Limeworks Co.*, [1883] W. N. 171.

(a) As to life and other assurance companies, see pp. 616 *et seq.*, *post*.

(b) *Re National Funds Assurance Co.* (1876), 24 W. R. 1066; *Re European Life Assurance Society* (1869), L. R. 9 Eq. 122.

(c) *Re Amalgamated Syndicate*, [1897] 2 Ch. 600; *Re Brinsmead (Thomas Edward) & Sons*, [1897] 1 Ch. 406, C. A.; *Re Sailing Ship "Kentmere" Co.*, [1897] W. N. 58. Compare *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737; *Re Langham Skating Rink Co.*, (1877) 5 Ch. D. 669, C. A.

(d) *Re Haven Gold Mining Co.* (1882), 20 Ch. D. 151, C. A.; *Re German Date Coffee Co.* (1882), 20 Ch. D. 169, C. A.; *Re Red Rock Gold Mining Co.* (1889), 1 Meg. 436; *Re International Cable Co.* (1890), 2 Meg. 183; compare *Re New Gas Co.* (1877), 37 L. T. 111, C. A.; *Norwegian Titanic Iron Co., Ltd.* (1865), 35 Beav. 223. As to the construction of the memorandum, see *Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd.*, [1902] 1 Ch. 745; *Pedlar v. Road Block Gold Mines of India, Ltd.*, [1905] 2 Ch. 427; *Campbell v. Australian Mutual Provident Society* (1908), 77 L. J. (P. C.) 117. And see generally *Pirie v. Stewart* (1904), 6 F. (Ct. of Sess.) 847 (loss of company's only vessel); *Re Palace Restaurants, Ltd.*, [1909] 127 L. T. Jo. 430 (restaurant company unable to acquire a site); *Symington v. Symington's Quarries, Ltd.* (1906), 8 F. (Ct. of Sess.) 121, where there was a deadlock and the order was made; *Re Furrier's Alliance, Ltd.* (1906), 51 Sol. Jo. 172, where there was a temporary deadlock and the order was refused; *Re Coolgardie Consolidated Gold Mines, Ltd.* (1897), 13 T. L. R. 301, C. A. (mines); *Re McDonald Gold Mines, Ex parte Duncan* (1898), 14 T. L. R. 204, C. A. (mines); *Re Varieties, Ltd.*, [1893] 2 Ch. 235, where a resolution for voluntary liquidation passed by those whose conduct required investigation was disregarded.

(e) *Re London and County Coal Co.* (1866), L. R. 3 Eq. 355, 358,

(f) *Re Crown Bank* (1890), 44 Ch. D. 634.

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and its paid-up capital is exhausted, and its uncalled capital can only be called up in a winding up (g); or where a loss has been made on the company's principal adventure, such as providing seats for a procession which has taken place and the company is about to embark on further *ultra vires* adventures (h); or where a company is fraudulent in its inception and carries on business at a loss, without capital of its own (i); or where it is carrying on business at a loss and its remaining assets are insufficient to pay its debts (k); or where it desires to go into liquidation with a view to an object which alone can save it from insolvency (l); or where the business of the company is being carried on in its name for the sole benefit of debenture-holders who have taken possession (m).

Misconduct of directors (n) or of liquidators (o), or the fact that its business has been carried on at a heavy loss (if the company is not insolvent) (o), or the issue of shares at a discount (p), is not *per se* a ground for winding up. Nor is the fact that the company has acted dishonestly to outsiders (q).

SUB-SECT. 3.—*Petitions.*

(i.) *In General.*

Who may
petition.

660. An application for the winding up of a company by the court is by petition, which may be presented by the company itself (r); or by any creditor or creditors (including any contingent or prospective creditor or creditors (s)); or by any contributory or

(g) *Re Bristol Joint Stock Bank* (1890), 44 Ch. D. 703.

(h) *Re Amalgamated Syndicate*, [1897] 2 Ch. 600; but not necessarily where the company is going to do something *ultra vires* (*Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176, 184; *Re Pioneers of Mashonaland Syndicate*, [1893] 1 Ch. 731, 734).

(i) *Re Brinsmead (Thomas Edward) & Sons*, [1897] 1 Ch. 406, C. A.; *Re London and County Coal Co.* (1866), L. R. 3 Eq. 355.

(k) *Re Wey and Arun Junction Canal Co.* (1867), L. R. 4 Eq. 197; *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, C. A.; *Re Great Northern Copper Mining Co. of Australia* (1869), 17 W. R. 462; *Re Bristol Joint Stock Bank*, *supra*.

(l) *Re Australian Joint Stock Bank*, [1897] W. N. 48.

(m) *Re Melson (Alfred) & Co., Ltd.*, [1906] 1 Ch. 841; *Re Crigglestone Coal Co., Ltd.*, [1906] 2 Ch. 327, C. A.

(n) *Re Anglo-Greek Steam Co.* (1866), L. R. 2 Eq. 1; *Re Bulch-y-Plym Co.* (1867), 17 L. T. 235; *Re Gold Co.* (1879), 11 Ch. D. 701, C. A.

(o) *Re Factage Parisien* (1863), 13 W. R. 214, 330; *Re London and Mediterranean Banking Co.* (1866), 15 W. R. 33; *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737; *Re Joint Stock Coal Co.* (1869), L. R. 8 Eq. 146; *Re New Zealand Quartz Crushing Co.*, [1873] W. N. 174.

(p) *Re Pioneers of Mashonaland Syndicate*, *supra*.

(q) *Re Medical Battery Co.*, [1894] 1 Ch. 444. See also, generally, *Re West Surrey Tanning Co.* (1866), L. R. 2 Eq. 737; *Re Fromm's Extract Co.* (1901), 17 T. L. R. 302, C. A.; *Re Kronand Metal Co.*, [1899] W. N. 14; *Re London and County Coal Co.* (1866), L. R. 3 Eq. 355; *Re General Phosphate Corporation*, [1893] W. N. 142.

(r) As to the costs of a petition presented by directors in their own names and dismissed, see *Smith v. Manchester (Duke)* (1883), 24 Ch. D. 611. If a petition is presented in the name of the company care must be taken that it is authorised by those who have the control of the company's affairs; see p. 223, *ante*.

(s) As, for instance, the holder of a bond whereby the company undertakes in consideration of monthly payments to pay the holder a sum certain on a certain day (*Re British Equitable Bond and Mortgage Corporation*, [1910] 1 Ch. 574).

contributories; or by all or any of those parties, together or separately (t); or by the official receiver in certain cases (a). A petition to wind up a trustee savings bank may be presented by the National Debt Commissioners or by a commissioner appointed under the Trustee Savings Banks Act, 1887, as well as by any person entitled to present a winding-up petition against a company (b).

An action for damages will lie for presenting a winding-up petition maliciously and without reasonable cause, though no special damage can be proved (c).

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by the
Court.

(ii.) *Creditor's Petition.*

661. The following persons are entitled to petition as creditors:— The assignee of a debt, if the assignment is not made while the creditor's petition is pending (d); the equitable assignee of part of a debt (e); the executor of a creditor, even before probate (f); a creditor in respect of a debt incurred by voluntary liquidators (g); a secured creditor (h); a judgment creditor (i); the holder of a bearer debenture (j); the holder of a debenture of a company incorporated by special Act and not registered under the Act of 1908 (k); and the holder of an investment bond (of an insolvent company)

Who may
petition as
creditors.

Prior to s. 28 of the Companies Act, 1907 (7 Edw. 7, c. 50), a contingent or prospective creditor could not petition except in the case of a life assurance company; see Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 21, now repealed and replaced by Assurance Companies Act, 1909 (9 Edw. 7, c. 49); see p. 636, *post*. As to a landlord in respect of rent not yet due, see *Re United Club and Hotel Co.* (1889), 60 L. T. 665; and as to a bill of exchange not yet matured, see *Re Powell (W.) & Sons*, [1892] W. N. 94; *Re Australian Joint Stock Bank*, [1897] W. N. 48. And see *Re Melbourne Brewery and Distillery*, [1901] 1 Ch. 453. As to the right of a creditor to a winding-up order, see note (a), p. 415, *post*.

(t) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 82; Companies Act, 1907 (7 Edw. 7, c. 50), s. 28]. If the petitioner dies before the hearing, an order of revivor may be made in favour of his personal representatives (*Re Dynevor Duffryn Collieries Co.*, [1878] W. N. 199; *Re Commercial Bank of London*, [1888] W. N. 214, where the order had been made in ignorance).

(a) See p. 403, *post*.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (vi.) [Trustee Savings Banks Act, 1887 (50 & 51 Vict. c. 47), s. 3].

(c) *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q. B. D. 674, C. A.

(d) *Re London and Birmingham Flint Glass and Alkali Co., Ltd., Ex parte Wright* (1859), 1 De G. F. & J. 257; *Re Paris Skating Rink Co.* (1877), 5 Ch. D. 959, C. A.

(e) *Re Montgomery Moore Ship Collision Doors Syndicate* (1903), 72 L. J. (CH.) 624; but see *Boules v. Baker*, [1910] W. N. 110.

(f) *Re Masonic and General Life Assurance Co.* (1885), 32 Ch. D. 373. Probate must be obtained before an order is made (*ibid.*).

(g) *Re Bank of South Australia* (2), [1895] 1 Ch. 578, C. A.

(h) *Re Portsmouth Borough (Kingston, Fratton and Southsea) Tramways Co.*, [1892] 2 Ch. 362; compare *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681; *Re Cambrian Mining Co., Ex parte Fell*, [1881] W. N. 125.

(i) *Re United Stock Exchange* (1884), 51 L. T. 687. The judgment is not conclusive evidence (*ibid.*); compare *Bowes v. Hope Life Insurance and Guarantee Co.* (1865), 11 H. L. Cas. 389.

(j) *Re Olathe Silver Mining Co.* (1884), 27 Ch. D. 278; compare *Re Uruguay Central and Hygueritas Rail. Co. of Monte Video* (1879), 11 Ch. D. 372.

(k) *Re Portsmouth Borough (Kingston, Fratton and Southsea) Tramways Co.*,

SECT. 16. which has not yet matured for payment (l). But the holder of
Winding up debenture stock constituted by a trust deed is not a creditor in respect
by the of interest for the payment of which there is not a direct covenant
Court. by the company with himself (m).

There is nothing in the Act requiring the debt to be of any minimum amount except in the case of a statutory demand, but the court will not as a rule make a winding-up order in respect of a debt less than £50 (n).

Who may
not petition.

662. A winding-up order cannot be obtained by the surety, in respect of a mortgage debt, of another company which has assigned the equity of redemption to the company petitioned against on the terms that the latter indemnifies the former, even if he has paid part of the debt (o); or by a landowner whose land has been taken and whose purchase and compensation money has been assessed under the Lands Clauses Consolidation Act, 1845 (p), but whose title has not been investigated or accepted by the company (q); or by a person claiming unliquidated damages (r); or by a judgment creditor who has attached a debt due from the company to his judgment debtor (s), his course being to obtain judgment in an action and then petition (t).

A winding-up order ought not to be made on the petition of a creditor who has so charged or dealt with his debt as to pass the real interest therein to another person (u).

A winding-up order will not be made on a debt which is *bonâ fide* disputed by the company (w); but the court must see that the

[1892] 2 Ch. 362; *Re Herne Bay Waterworks Co.* (1878), 10 Ch. D. 42; *Re Exmouth Docks Co.* (1873), L. R. 17 Eq. 181.

(l) *Re British Equitable Bond and Mortgage Corporation*, [1910] 1 Ch. 574.

(m) *Re Dunderland Iron Ore Co.*, [1909] 1 Ch. 446.

(n) *Re Standring (Herbert) & Co.*, [1895] W. N. 99; *Re Fancy Dress Balls Co.*, [1899] W. N. 109; *Re Milford Docks Co.*, *Lister's Petition* (1883), 23 Ch. D. 292, 295. If the order is made, it is usually without costs (*ibid.*). But where the creditor is met with defiance, as when the company refuses to make calls, a winding-up order, with costs, will be made (*Re World Industrial Bank, Ltd.*, [1909] W. N. 148). And an order with costs will be made when the petitioner is supported by other creditors, making an aggregate indebtedness of over £50 (*Re Leyton and Walthamstow Cycle Co.*, [1901] W. N. 225). In *Re Yate Collieries and Limeworks Co.*, [1883] W. N. 171, NORTH, J., held that a creditor for less than £50 had established that the company was unable to pay its debts by proving that he was a judgment creditor, and that he had not issued execution on his judgment because the company's solicitors had informed him that a mortgagee had taken possession of all its property.

(o) *Re Law Courts Chambers Co.* (1889), 61 L. T. 669.

(p) 8 & 9 Vict. c. 18; see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 83.

(q) *Re Milford Docks Co.*, *Lister's Petition*, *supra*.

(r) *Re Pen-y-Van Colliery Co.* (1877), 6 Ch. D. 477; *Re Gold Hill Mines* (1883), 23 Ch. D. 210, 213, C. A.

(s) *Re Combined Weighing and Advertising Machine Co.* (1889), 43 Ch. D. 99, C. A.

(t) *Pritchett v. English and Colonial Syndicate*, [1899] 2 Q. B. 428, C. A.

(u) *Re Pentalta Exploration Co.*, [1898] W. N. 55. This difficulty may be got over by joining the mortgagee as a co-petitioner (*Re Bartitsu Light Cure Institute* (1909), *Times*, January 13, 1909).

(w) *Re Gold Hill Mines* (1883), 23 Ch. D. 210, C. A.; *Re Brighton Club and*

dispute is based on a substantial ground (*x*). If the petition has actually been presented it may be either dismissed or stayed (*a*), and an injunction may be granted restraining the advertisement of the petition (*b*). Where a petition has not been presented but is threatened in respect of a disputed debt, an injunction may be granted restraining the presentation (*c*). To save expense the court will sometimes decide the dispute as to the debt (*d*); in other cases the court adjourns the petition to enable the question to be decided in an action (*e*), and may order the amount of the alleged debt to be paid into court (*f*). Where the judgment for the debt on which the petition is presented is reversed before the hearing, the petition will be dismissed (*g*).

SECT. 16.
Winding up
by the
Court.

663. The court cannot give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the court thinks reasonable, and until a *prima facie* case for winding up has been established to the satisfaction of the court (*h*).

Contingent
creditors.

(iii.) *Shareholder's Petition.*

664. The statutory right of a contributory to petition cannot be excluded or limited by the articles of association (*i*).

Petition by
contributory.

A contributory is not entitled to present a winding-up petition unless (1) either the number of members is reduced, in the case of a private company, below two, or in the case of any other company,

Norfolk Hotel Co. (1865), 35 Beav. 204; *Re London Wharfing and Warehousing Co.* (1865), 35 Beav. 37.

(*x*) *Re King's Cross Industrial Dwellings Co.* (1870), L. R. 11 Eq. 149; *Re Imperial Hydropathic Hotel Co., Blackpool* (1882), 49 L. T. 147, C. A.; *Re Great Britain Mutual Life Assurance Society* (1880), 16 Ch. D. 246, C. A.

(*a*) *Re Gold Hill Mines* (1883), 23 Ch. D. 210, C. A.; *Re Compagnie Générale des Asphaltes de Paris, Ex parte Neuchatel Asphalte Co.*, [1883] W. N. 17; *Re Rhodesian Properties, Ltd.*, [1901] W. N. 130.

(*b*) *Re A Company*, [1894] 2 Ch. 349.

(*c*) *Cadiz Waterworks Co. v. Barnett* (1874), L. R. 19 Eq. 182; *Niger Merchants Co. v. Capper* (1877), 18 Ch. D. 557, n.; *Cercle Restaurant Castiglione Co. v. Lavery* (1881), 18 Ch. D. 555; *New Travellers' Chambers, Ltd. v. Cheese and Green* (1894), 70 L. T. 271; *Merchant Banking Co. of London v. Hough*, [1874] W. N. 230; *Brown (John) & Co. v. Keeble*, [1879] W. N. 173.

(*d*) *Re Imperial Silver Quarries Co.* (1868), 16 W. R. 1220.

(*e*) *Re Imperial Guardian Life Assurance Society* (1869), L. R. 9 Eq. 447; *Re Inventors' Association* (1865), 12 L. T. 840; *Re Catholic Publishing and Book-selling Co.* (1864), 2 De G. J. & Sm. 116, C. A.

(*f*) *Re Compagnie Générale des Asphaltes de Paris, Ex parte Neuchatel Asphalte Co.*, *supra*.

(*g*) *Re Anglo-Bavarian Steel Ball Co.*, [1899] W. N. 80.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (1) (i.) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 28]. There is a similar provision in the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 15; see p. 636, *post*. Presumably, where the company is already in voluntary liquidation it is unnecessary to consider whether a *prima facie* case has been established or to order security; see *Re British Alliance Assurance Corporation* (1878), 9 Ch. D. 635. As to a creditor petitioning during a voluntary winding up, see p. 416, *post*.

(*i*) *Re Peveril Gold Mines, Ltd.*, [1898] 1 Ch. 122, C. A.; see *Payne v. Cork Co.*, L., [1900] 1 Ch. 308, 315.

SECT. 16. below seven; or (2) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held (*j*) by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder (*k*).

Husband of shareholder. Where any person, as the husband of a female contributory, is himself a contributory, and a share has during the whole or any part of the six months been held by or registered in the name of the wife, or by or in the name of a trustee for the wife or for the husband, the share is deemed to have been held by and registered in the name of the husband (*l*).

Quasi-shareholders. A petition may be presented by a person who, although not registered, has obtained a judgment ordering the company to allot him shares and register him as a shareholder (*m*), or by the holder of scrip certificates entitling the holder to be a shareholder (*n*).

Default in filing statutory report. A petition on the ground of default in filing the statutory report, or in holding the statutory meeting, can only be presented by a shareholder, and then only after the expiration of fourteen days after the last day on which the meeting ought to have been held (*o*).

Where voluntary winding up. Where there is a voluntary winding up, whether under supervision or not, which cannot be continued with due regard to the interests of contributories, a contributory may present a petition for a winding up by the court (*p*).

Shareholder in arrear. Petitions by shareholders in arrear with calls have been dismissed on the ground that they have not performed their duty to the company (*q*). There is, however, no provision in the Act that all calls due must have been paid, and if calls on a petitioning shareholder are in arrear, the court will allow the petition to proceed on his paying the calls into court (*r*) or undertaking to submit to any order which the court may think fit to make as to the payment of calls, in which case, if the petition is dismissed, the undertaking will be enforced by ordering the calls to be paid (*s*).

(*j*) This means that the name of the contributory is registered as that of the holder of shares (*Re Wala Wynaad Indian Gold Mining Co.* (1882), 21 Ch. D. 849); compare *Re Positive Government Security Life Assurance Co.*, [1877] W. N. 23. As to the considerations to which the court will have regard on the question of ordering a winding up at the instance of a shareholder, see p. 413, *post*.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (1) (a) (i.), (ii.) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 40].

(*l*) *Ibid.*, s. 137 (3) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 40]; and see *Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), ss. 6, 7, 13, 14.

(*m*) *Re Patent Steam Engine Co.* (1878), 8 Ch. D. 464.

(*n*) *Re Littlehampton etc. Steamship Co.* (1865), 2 De G. J. & Sm. 521, C. A.; compare *Re A Company*, [1894] 2 Ch. 349.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (1) (b) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 12 (8)].

(*p*) *Ibid.*, s. 137 (2); and see p. 416, *post*.

(*q*) *Re European Life Assurance Society* (1870), L. R. 10 Eq. 403; *Re Steam Stoker Co.* (1875), L. R. 19 Eq. 416.

(*r*) *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, not following *Re European Life Assurance Society*, *supra*; *Re Steam Stoker Co.*, *supra*.

(*s*) *Re Crystal Reef Gold Mining Co.*, [1892] 1 Ch. 408.

A fully-paid shareholder may, as a contributory, present a winding-up petition if he alleges and proves that there is a reasonable probability of a surplus being left for distribution amongst shareholders (t), but not otherwise (a).

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by the
Court.

(iv.) *Official Receiver's Petition.*

665. The official receiver attached to the court may present a petition for the winding up of a company already in liquidation, whether subject or not to the supervision of the court. The court cannot make a winding-up order on the petition unless it is satisfied that the existing winding up cannot be continued with due regard to the interests of the creditors or contributories (b), and it is not a matter of course to make a compulsory winding up order on the official receiver's petition. An order will be made, however, when the official receiver, after such an order, will possess any power which the voluntary liquidator cannot exercise, and which is necessary in order that there may be an efficient winding up in the interests of the creditors or contributories, as for instance, where misfeasance proceedings are contemplated and a public examination is absolutely necessary to obtain a proper disclosure of facts (c).

Petition by
official
receiver.

(v.) *Procedure on Petition.*

666. Every petition for the winding up of a company by the court, or subject to the supervision of the court, must be in the prescribed form, with such variations as circumstances may require (d).

Form of
petition.

A petitioner must in his petition allege and prove the facts entitling him to present it, showing that one or more of the grounds specified in the Act for making a compulsory order exist; unless these allegations are contained in the petition it is demurrable (e), and the court will dismiss it (f), except in the case where a shareholder omits to state that he has held his shares for six months (g).

Contents of
petition.

(t) *Re National Savings Bank Association* (1866), 1 Ch. App. 547; *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, C. A.; *Re Rica Gold Washing Co.* (1879), 11 Ch. D. 36, C. A.; see *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176, 190; *Re Vron Colliery Co.* (1882), 20 Ch. D. 442, C. A.; *Re Gold Co.* (1879), 11 Ch. D. 701, C. A.; *Re Pioneers of Mashonaland Syndicate*, [1893] 1 Ch. 731.

(a) *Re Kaslo-Slocan Mining and Financial Corporation*, [1910] W. N. 13.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 14].

(c) *Re 1897 Jubilee Sites Syndicate*, [1899] 2 Ch. 204.

(d) Companies (Winding-up) Rules, r. 2^f; and *ibid.*, Forms 4, 5.

(e) *Re Wear Engine Works Co.* (1875), 10 Ch. App. 188; *Re Steam Stoker Co.* (1875), L. R. 19 Eq. 416.

(f) *Re Spence's Patent Non-conducting Composition and Cement Co.* (1869), L. R. 9 Eq. 9; *Re Wear Engine Works Co.*, *supra*; *Re Langham Skating Rink Co.* (1877), 5 Ch. D. 669, C. A.; compare *Re Queen's Benefit Building Society* (1871), 6 Ch. App. 815, where amendment of the petition was allowed.

(g) *Re City and County Bank* (1875), 10 Ch. App. 470; *Re Glendower Steamship Co.*, [1899] W. N. 114. Formerly a fully-paid shareholder had to allege and prove that there were such assets of the company as, in the event of a winding up, would give a surplus for fully-paid shareholders; and at one time it was required that a creditor's petition should allege that the company had assets

SECT. 16. Unless the address of the petitioner is given, security for costs will be ordered (*h*).

Winding up by the Court.

Presentation of petition.

667. A petition must be presented at the office or chambers of the registrar of the court to which it is addressed, who appoints the time and place at which the petition is to be heard (*i*). Notice of the time and place appointed for hearing the petition is written on the petition and sealed copies thereof, and the registrar may at any time before the petition has been advertised alter the time appointed and fix another time (*k*).

The winding-up petition must have a distinctive number assigned to it in the office of the registrar, and all subsequent proceedings in the matter must bear the same number as the petition (*l*).

Filing of petition.

668. All petitions and other proceedings in the High Court in a winding-up matter are to be kept and remain of record in the office of the registrar and, subject to the directions of the court, placed in one continuous file, and no proceeding in any winding-up matter is to be filed in the Central Office (*m*).

In courts other than the High Court a file of proceedings is to be kept on which, subject to the directions of the court, all petitions and other proceedings in the matter are to be placed and remain of record as far as possible in continuous order (*n*).

Advertisement of petition.

669. Every petition must be advertised seven clear days (*o*) before the hearing as follows:—(1) In the case of a company whose registered office, or if there is no such office, then whose principal

available for distribution in the winding up (*Re Rica Gold Washing Co.* (1879), 11 Ch. D. 36, C. A.; *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, C. A.; *Re Irrigation Co. of France, Ex parte Fox* (1870), 6 Ch. App. 176; and see *Re Vron Colliery Co.* (1882), 20 Ch. D. 442, 447, C. A.; Winding-up Petitions (Practice Note (1902), 18 T. L. R. 503). But s. 141 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), extends the principle of *Re Crigglestone Coal Co., Ltd.*, [1906] 2 Ch. 327, C. A. (see note (*a*), p. 415, *post*), to a contributory petition, and the above decisions and practice appear no longer to apply.

(*h*) *Re Sturgis (British) Motor Power Syndicate* (1885), 53 L. T. 715.

(*i*) The provisions of R. S. C., 1887, r. 2, relating to petitions in the district registries of Liverpool and Manchester, are to apply to petitions presented in those registries under the Act of 1908 and Rules of 1909 (Companies (Winding-up) Rules, r. 219). The rule referred to provides that petitions presented in the district registries referred to, requiring answer must be answered in the name of one of the district registrars of such registries, and that the R. S. C., and particularly Ord. 62, r. 18, are, as regards such petitions, to be construed as if the district registrars of Liverpool and Manchester respectively were mentioned in place of the registrars of the Chancery Division.

(*k*) Companies (Winding-up) Rules, r. 26. At any time after the presentation of the petition, and before the making of a winding-up order, the court may appoint a provisional liquidator (see p. 420, *ante*), and actions against the company may be stayed or restrained (see p. 533, *post*).

(*l*) *Ibid.*, r. 11 (2).

(*m*) Companies (Winding-up) Rules, r. 16.

(*n*) *Ibid.*, r. 17.

(*o*) The term may be shortened or extended (*ibid.*, r. 216; and see *Re City and County Bank* (1875), 10 Ch. App. 470; *Re Cork and Youghal Rail. Co.* (1866), 14 L. T. 750; *Re Land and Sea Telegraph Co.* (1870), 18 W. R. 1150; *Re McLean and Co.*, [1881] W. N. 8). The days may be counted during vacation (*Re London Indemnity Co.* (1866), 14 W. R. 594).

or last known principal place of business, is or was situate within ten miles of the principal entrance of the Royal Courts of Justice, once in the *London Gazette*, and once at least in one London daily morning newspaper, or in such other newspaper as the court directs; (2) in the case of any other company, once in the *London Gazette*, and once at least in one local newspaper circulating in the district where the registered office, or principal or last known principal place of business, as the case may be, of such company is or was situate, or in such other newspaper as the court directs.

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The advertisement must state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor and London agent (if any), and contain a note at the foot thereof, stating that any person who intends to appear on the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner, or to his solicitors or London agent, within the time and in the manner prescribed (*p*). An advertisement of a petition for the winding up of a company by the court which does not contain such a note is to be deemed irregular (*q*). If the petitioner or his solicitor does not within the time prescribed duly advertise the petition (*r*), the appointment of the time and place at which the petition is to be heard is to be cancelled by the registrar, and the petition removed from the file in the Companies (Winding-Up) Office, unless the judge or the registrar otherwise directs (*s*).

Contents.

The advertisement states that a copy of the petition will be furnished to any creditor or contributory applying for the same (*t*), and the petitioner's solicitor must ascertain whether the applicants are creditors or contributories (*u*). Every contributory or creditor is entitled to be furnished, by the solicitor of the petitioner, with a copy of the petition, within twenty-four hours after requiring the same, on paying at the rate of 4*d.* per folio of seventy-two words for such copy (*a*).

A material error in the advertisement may invalidate it, as, for instance, in the name of the company (*b*) (except where no one could be deceived (*c*)), or as to the day of hearing (*d*), or the title of the

(*p*) By Companies (Winding-up) Rules, r. 27; see p. 408, *post*.

(*q*) *Ibid*.

(*r*) See note (*o*), p. 404, *ante*.

(*s*) Companies (Winding-up) Rules, r. 27; and see *ibid.*, Form 6.

(*t*) See *ibid.*, Form 6.

(*u*) *Re Cheltenham and Swansea Railway Carriage and Wagon Co.* (1869), L. R. 8 Eq. 580, 583.

(*a*) Companies (Winding-up) Rules, r. 30.

(*b*) *Re City and County Bank* (1875), 10 Ch. App. 470, 477.

(*c*) *Re Army and Navy Hotel* (1886), 31 Ch. D. 644; *Re Consolidated Mineral Lead Mining Co.*, [1876] W. N. 234; *Re Newcastle Machinists Co.*, [1888] W. N. 246; *Re London and Provincial Pure Ice Manufacturing Co.*, [1904] W. N. 136; *Re Birch (Samuel) Co., Ltd.*, [1907] W. N. 31.

(*d*) *Re Joint-Stock Companies Winding up Act* (1849), 13 Beav. 434; *Re Bull, Bevan & Co.*, [1891] W. N. 170. But where a wrong date for giving notice of intention to appear was inserted an order was made without re-advertising (*Re Moss (Saul) & Sons, Ltd.*, [1906] W. N. 142). As to dispensing with advertisement in a second paper, see *Re London Indiarubber Co.* (1866), 14 W. R. 527 compare *Re Worthing Royal Sea House Hotel Co.*, [1872] W. N. 74; *Re Night Light Co.*, [1892] W. N. 5,

SECT. 16. petition (e), or where the footnote is omitted from the form of Winding up advertisement (f).

by the
Court.

If a petition presented after a voluntary winding up has commenced asks for a compulsory order only, or for a compulsory order and in the alternative for a supervision order (g), the court refuses to make a supervision order until the petition has been amended and re-advertised (h). So again, if the petition asks only for a supervision order, and is subsequently amended by asking for a compulsory order, the court requires the petition to be re-advertised before making a compulsory order (i). The court on making a supervision order will dispense with re-advertising or amending the petition, where it is presented before the commencement of the voluntary winding up and the affidavits prove the passing of the winding-up resolution (k), or where a supervision order is discharged for irregularity in the resolutions, and a compulsory order is made on the rehearing (l).

Attendance
to satisfy
registrar.

670. After a petition has been presented, the petitioner, or his solicitor, must, on a day to be appointed by the registrar, attend before the registrar and satisfy him that the petition has been duly advertised, that the prescribed affidavit verifying the statements therein and the affidavit of service (if any) have been duly filed, and that the rules as to petitions for winding up companies have been duly complied with by the petitioner. No order for winding up is to be made on the petition of any petitioner who has not, prior to the hearing of the petition, so attended and satisfied the registrar (m).

Service of
petition.

671. Every petition (not being one presented by the company itself) must be served upon the company (n) at its registered office, if any, and if there is no registered office, then at the principal or last known principal place of business of the company, if any such can be found, by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at such registered office or principal place of business, or by serving it on such member or members of the company as the court may direct (o).

(e) *Re Marezzo Marble Co.* (1874), 43 L. J. (CH.) 544.

(f) *Re Hille India Rubber Co.*, [1897] W. N. 6; see *Re Mont de Piété of England*, [1892] W. N. 166.

(g) *Re New Morgan Gold Mining Co.*, [1893] W. N. 79.

(h) *Re New Oriental Bank Corporation*, [1892] 3 Ch. 563; Practice Note, [1902] W. N. 77; see *Re Civil Service Brewery Co.*, [1893] W. N. 5; *Re Waterproof Materials Co.*, [1893] W. N. 18; *Re United Bacon Curing Co.*, [1890] W. N. 74, where advertisement was not required.

(i) *Re National Wholemeal Bread and Biscuit Co.*, [1891] 2 Ch. 151.

(k) *Re Marine and General Land, Building and Investment Co.* (1890), 62 L. T. 723.

(l) *Re Patent Floor Cloth Co.* (1869), L. R. 8 Eq. 664. An application to rectify a slip in the proceedings need not be advertised (*Re Shield's Marine Insurance Co.*, [1867] W. N. 296).

(m) Companies (Winding-up) Rules, r. 32; see *Re Kershaw and Pole, Ltd.*, [1891] W. N. 202.

(n) Service on a solicitor appointed for the purpose is sufficient (*Re Regent United Service Stores* (1878), 8 Ch. D. 75, O. A.; compare *Re Fortune Copper Mining Co.* (1870), L. R. 10 Eq. 390). As to service in case of a defunct company, see *Re Anglo-American Exploration and Development Co.*, [1898] 1 Ch. 100.

(o) When there is no registered office, or the office is not occupied,

Where the company is being wound up voluntarily, the petition must also be served upon the voluntary liquidator, if any (*p*). The liquidator should not be served where the petitioning company is in voluntary liquidation (*q*).

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672. Every petition for winding up by the court must be verified by an affidavit, referring thereto, which must be made by the petitioner (*r*), or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary, or other principal officer thereof (*s*), and must be sworn and filed within four days after the petition is presented (*t*). Such affidavit is sufficient *prima facie* evidence of the statements in the petition (*a*), unless fraud is charged, in which case the facts alleged to constitute fraud must be set out in an affidavit (*b*). When the petition is presented by the Attorney-General on behalf of the Crown, the affidavit need not be made by the Attorney-General himself, but may be made by any fit and proper person, such as, in an income-tax case, the solicitor to the Inland Revenue Commissioners (*c*).

Affidavits.

may be sufficient if made on the late secretary (*Re Petroleum Co.* (1866), 15 W. R. 29; see *Re Thames Mutual Club Insurance Co.* (1866), 15 L. T. 263; *Re Iron Slate Co.*, [1878] W. N. 70); the chairman or directors (*Re National Credit and Exchange Co.* (1862), 11 W. R. 161; *Re Unity General Assurance Association* (1863), 11 W. R. 355; *Re London and Westminster Wine Co.* (1863), 12 W. R. 6; *Re South Essex Estuary and Reclamation Co.* (1868), 18 L. T. 178); subscribers to the memorandum (*Re Inventors' Association* (1865), 13 W. R. 1015; *Re Great Cwmsylog Silver Lead Mining Co.* (1868), 16 W. R. 270; *Re Velletri and Terrencina Co.* (1868), 18 L. T. 350); a liquidator (*Re Stewart and Brother*, [1880] W. N. 15); but not a workman employed on the site of the office (*Re Manchester and London Life Assurance and Loan Association* (1870), L. R. 9 Eq. 643). As to unregistered companies, see *Re City of London and Colonial Financial Association* (1867), 36 L. J. (CH.) 832, C. A. A consent brief for persons who ought to have been served has been held to cure want of service (*Re Panonia Leather Cloth Co.* (1865), 13 W. R. 1015, n.; but see *Re Manchester and London Life Assurance and Loan Association*, *supra*).

(*p*) Companies (Winding-up) Rules, r. 28. For forms of affidavits of service, see *ibid.*, Forms 7, 8.

(*q*) *Re Chester (Edward) & Co.* (1903), 52 W. R. 189.

(*r*) The rule is merely directory as to the affidavit being made by the petitioner, and in a proper case it may be made by his solicitor or agent, especially when the latter knows the facts better (*Re African Farms, Ltd.*, [1906] 1 Ch. 640; *Re Carrara Marble Co.*, [1896] W. N. 87; *Re Fortune Copper Mining Co.* (1870), L. R. 10 Eq. 390 (petitioner abroad); compare *Re Charterland Stores and Trading Co.*, [1900] 2 Ch. 870).

(*s*) The liquidator is a principal officer of a company in liquidation (*Re Review Publishing Co.*, [1893] W. N. 5).

(*t*) The time for filing may be enlarged (Companies (Winding-up) Rules, r. 216); see *Re East Cambrian Gold Mining Co.* (1865), 12 L. T. 587; *Re London and Westminster Co-operative Store Co.* (1868), 17 L. T. 559; *Re Patent Screwed Boot and Shoe Co.* (1863), 32 Beav. 142; *Re Kentish Royal Hotel Co.* (1865), 13 W. R. 448; *Re Western Benefit Building Society* (1864), 33 Beav. 368, where the affidavit was filed before the petition was presented.

(*a*) Companies (Winding-up) Rules, r. 2; see *Re New Callao*, [1882] W. N. 60, C. A.; and compare Companies (Winding-up) Rules, Form 9. That form is varied where the petitioner is another company.

(*b*) *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102, 110; *Re London and Hull Soap Works*, [1907] W. N. 254.

(*c*) *Re Brandy Distillers Co.* (1901), 17 T. L. R. 272, C. A.

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Court.

Notice of the filing of the statutory affidavit need not be given, but notice should be given of the filing of additional or supplemental affidavits (*d*).

Affidavits in opposition to a petition that a company may be wound up by the court must be filed within seven days of the date on which the affidavit verifying the petition is filed. Notice of the filing of every affidavit in opposition to such a petition must be given to the petitioner or to his solicitor or London agent on the day on which the affidavit is filed (*e*).

An affidavit in reply to an affidavit filed in opposition to a petition must be filed within three days of the date on which notice of such affidavit is received by the petitioner, or his solicitor or London agent (*f*).

Notice of
intention to
appear.

673. Every person who intends to appear on the hearing of a petition must serve on, or send by post to, the petitioner, or his solicitor or London agent, at the address stated in the advertisement of the petition, a notice of his intention (*g*) containing the address of the person giving it, and signed by him or by his solicitor or London agent. It must be served, or if sent by post posted, in such time as in ordinary course of post to reach the address not later than six o'clock in the afternoon of the day previous to the day appointed for the hearing of the petition. The notice may be in the prescribed form with such variations as circumstances require. A person failing to give such notice is not, without the special leave of the court, allowed to appear on the hearing of the petition (*h*).

The notice of intention to appear must show on the face of it whether the person giving it intends to oppose or to support the petition (*i*); and if to support it, whether to support a compulsory or supervision order (*k*). Otherwise the persons appearing, even if at the hearing they support the successful side, will not be allowed to share in the costs (*l*).

The petitioner, or his solicitor or London agent, must prepare a list in the prescribed form of the names and addresses of the persons who have given notice of their intention to appear on the hearing of the petition, and of their respective solicitors. On the day appointed for hearing the petition a fair copy of the list, or if no notice of intention to appear has been given, a statement in writing to that effect (*a*), must be handed by the petitioner, or

(*d*) *Re British Cycle Manufacturing Co.* (1898), 77 L. T. 683.

(*e*) Companies (Winding-up) Rules, r. 35 (1).

(*f*) *Ibid.*, r. 35 (2).

(*g*) The notice cannot be given in a representative capacity (*Re Mid Kent Fruit Factory*, [1892] W. N. 65).

(*h*) Companies (Winding-up) Rules, r. 33; and see *ibid.*, Form 11. The requirement as to giving addresses is strictly enforced (*Re Descours, Parry & Co., Ltd.*, [1909] W. N. 50).

(*i*) *Re Green, McAllan and Feilden, Ltd.*, [1891] W. N. 127.

(*k*) *Re Woodrow, Hooper & Co.*, [1893] W. N. 38. As to the costs of persons appearing by the same solicitor as the petitioner, see *Re Brighton Marine Palace and Pier Co.*, [1897] W. N. 12. Notice by them appears to be unnecessary (*Re Invicta Works, Ltd.*, [1894] W. N. 39).

(*l*) See *Re Sheringham Development Co.*, [1893] W. N. 5.

(*a*) If no notice has been given, intimation should be given to the registrar

his solicitor or London agent, to the court prior to the hearing of the petition (b).

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674. At any time after the presentation of the winding-up petition, and before the winding-up order, the company, or any creditor or contributory, may apply to have pending litigation against the company stayed or restrained (c), or to have a provisional liquidator appointed (d).

Stay of
action.

675. Security for costs will be ordered to be given by a petitioner who is ordinarily residing abroad, or in Scotland or Ireland (e), unless he is a judgment creditor (f), or his claim is admitted (g), in which cases security will, however, be ordered if a voluntary winding up is pending and the liquidator alleges that he has no assets (h); or by a petitioner who has given a false address (i); or by a petitioner who has filed a bankruptcy petition (j), or by a petitioning company which is in liquidation (k). A shareholder opposing a petition cannot be ordered to give security (l).

Security for
costs.

676. Winding-up petitions, whether in the High Court or in any other court, must be heard in open court (m). On petition days unopposed petitions are taken before opposed petitions, and are disposed of at the first calling on of the cases (n).

Hearing of
petition.

Subject to the orders of the Lord Chancellor, the place of sitting of each county court having winding-up jurisdiction is for the purposes of such jurisdiction the town and place in which the court holds its sittings for the general business of the court under the County Court Acts (o). Subject to the provisions of the Act of 1908, the times of the sitting of each court, other than the High Court, in winding-up matters are to be those appointed for the transaction of the general business of the court, unless the judge of any such court otherwise orders (p).

Place and
time.

On hearing the petition the court may dismiss it with or without

Powers of
court.

(*Re Australian Alkaline Reduction and Smelting Syndicate*, [1891] W. N. 209; and see *Re Inman & Co.*, [1891] W. N. 202).

(b) Companies (Winding-up) Rules, r. 34. In default of compliance with this rule, costs may be disallowed (Practice Note, [1906] W. N. 127).

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 140; see p. 533, *post*.

(d) *Ibid.*, s. 149; see p. 420, *post*.

(e) *Re Royal Bank of Australia, Ex parte Latta* (1850), 3 De G. & Sm. 186; *Re Home Assurance Association* (No. 2) (1871), L. R. 12 Eq. 112; *Fontaine's Case* (1889), 41 Ch. D. 118, C. A.; *Re East Llangynog Lead Mining Co.*, [1875] W. N. 81.

(f) *Re Contract and Agency Corporation* (1887), 57 L. J. (OH.) 5.

(g) *Re Alabama Portland Cement Co.*, [1909] W. N. 157.

(h) *Ibid.*

(i) *Re Sturgis (British) Motor Power Syndicate* (1885), 53 L. T. 715.

(j) *Malcolm v. Hodgkinson* (1873), L. R. 8 Q. B. 209; *Brocklebank v. Lynn Steamship Co.* (1878), 3 O. P. D. 365; *Re Carta Para Mining Co.* (1881), 19 Ch. D. 457.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 278.

(l) *Re Percy and Kelly, Nickel, Cobalt, and Chrome Iron Mining Co.* (1876), 2 Ch. D. 531.

(m) Companies (Winding-up) Rules, rr. 5, 6.

(n) *Re Inman & Co., Ltd.*, *supra*.

(o) Companies (Winding-up) Rules, r. 9.

(p) *Ibid.*, r. 10.

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costs, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it deems just (*q*). Only the petitioner, the company, and creditors and contributories supporting and opposing are entitled to appear on the petition (*r*).

Costs.

677. The court has a discretion as regards orders as to costs (*s*). When a winding-up order is made the company is usually given its costs, and one set of costs is generally given to the petitioner, another among all the creditors supporting him, and a third among the contributories supporting him (*t*). The same rule is followed when the petitioner for a compulsory order accepts a supervision order (*u*). When the petition, not being by the company, is dismissed, the petitioner generally has to pay one set of costs to the company, another set among all the creditors opposing, and a third set among all the contributories opposing (*w*). Secured creditors are allowed to share in the set given to creditors (*a*). A petition may be dismissed without costs (*b*); and costs will not be given to a petitioner where the petition is dismissed (*c*). If he continues the petition after an offer to pay his debt and costs, he will not get the costs incurred after the offer (*d*), and may have to pay costs (*e*).

Where two petitions are presented for winding-up the same

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 141 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 86]; *Re Catholic Publishing and Bookselling Co.* (1864), 33 L. J. (CH.) 325, C. A. As to allowing amendment, see *Re Queen's Benefit Building Society* (1871), 6 Ch. App. 815; *Re Rica Gold Washing Co.* (1879), 11 Ch. D. 36, 42, C. A.; *Re White Star Consolidated Gold Mining Co.* (1883), 48 L. T. 815; as to the right of a creditor appearing to have the petition disposed of, see *Re Norton Iron Co.* (1877), 47 L. J. (CH.) 9; *Re Margate Hotel Co.*, [1888] W. N. 73; *Re Spence's Patent Non-conducting Composition and Cement Co.* (1869), L. R. 9 Eq. 9; *Re Home Assurance Association* (1871), L. R. 12 Eq. 59.

(*r*) *Re New Gas Co.* (1877), 5 Ch. D. 703, C. A.; *Re Bradford Navigation Co.* (1870), 5 Ch. App. 600; and see p. 408, *ante*.

(*s*) Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5; *Re Fisher*, [1894] 1 Ch. 450, C. A.; as to the costs on the withdrawal of a petition, see p. 413, *post*.

(*t*) *Re Criterion Gold Mining Co.* (1889), 58 L. J. (CH.) 277; *Re Peckham etc. Tramways Co.* (1888), 57 L. J. (CH.) 462. As to what costs are included as contributories' costs, see *Re Ibo Investment Trust, Ltd.*, [1904] 1 Ch. 26.

(*u*) *Re Chepstow Bobbin Mills Co.* (1887), 36 Ch. D. 563. As to costs of persons appearing by the petitioner's solicitor, see *Re Military and General Tailoring Co.* (1877), 47 L. J. (CH.) 141; *Re Brighton Marine Palace and Pier Co.*, [1897] W. N. 12. Creditors and contributories appearing by the same solicitor are, as a rule, entitled to only one set of costs, although represented by separate counsel (*Re Ibo Investment Trust, Ltd.*, *supra*; *Re Silberhütte Supply Co.*, [1910] W. N. 81). As to the costs of a provisional liquidator, see *Re General International Agency Co.* (1865), 36 Beav. 1; *Re Times Life Assurance and Guarantee Co.* (1869), L. R. 9 Eq. 382. As to the priority of a petitioner's costs, see p. 526, *post*.

(*w*) *Re New Gas Co.*, *supra*; *Re Diamond Fuel Co.*, [1878] W. N. 11.

(*a*) *Re Carmarthenshire Anthracite Coal and Iron Co.* (1875), 45 L. J. (CH.) 200. But creditors are not entitled to costs (*Re Hull and County Bank* (1878), 10 Ch. D. 130).

(*b*) *Re Great Northern Copper Mining Co.* (1866), 14 W. R. 705.

(*c*) *Re Tyneside Permanent Benefit Building Society*, [1885] W. N. 148.

(*d*) *Re Times Life Assurance and Guarantee Co.*, *supra*; *Re Adjustable Horse Shoe Syndicate, Ltd.*, [1890] W. N. 157; compare *Re Flugstaff Silver Mining Co. of Utah* (1875), L. R. 20 Eq. 268.

(*e*) *Re Imperial Guardian Life Assurance Society* (1869), L. R. 9 Eq. 447; see *Re Adjustable Horse Shoe Syndicate, Ltd.*, *supra*.

company they have priority according to their dates of presentation (*f*), and if one order is made on both petitions the carriage of the order (if any) is, or used to be, generally given to the first petitioner (*g*). The second petitioner is usually allowed his costs up to the time he has notice of the presentation of the first petition (*h*); but if he proceeds with the second petition he may be ordered to pay the subsequent costs (*i*), unless he shows that there was some good ground for his doing so, as, for instance, that the first petition was not presented *bonâ fide* but in collusion with the company (*j*), or that some benefit was secured for creditors by the second petition (*k*). If good ground is shown, and the order is made on the first petition, he will be allowed to share in the set of costs given to the class supporting the petition whom he represents, or to have the costs of his petition (*l*).

One of several petitions may be dismissed on its merits, though on another an order has been made (*m*).

Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the court may order the costs to be paid by any persons who, in its opinion, are responsible for the default (*n*).

Where a personal charge is made against a director by the petition, he is entitled to appear separately, and, if free from blame, to be paid a separate set of costs (*o*). Calls owing by a petitioning shareholder cannot be set off against the costs of a petition ordered to be paid to him (*p*). Where a petitioner refuses an offer by the company to pay the amount claimed into court and to pay to him

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Winding up
by the
Court.

Costs of two
petitions.

(*f*) *Re Building Societies' Trust, Ltd.* (1890), 44 Ch. D. 140; *Re Standard Portland Cement Co.* (1890), 59 L. J. (CH.) 408.

(*g*) *Re Stortforth Lane Colliery Co.* (1879), 10 Ch. D. 487; see *Re London and Australian Agency* (1873), 22 W. R. 45; *Re Constantinople and Alexandria Hotels Co.* (1865), 13 W. R. 851.

(*h*) *Re General Financial Bank* (1882), 20 Ch. D. 276, C. A.; *Re Brooke (G. F.) & Co.*, [1888] W. N. 213; see *Re Owen's Wheel and Tyre Co.* (1873), 22 W. R. 151; *Re London and Australian Agency*, *supra*; *Re Sheringham Development Co.*, [1893] W. N. 5.

(*i*) *Re Joint Stock Coal Co.* (1869), L. R. 8 Eq. 146; *Re Accidental and Marine Insurance Co.* (1867), 36 L. J. (CH.) 75; *Re Empire Assurance Corporation* (1867), 16 L. T. 341.

(*j*) *Re Norton Iron Co.* (1877), 47 L. J. (CH.) 9; *Re Building Societies' Trust, Ltd.*, *supra*.

(*k*) *Re Commercial Bank of South Australia* (1886), 33 Ch. D. 174.

(*l*) *Re General Financial Bank*, *supra*; *Re Marron Bank Paper Mill Co.* (1878), 38 L. T. 140; and see, generally, *Re Doré Gallery, Ltd.*, [1891] W. N. 98; *Re British and Foreign Generating Apparatus Co.* (1865), 12 L. T. 368; *Re Humber Ironworks Co.* (1866), L. R. 2 Eq. 15; *Re United Service Co.* (1868), L. R. 7 Eq. 76; *Re Standard Portland Cement Co.*, [1890] W. N. 91; *Re Scott and Jackson, Ltd.*, [1893] W. N. 184.

(*m*) *Re European Banking Co., Ex parte Baylis* (1866), L. R. 2 Eq. 521.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 141 (2) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 12 (8)].

(*o*) *Re Anglo-Greek Steam Co.* (1866), L. R. 2 Eq. 1. If he appears by the company's solicitors he is not entitled to share in the contributories' set of costs (*Re Ibo Investment Trust, Ltd.*, [1904] 1 Ch. 26). As to costs of copying and procuring evidence, see *ibid.*

(*p*) *Re General Exchange Bank* (1867), L. R. 4 Eq. 138; *Re Equestrian and Public Buildings Co.* (1868), 1 Meg. 116.

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Winding up
by the
Court.

Adjournment
of winding-
up petition.

such costs of the petition as the court shall adjudge, he will be ordered to pay all costs of the petition subsequently incurred (q).

678. Adjournments for the purposes of enabling evidence to be completed, witnesses cross-examined, compromises arrived at, or reconstructions carried out are of frequent occurrence; but long unconditional adjournments may do great harm, not only by paralysing the company, but by invalidating intermediate transactions if a winding-up order is ultimately made (r). An adjournment will not be allowed pending an appeal by the company to the House of Lords where the company is unwilling to give security for costs already incurred in the litigation, although security for the costs of the appeal has been given (s).

Where an adjournment for a considerable time is allowed, it is often on the terms that the company shall undertake not to consent to a winding-up order on the petition of any other creditor, or to a voluntary winding up, to give notice to the petitioner of the presentation of any other winding up petition, and to consent that, on the presentation of any other petition, the present application for winding-up may be renewed so that the court may be able to deal with it as if there had been no suspension (t).

Substitution
of petitioner.

679. When a petitioner consents to withdraw his petition, or to allow it to be dismissed, or the hearing adjourned, or fails to appear in support of his petition when it is called on in court on the day originally fixed for the hearing thereof, or on any day to which the hearing has been adjourned (u), or, if appearing, does not apply for an order in the terms of the prayer of his petition, the court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who in the opinion of the court would have a right to present a petition, and who is desirous of prosecuting the petition (w).

An application for substitution will only be entertained where the original petition was founded on a valid subsisting debt (x).

(q) *Re Imperial Guardian Life Assurance Society* (1869), L. R. 9 Eq. 447; *Re Langley Mill Steel and Iron Works Co.* (1871), L. R. 12 Eq. 26.

(r) See *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259, 267, C. A.; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 139, 205; and see *Bowes v. Hope Life Insurance and Guarantee Co.* (1865), 11 H. L. Cas. 389; *Re Metropolitan Railway Warehousing Co.* (1867), 17 L. T. 108, 111; *Re Great Western (Forest of Dean) Coal Consumers' Co.* (1882), 21 Ch. D. 769; *Re Western of Canada Oil, Lands, and Works Co.* (1873), L. R. 17 Eq. 1.

(s) *Re British Liquid Air Co.* (1908), 126 L. T. Jo. 7.

(t) *Re St. Thomas' Dock Co.* (1876), 2 Ch. D. 116, 122, where the order was never drawn up; *Re St. Neot's Water Co.* (1905), W. N. 183.

(u) The part of the rule referring to non-appearance was inserted to amend the old rule (Companies (Winding-up) Rules, 1903, r. 36) which could be evaded by the petitioner failing to appear (*Re Vanguard Motorbus Co.*, [1908] W. N. 99). As to the costs when the petitioner does not appear, see *Re Anglo-Virginian Freehold Land Co.*, [1880] W. N. 155.

(w) Companies (Winding-up) Rules, r. 36. As to the procedure when a new petitioner is substituted, see *Re Invicta Works, Ltd.*, [1894] W. N. 39. A petitioner cannot himself transfer to any other person the right to proceed with his petition (*Re Paris Skating Rink Co.* (1877), 5 Ch. D. 959, C. A.).

(x) *Re Charles, Ltd.* (1906), 51 Sol. Jo. 101.

Subject as aforesaid, the petitioner is *dominus litis* and may at the hearing withdraw his petition subject to his liability to pay the costs of persons appearing (y). Where a petitioner elects at the hearing to withdraw his petition or have it dismissed, or does not appear to support it at the hearing, the court orders him to pay the costs of those who have duly given notice of their intention to appear, one set of costs being given to those who support the petition and another set to those who oppose it (a).

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Winding up
by the
Court.

If the debt is paid, the petition may be continued to obtain costs (b), unless an indemnity in regard to them has been given (c).

680. With the consent of the petitioner, but not otherwise, a compulsory order may be made on a petition for a supervision order, or *vice versâ* (d).

Order in
terms not
prayed for.

681. The court may, in deciding between a winding up by the court and a supervision order, or whether a petition should be dismissed or adjourned, and as to all other matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence (e). For the purpose of ascertaining those wishes it may direct meetings of the creditors or contributories to be called, held, and conducted in such manner as it directs, and may appoint a person to act as chairman of any such meeting, and to report the result thereof to the court, regard being had in the case of creditors to the value of each creditor's debt, and in the case of contributories to the number of votes conferred on each contributory by the articles (f). The court may be satisfied as to the views of the general body of creditors or

Wishes of
creditors and
contribu-
tories.

(y) *Re Mid Wales Hotel Co.* (1868), 17 L. T. 597; *Re An Insurance Co.* (1875), 33 L. T. 49; *Re Home Assurance Association* (1871), L. R. 12 Eq. 59; *Re Hereford and South Wales Waggon and Engineering Co.* (1874), L. R. 17 Eq. 423.

(a) *Re British Electric Street Tramways*, [1903] 1 Ch. 725; *Re Patent Cocoa Fibre Co.* (1876), 1 Ch. D. 617, 618; *Re Criterion Gold Mining Co.* (1889), 41 Ch. D. 146; *Re Vanguard Motorbus Co.*, [1908] W. N. 99. As to earlier orders giving separate sets of costs, see *Re North Brazilian Sugar Factories, Ltd.* (1886), 56 L. T. 229; *Re Peckham etc. Tramways Co.* (1888), 57 L. J. (CH.) 462; *Re Paper Bottle Co.* (1888), 40 Ch. D. 52; *Re Nacupai Gold Mining Co.* (1884), 28 Ch. D. 65. But the court has allowed a petition to be withdrawn without payment of costs (*Re District Bank of London* (1887), 35 Ch. D. 576); *Re Tablochkoff Electric Light and Power Co.*, [1883] W. N. 189; *Re Walkham United Mines*, [1882] W. N. 134; see *Re United Stock Exchange, Ltd., Ex parte Philp and Kidd* (1884), 28 Ch. D. 183, where the petition had not been advertised). Separate costs may be refused to persons appearing by the same solicitor as the petitioner (*Re British Guardian Life Assurance Society* (1876), 24 W. R. 637).

(b) *Re Flagstaff Silver Mining Co. of Utah* (1875), L. R. 20 Eq. 268.

(c) *Re Adjustable Horse Shoe Syndicate, Ltd.*, [1890] W. N. 157; compare *Re Times Life Assurance and Guarantee Co.* (1869), L. R. 9 Eq. 382.

(d) *Re Electric and Magnetic Co.* (1881), 50 L. J. (CH.) 491; *Re Chepstow Bobbin Mills Co.* (1887), 36 Ch. D. 563; *Re New Oriental Bank Corporation*, [1892] 3 Ch. 563. As to re-advertising, see p. 406, *ante*.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 145, 201 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 91, 149]; *Re Western of Canada Oil, Lands, and Works Co.* (1873), L. R. 17 Eq. 1; *Re Radford and Bright, Ltd.*, [1901] 1 Ch. 272, 277, and the cases cited *infra*. As to creditors' views as to whether a supervision order should be made, see *Re West Hartlepool Ironworks Co.* (1875), 10 Ch. App. 618.

(f) *Ibid.*, s. 219 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 91, 149]. Except where and so far as the nature of the subject-matter or the context

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Winding up
by the
Court.

Where
different
classes of
creditors.

contributories without calling meetings (*g*). Where the interests of shareholders only are concerned, as in a case where it is alleged that the substratum of a solvent company is gone, their wishes only will be regarded (*h*). Where the company is insolvent, the wishes of the creditors only are regarded (*i*).

In the case of creditors of different classes the interest of the class particularly affected must be primarily considered. Thus, on the question of winding up a company whose assets are entirely covered by debentures, the wishes of the unsecured creditors must be regarded in preference to those of the secured creditors (*j*). If the court has no power to make a winding-up order, it cannot direct a meeting to be held (*k*); but the power to direct meetings is in existence when the petition comes on for hearing (*l*). The power to regard the wishes of creditors and contributories is not then confined to cases where the question is whether the winding up should be compulsory or under supervision, but extends to cases in which the question is whether a winding-up order should be made or not, where either shareholders (*m*) or creditors (*n*) are interested, and in which the question is whether the petition shall or shall not stand over (*o*). The court is not bound to accede to the wishes of the majority (*p*). In the case of shareholders, refusal to accede to their wishes as shown by the majority of votes is generally based on the fact that such majority is deceptive and does not represent the majority of the independent shareholders (*q*); and, in the case of creditors, the court has acceded to their wishes as far as possible. Thus, in cases of a voluntary winding up where they have not proved that the creditors will be prejudiced by a continuance of the voluntary winding up the court has, nevertheless, made a compulsory order (*r*).

may otherwise require, rr. 123—138 apply to meetings called under s. 219 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), but so nevertheless that such rules shall take effect as to such meetings subject and without prejudice to any express directions of the court (Companies (Winding-up) Rules, r. 122); and see p. 466, *post*.

(*g*) *Re West Hartlepool Ironworks Co.* (1875), 10 Ch. App. 618; *Re Joint Stock Coal Co.* (1869), L. R. 8 Eq. 146.

(*h*) *Re Langham Skating Rink Co.* (1877), 5 Ch. D. 669, C. A. As to petitions by small minorities of shareholders, see *Re Shepherd's Bush Improvement, Ltd.* (1909), *Times*, March 9th, 1909.

(*i*) *Re Lonsdale Vale Ironstone Co.* (1868), 16 W. R. 601.

(*j*) *Re Crigglestone Coal Co., Ltd.*, [1906] 2 Ch. 327, 333, C. A.; *Re St. Thomas' Dock Co.* (1876), 2 Ch. D. 116; *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259, C. A.

(*k*) *Re Joint Stock Coal Co.*, *supra*; see *Re Langham Skating Rink Co.*, *supra*.

(*l*) *Re Western of Canada Oil, Lands, and Works Co.* (1873), L. R. 17 Eq. 1.

(*m*) *Re London Suburban Bank* (1871), 6 Ch. App. 641; *Re Sanderson's Patents Association* (1871), L. R. 12 Eq. 188; *Re Kronand Metal Co.*, [1899] W. N. 14; *Re Middlesborough Assembly Rooms Co.* (1880), 14 Ch. D. 104, C. A.

(*n*) *Re Langley Mill Steel and Iron Works Co.* (1871), L. R. 12 Eq. 26.

(*o*) *Re Brighton Hotel Co.* (1868), L. R. 6 Eq. 339; *Re Great Western (Forest of Dean) Coal Consumers' Co.* (1882), 21 Ch. D. 769; *Re St. Thomas' Dock Co.*, *supra*.

(*p*) *Re West Surrey Tanning Co.* (1866), L. R. 2 Eq. 737; *Re Gold Co.* (1879), 11 Ch. D. 701, 710, C. A.; *Re Land Development Association*, [1892] W. N. 23; *Re The Varieties, Ltd.*, [1893] 2 Ch. 235.

(*q*) *Ibid.*

(*r*) *Re Bishop (E.) & Sons, Ltd.*, [1900] 2 Ch. 254; see *Re New Oriental Bank Corporation* [1892] 3 Ch. 563 (supervision order made at the instance of creditors); *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737, 743; *Re Haven Gold*

682. The court is not to refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets(s). Where, however, a company against which a winding-up order has been made has no available assets, the official receiver is not required to incur any expense in relation to the winding up without the express directions of the Board of Trade (a).

SECT. 16.
Winding up
by the
Court.

Winding up
of company
without
available
assets.

Mining Co. (1882), 20 Ch. D. 151, C. A.; *Re German Date Coffee Co.* (1882), 20 Ch. D. 169, C. A.; *Re Middlesborough Assembly Rooms Co.* (1880), 14 Ch. D. 104, C. A.; *Re Rock Investment Trust* (1891), 35 Sol. Jo. 447 (cases where it was alleged that the substratum of the company was gone); *Re City and County Bank* (1875), 10 Ch. App. 470 (shareholder's petition ordered to stand over for general meeting to consider the question of a voluntary winding up); *Re Petersburg and Viborg Gas Co.*, [1874] W. N. 196 (shareholder's petition dismissed at the instance of the other shareholders). See also *Re Professional, Commercial and Industrial Benefit Building Society* (1871), 6 Ch. App. 856, 863; *Re General Phosphate Corporation*, [1893] W. N. 42; *Re International Contract Co., Ex parte Spartali and Tabor* (1866), 14 L. T. 726; *Re British Oil and Cannel Coal Co.* (1867), 15 L. T. 601; *Re London and Provincial Starch Co., Ex parte Adams* (1867), 16 L. T. 474.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 141 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 29]. This gives statutory effect to the decisions referred to in note (a), *infra*. The absence of assets is no ground for referring an order (*Re Bartitsu Light Cure Institute, Ltd.* (1909), *Times*, January 13, 1909), except where the petitioner is a fully paid shareholder (*Re Kaslo-Slogan Mining and Financial Corporation*, [1910] W. N. 13). In the case of a guarantee company without a share capital debentures cannot create a valid charge on the amounts guaranteed by members (*Re Irish Club Co., Ltd.*, [1906] W. N. 127).

(a) Companies (Winding-up) Rules, r. 203. Up to 1905, notwithstanding a similar provision in the rules then applicable, the old decisions were implicitly followed which established that, although as between himself and the company a creditor had a right *ex debito justitiæ* to a winding-up order (*Bowes v. Hope Life Insurance and Guarantee Co.* (1865), 11 H. L. Cas. 389, 401; *Re Isle of Wight Ferry Co.* (1865) 2 Hem. & M. 597; *Re Western of Canada Oil, Lands, and Works Co.* (1873), L. R. 17 Eq. 1; *Re Manchester and Liverpool Transport Co.* (1903), 19 T. L. R. 227); unless it was proved that the company had no assets, or that no useful purpose would result from a winding up (*Re Krasnapolsky Restaurant and Winter Garden Co.*, [1892] 3 Ch. 174; *Re International Commercial Co.* (1897), 75 L. T. 639, C. A.; *Re Uruguay Central and Hygueritas Rail. Co. of Monte Video* (1879), 11 Ch. D. 372; *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259, C. A.; *Re Faversham Free Fishermen (Co. or Fraternity)* (1887), 36 Ch. D. 329, C. A.; *Re Greenwood & Co.*, [1900] 2 Q. B. 306; *Re London Health Electrical Institute* (1897), 76 L. T. 98, C. A.; *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102; *Re Manchester and Liverpool Transport Co.* (1903), 19 T. L. R. 227); yet as between himself and other creditors the court might refuse an order if the majority of creditors opposed the petition (*Re Brighton Hotel Co.* (1868), L. R. 6 Eq. 339; *Re Langley Mill Steel and Iron Works Co.* (1871), L. R. 12 Eq. 26; *Re Uruguay Central and Hygueritas Rail. Co. of Monte Video*, *supra*; *Re Chapel House Colliery Co.*, *supra*; *Re Universal Drug Supply Association* (1874), 22 W. R. 675; *Re London Flour Co.* (1868), 19 L. T. 136, C. A.); or might, if there was a voluntary winding up and the majority of creditors so desired, make a supervision order, even although the voluntary winding up commenced after the winding-up petition was presented (*Re West Hartlepool Ironworks Co.* (1875), 10 Ch. App. 618; *Re Owen's Patent Wheel, Tire, and Axle Co.* (1873), 29 L. T. 672; *Re Simon's Reef Consolidated Gold Mining Co.* (1882), 31 W. R. 238). But according to later decisions a company might be ordered to be wound up although its entire assets were more than covered by debentures and nothing would result for the benefit of the unsecured creditors (*Re Chic, Ltd.*, [1905] 2 Ch. 345; *Re Melson (Alfred) & Co., Ltd.*, [1906] 1 Ch. 841); and the fact that the secured creditors oppose was immaterial (*Re Crigglestone Coal Co., Ltd.*, [1906] 2 Ch. 327, C. A.). S. 141 (1) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), is a statutory recognition of these authorities.

SECT. 16.
Winding up
by the
Court.

Effect of
voluntary
winding up.

683. The voluntary winding up of a company does not bar the right of any creditor or contributory to have it wound up by the court, if the court is of opinion, in the case of an application by a creditor, that the rights of the creditor or, in the case of an application by a contributory, that the rights of the contributory will be prejudiced by a voluntary winding up (b).

In order to succeed a creditor must allege and prove that the continuance of the voluntary winding up will be prejudicial to his rights (c), even where the voluntary winding-up resolution has been passed after the presentation, but before the hearing of the petition (d). If, however, the general body of the creditors desire a compulsory order, an existing voluntary winding up is no bar in spite of the fact that no individual creditor shows that his rights will be prejudiced by a voluntary winding up (e). A compulsory order may be made on the application of creditors, although the company is in voluntary liquidation, where the same person has been appointed as receiver in the debenture-holders' action, and as its liquidator (f); or where a *prima facie* case of fraud is established as to the formation of the company or the conduct of its business (g); or where there has been great delay in conducting the voluntary liquidation (h); or where the company's liabilities are very great (i); or where the conduct of the voluntary liquidation is unsatisfactory (j); or where the foundation of the voluntary winding up, as, for instance, a reconstruction, has gone (k); or where the passing of the resolution is a breach of faith (l); or where circumstances show that a public investigation is required (m). Where a scheme of reconstruction is eminently unfair to an independent minority of the shareholders the court will, on the petition of one of them, stop the scheme by making a compulsory

(b) *Companies (Consolidation) Act*, 1908 (8 Edw. 7, c. 69), s. 197 [*Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 145, amended]. So far as this enactment expressly refers to contributories it is new; see s. 145 of the Act of 1862, which only referred to a creditor. It is a contempt of court to issue circulars with a view to misrepresent the effect of a voluntary winding up (*Re Parsonage (Septimus) & Co.*, [1901] 2 Ch. 424).

(c) *Re Russell, Corder & Co.*, [1891] 3 Ch. 171.

(d) *Re New York Exchange, Ltd.* (1888), 39 Ch. D. 415, C. A.; *Re Electrical Engineering Co.* (1891), 64 L. T. 658; *Re Medical Battery Co.*, [1894] 1 Ch. 444. There is only time to do this by passing an extraordinary resolution for voluntary winding up.

(e) *Re Bishop (E.) & Sons, Ltd.*, [1900] 2 Ch. 254 (FARWELL, J.), followed by PARKER, J., in *Re Lichtenstein (Hermann) & Co.* (1907), 23 T. L. R. 424, and by BYRNE, J., in an unreported case.

(f) *Re Medical Battery Co.*, [1894] 1 Ch. 444.

(g) *Re Varieties, Ltd.*, [1893] 2 Ch. 235; *Re National Debenture and Assets Corporation*, [1891] 2 Ch. 605, 518, 521, C. A.; see *Re Medical Battery Co.*, *supra*, where frauds on the public committed in the course of business were said to affect this question.

(h) *Re Manchester Queensland Cotton Co.* (1867), 16 L. T. 583; *Re Fire Annihilator Co.* (1863), 32 Beav. 561.

(i) *Re Barded's Banking Co.* (1866), 14 L. T. 451; see *Re Lonsdale Vale Ironstone Co.* (1868), 16 W. R. 601; *Re General Rolling Stock Co.* (1865), 34 Beav. 314.

(j) *Re Caerphilly Colliery Co., Ex parte Dolling* (1875), 32 L. T. 15.

(k) *Re Gutta Percha Corporation*, [1900] 2 Ch. 665.

(l) *Re A. B. Cycle Co.* (1902), 19 T. L. R. 84.

(m) *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] 1 Ch. 491.

order, if the contract with the new company has not been executed (n).

An existing voluntary winding up is generally a bar to a contributory obtaining a compulsory order, unless the resolution to wind up has been passed fraudulently, or by undue influence, or unless creditors appear to support the petition (o). In exceptional circumstances a compulsory order may be obtained, although no fraud or undue influence is proved, even if no creditor appears in support (p).

The fact that a voluntary winding up has been continued under the supervision of the court is not necessarily a bar to the obtaining of a compulsory order; for in such a case, if the court is satisfied that the winding up cannot be continued with due regard to the interests of the creditors or contributories, a compulsory winding-up order may be made on the petition of the official receiver attached to the court which has jurisdiction, or of any creditor or contributory, or, probably, by the company itself acting by its voluntary liquidator (q).

684. Where a company is being wound up voluntarily, and an order is made for winding up by the court, the court may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up (r). The court may adopt a B. list of contributories (s) made in the voluntary winding up, but cannot adopt the resolution for voluntary winding up so as to make the date of the resolution the date of the commencement of winding up (t). The effect of the winding up order is not to nullify or abrogate everything that has been done under the voluntary winding up (u), or avoid *ab initio* all the proceedings in it (a).

SECT. 16.
Winding up
by the
Court.
Contribu-
tory's right.

Adoption of
voluntary
winding-up
proceedings.

(n) *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] 1 Ch. 491.

(o) *Re London and Mercantile Discount Co.* (1865), L. R. 1 Eq. 277; *Re Bank of Gibraltar and Malta* (1865), 1 Ch. App. 69; *Re Imperial Mercantile Credit Association* (1866), 12 Jur. (N. S.) 739; *Re St. David's Gold Mining Co.* (1866), 14 L. T. 539; *Re Beaujolais Wine Co.* (1867), 3 Ch. App. 15; *Re Madras Coffee Co.* (1869), 17 W. R. 643; *Re Irrigation Co. of France, Ltd.* (1870), 39 L. J. (CH.) 663; *Re London Suburban Bank* (1871), 6 Ch. App. 641; *Re Star and Garter, Ltd.* (1873), 42 L. J. (CH.) 374; *Re Sir John Moore Gold Mining Co.* (1877), 37 L. T. 242; *Re Gold Co.* (1879), 11 Ch. D. 701; *Re Hadleigh Castle Gold Mines, Ltd.*, [1900] 2 Ch. 419.

(p) *Re Varieties, Ltd.*, [1893] 2 Ch. 235; *Re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230; *Re Gutta Percha Corporation*, [1900] W. N. 164; *Re Littlehampton, Havre and Honfleur Steam-ship Co., Ex parte Ellis* (1865), 34 L. J. (CH.) 237; and see *Re 1897 Jubilee Sites Syndicate*, [1899] 2 Ch. 204; *Re Gold Co., supra*; *Re National Distribution of Electricity Co., Ltd.*, [1902] 2 Ch. 34, C. A.

(q) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 137 (2); *Re London and Mediterranean Bank* (1866), 15 L. T. 153.

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 198 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 146]. An adoption order was made in *Re Hertfordshire Brewery Co.* (1874), 43 L. J. (CH.) 358.

(s) See p. 495, *post*.

(t) *Re Taurine Co.* (1883), 25 Ch. D. 118, C. A.

(u) *Cleve v. Financial Corporation* (1873), L. R. 16 Eq. 363, 880.

(a) *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250, C. A. As to the remuneration of an invalidly-appointed liquidator in a voluntary winding up, which is followed by a compulsory order, see *Re Allison, Johnson and Foster, Ltd., Ex parte Birkenshaw*, [1904] 2 K. B. 327.

SECT. 16.

Winding up
by the
Court.

685. When an order for the winding up of a company has been pronounced in court, the registrar of the court must on the same day send to the official receiver a notice informing him that the order has been pronounced (*b*), and he thereupon takes possession of the company's assets (*c*).

Completion
of order.

686. It is the duty of the petitioner, or his solicitor or his London agent, and of all other persons who have appeared on the hearing of the petition, at latest on the day following the day on which the order for winding up is pronounced in court, to leave at the registrar's office all the documents required for the purpose of enabling him to complete the order forthwith (*d*). The registrar need not make an appointment to settle the order unless in any particular case special circumstances make an appointment necessary (*e*).

Form of
order.

687. The order will be in the prescribed form (*f*), and contains at the foot thereof a notice stating that it will be the duty of the person who is at the time secretary or chief officer of the company, and of such of the persons who are liable to make out or concur in making out the company's statement of affairs as the official receiver may require, to attend on the official receiver forthwith on the service of the order at the place mentioned therein (*g*).

Copies and
gazetting of
order.

688. When the order has been drawn up, three copies sealed with the seal of the court must forthwith be sent by post or otherwise by the registrar of the court to the official receiver. The official receiver must cause one sealed copy to be served on the secretary or other chief officer of the company at its registered office (if any), or upon such other person or persons, or in such other manner as the court directs, and must forward to the Registrar of Companies the copy of the order which by the Act is directed to be so forwarded by the company (*h*), and must forthwith give notice of the order to the Board of Trade (who must cause the notice to be gazetted). He must also send notice of the order to such local paper as the Board of Trade may from time to time direct, or, in default of such direction, as he may select (*i*).

(vi.) *Effect of Winding-up Order.*

Operation of
winding-up
order.

689. An order for winding up operates in favour of all the creditors and contributories of the company as if made on the joint petition of a creditor and of a contributory (*k*). If a winding-up

(*b*) Companies (Winding-up) Rules, r. 37. The notice will be in Form 13, with such variations as circumstances may require (*ibid.*).

(*c*) See p. 424, *post*.

(*d*) Companies (Winding-up) Rules, r. 38.

(*e*) *Ibid.*, r. 39.

(*f*) *Ibid.*, Form 15. Winding-up orders are not now made in the restricted form for a short time in vogue (Practice Note (1903), 20 T. L. R. 73).

(*g*) Companies (Winding-up) Rules, r. 40.

(*h*) See s. 143 of the Companies (Consolidation) Act, 1903 (8 Edw. c. 69) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 88], which requires the registrar to make a minute of the order in his books relating to the company.

(*i*) Companies (Winding-up) Rules, r. 41 (1). For form of notice to local paper, see *ibid.*, Form 17.

(*k*) Companies (Consolidation) Act, 1903 (8 Edw. 7, c. 69), s. 138 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 138].

order has been obtained by mistake, the court has no jurisdiction to rescind the order after (l), though it may do so before (m), the order has been passed and entered.

SECT. 16.
Winding up
by the
Court.

690. A winding up of a company by the court is deemed to commence at the time of the presentation of the petition for the winding up (n). The making of a compulsory winding-up order after a voluntary winding up alters the date of commencement of winding up to the date of the presentation of the petition where there has been no supervision order (o), and this would seem to be so even when a supervision order has been made (p).

Commence-
ment of
compulsory
winding up.

A compulsory winding up, from the time when it commences, puts an end to or supersedes a previous voluntary winding up (a).

The date of commencement of winding up affects many matters. Thus, an action for rescission of a contract to take shares, on the ground of misrepresentation, commenced after the filing of a petition, is defeated by a compulsory winding-up order made on that petition (b). In the case of a winding up by the court, every disposition of the company's property (including choses in action) and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up, is, unless the court otherwise orders, void (c). It depends on the date of commencement of winding up whether a person is liable as a present member, or whether a person who has ceased to be a member is liable as a past member, to contribute to the company's assets (d); whether a transaction is a fraudulent preference (e); whether certain attachments, sequestrations, distresses, and executions are void or in force against the company's assets (f); whether certain floating charges are available as securities (g); and at what date the liquidator is to send to the Registrar of Companies his statement as to the proceedings in and position of the liquidation (h). The date may be important when applying bankruptcy rules in the winding up of insolvent companies (i).

Importance
of date of
commence-
ment.

691. When a winding-up order has been made, no action or proceeding is to be proceeded with or commenced against the

(l) *Re Lyric Syndicate* (1900), 17 T. L. R. 162.

(m) *Re Crown Bank* (1890), 44 Ch. D. 634.

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 139 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 84].

(o) *Re Taurine Co.* (1883), 25 Ch. D. 118, O. A. As to the effect of a supervision order, see p. 599, *post*.

(p) Compare *Re United Service Co.* (1868), L. R. 7 Eq. 76, and see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 200.

(a) See p. 417, *ante*.

(b) *Kent v. Freehold Land and Brick-making Co.* (1868), 3 Ch. App. 493.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 153].

(d) *Ibid.*, s. 123; and see p. 488, *post*.

(e) *Ibid.*, s. 210 (2), where, however, the commencement of the winding up is not expressly stated as the date from which the period runs back; see p. 544, *post*.

(f) *Ibid.*, s. 211; see pp. 533 *et seq.*, *post*.

(g) *Ibid.*, s. 212; see p. 388, *ante*.

(h) *Ibid.*, s. 224; see p. 455, *post*.

(i) *Ibid.*, s. 207; see p. 512, *post*.

SECT. 16.
Winding up
by the
Court.

Directors'
powers.

company except by leave of the winding-up court, and subject to such terms as the court may impose (*k*). The winding-up order also has the effect of discharging all the servants of the company (*l*), and of dismissing its directors (*m*).

692. The winding-up order puts an end to the directors' powers—at any rate as to making calls (*a*)—and they cease to be officers of the company (*b*). They may, however, appeal in the name of the company from the winding-up order (*c*). The winding-up order does not dissolve the company as a corporation (*d*) or vest the company's property in the liquidator, unless a vesting order is thereby made in the case of an unregistered company (*e*).

SUB-SECT. 4.—Provisional Liquidator and Special Manager.

(i.) *Provisional Liquidator before Winding-up Order.*

Interim
provisional
liquidator.

693. A liquidator is appointed for the purpose of conducting the proceedings in winding up a company and performing the duties imposed in reference thereto (*f*).

The court may appoint the official receiver or any other fit person as provisional liquidator at any time after the presentation of a winding-up petition, and before the making of an order for winding up (*g*). A person other than the official receiver has occasionally

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 142 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 87]; see p. 533, *post*. In the case of an unregistered company, no action is to be commenced or proceeded with against any contributory of the company except by and subject to the same leave and terms (*ibid.*, s. 271 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 202]); see p. 653, *post*. There is a similar provision as regards actions or proceedings against a company registered under Part VII. of the Act, or any contributory of such a company, in respect of a debt of the company (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 266 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 198]).

(*l*) *Chapman's Case* (1866), L. R. 1 Eq. 346. As to continuing the servants in analogous duties, or employing them in the business, see *MacDowall's Case* (1886), 32 Ch. D. 366; *Re English Joint Stock Bank, Ex parte Harding* (1867), L. R. 3 Eq. 341. An agent paid by commission is not entitled to prove for the loss of his future commission (*Re English and Scottish Marine Insurance Co., Ex parte Maclure* (1870), 5 Ch. App. 737). As to proof by servants, see further p. 522, *post*. Where an entertainment company has, in consideration of payments, given certain classes of members the right of free admission, they are not entitled to compensation for the loss of the privilege occasioned by winding up (*Re Royal Aquarium and Summer and Winter Garden Society* (1903), 20 T. L. R. 35). As to the obligation to continue business, see *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q. B. 488, C. A.; *Ogdens, Ltd. v. Nelson*, [1905] A. C. 109.

(*m*) *Measures Brothers, Ltd. v. Measures*, [1910] 1 Ch. 336, affirmed (1910) 26 T. L. R. 488, C. A. The dismissal discharges a restrictive covenant as to competing in business with the company (*ibid.*).

(*a*) *Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724. As to the effect on the directors' remuneration, see *Re South Western of Venezuela (Barguismeto) Railway*, [1902] 1 Ch. 701.

(*b*) *Madrid Bank v. Bayley* (1866), L. R. 2 Q. B. 37.

(*c*) *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, C. A. As to security for costs in such a case, see *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] 1 Ch. 491.

(*d*) See p. 567, *post*.

(*e*) See p. 473, *post*.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (1); and see p. 442, *post*.

(*g*) *Ibid.*, s. 149 (2), (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 85]; Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (5)].

been appointed (*h*); but the almost invariable rule is to appoint the official receiver (*i*).

When a provisional liquidator is appointed, the court may limit and restrict his powers by the order appointing him (*k*).

SECT. 16.
Winding up
by the
Court.

694. The application for the appointment of the official receiver as interim provisional liquidator may be made by a creditor or a contributory, or by the company. On proof by affidavit of sufficient grounds for the appointment, the court, if it thinks fit, and upon such terms as in its opinion are just and necessary, may make the appointment (*l*).

Application
for appoint-
ment.

695. When an order appointing the official receiver as provisional liquidator, prior to the making of a winding-up order, has been made by the court, the registrar of the court is on the same day to send to the official receiver a notice informing him that the order has been made, which notice may be in the form prescribed with such variations as circumstances may require (*m*). The order must bear the number of the petition, and state the nature and a short description of the property of which the official receiver is ordered to take possession, and the duties to be performed by him (*n*).

Incidents
to appoint-
ment.

If no order for the winding up of the company is made upon the petition, or if an order for the winding up of the company on the petition is rescinded, or if all proceedings on the petition are stayed, or if an order is made continuing the voluntary winding up of the company subject to the supervision of the court, then, subject to any order of the court, the official receiver as provisional liquidator is entitled to be paid, out of the property of the company, all costs, charges, and expenses properly incurred by him as provisional liquidator, including fees payable to the Board of Trade under the scale of fees in force for the time being, and may retain out of such property the amounts of such costs, charges, expenses, and fees (*o*).

When the official receiver is appointed interim provisional liquidator, three sealed copies of the order have to be sent to him, as in the case of a winding-up order, one of which he serves at the company's registered office; he must also give notice of the order to the Board of Trade to be gazetted, and send notice of the order to the local paper (*p*).

(*h*) *Re Unionist Club, Ltd.*, [1891] W. N. 64; *Re Mercantile Bank of Australia*, [1892] 2 Ch. 204. As to the notification of his appointment and giving of security, see p. 440, *post*.

(*i*) *Re North Wales Gunpowder Co.*, [1892] 2 Q. B. 220, C. A.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (5) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 96].

(*l*) Companies (Winding-up) Rules, r. 31(1); and see *Emmerson's Case* (1866), 1 Ch. App. 433; *Re Cilfoden Benefit Building Society* (1868), 3 Ch. App. 462; *Re Hammermith Town Hall Co.* (1877), 6 Ch. D. 112; *Re Bound & Co.*, [1893] W. N. 21, where the powers were restricted to applying for the appointment of a special manager. The application is usually by summons.

(*m*) Companies (Winding-up) Rules, r. 37. For form of notice see *ibid.*, Form 14.

n) *Ibid.*, r. 31 (2).

o) *Ibid.*, r. 31 (3).

p) See *ibid.*, r. 41 (1).

SECT. 16. The court may fix the remuneration of a liquidator, even when appointed provisionally (q).
Winding up by the Court.

(ii.) *Special Manager.*

Application for appointment.

696. Where the official receiver becomes the liquidator of a company, whether provisionally or otherwise, he may, if satisfied that the nature of the estate or business of the company, or the interests of the creditors or contributories generally, require the appointment of a special manager of the estate or business of the company other than himself, apply to the court to, and the court may on such application, appoint a special manager thereof to act during such time as the court may direct, with such powers, including any of the powers of a receiver or manager, as may be intrusted to him by the court (r). The court may also, in appointing the official receiver as interim provisional liquidator, restrict his power to that of applying for the appointment of a special manager (s).

Evidence on application.

The official receiver's application for the appointment of a special manager must be supported by a report by the official receiver (which must be placed on the file of proceedings), in which must be stated the amount of remuneration which, in the opinion of the official receiver, ought to be allowed to the special manager, but no affidavit by the official receiver in support of the application is required (t).

Security, remuneration, and accounts.

697. The special manager must give such security and account in such manner as the Board of Trade directs, and receives such remuneration as may be fixed by the court (a). The remuneration must, unless the court otherwise in any special case directs, be stated in the order appointing the special manager; but the court may at any subsequent time for good cause shown make an order for payment to the special manager of further remuneration (b).

Every special manager must account to the official receiver, and the accounts must be verified by affidavit, and, when approved by the official receiver, the totals of the receipts and payments must be added by the official receiver to his accounts (c).

Provisional Liquidator after Winding-up Order.

Ex officio provisional liquidator.

698. On a winding-up order being made the official receiver, by virtue of his office, becomes the provisional liquidator, and continues to act as such until he or another person becomes

(q) See p. 448, *post*. As to the remuneration of an official receiver as provisional liquidator, see p. 434, *post*.

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 161 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 5]. As to the notification of his appointment to the Board of Trade and the giving of security, see p. 440, *post*. The validity of the appointment is not affected by the subsequent dismissal of the petition; see *Re A. B. & Co.*, [1900] 2 Q. B. 429 (a bankruptcy case).

(s) *Re Bound & Co.*, [1893] W. N. 21. But the court may by the winding-up order give the official receiver power to carry on the company's business (*Re General Service Co-operative Stores* (1891), 64 L. T. 228).

(t) Companies (Winding-up) Rules, r. 48 (1).

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 161 (2), (3); [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 5 (2), (3).]

(b) Companies (Winding-up) Rules, r. 48 (2).

(c) *Ibid.*, r. 49. For form of affidavit, see *ibid.*, Form 20.

liquidator and is capable of acting as such. No other person can then or subsequently be appointed provisional liquidator (*d*).

SECT. 16.
Winding up
by the
Court.

SUB-SECT. 5.—*Official Receivers.*

(i.) *Appointment, Removal, and Status.*

699. The term "official receiver," as used in relation to the winding up of companies by the court, means the official receiver, if any, attached to the court for bankruptcy purposes, or if there is more than one such official receiver, then such one of them as the Board of Trade may appoint, or if there is no such official receiver, then an officer appointed for the purpose by the Board of Trade; and any such officer is, for the purpose of his duties under the Act of 1908, to be styled the official receiver (*e*). The official receiver in companies' liquidation in London is a distinct person from the official receiver in bankruptcy; but in the provinces the official receiver in companies' liquidation is generally, if not invariably, the same person as the official receiver in bankruptcy.

Definition.

The official receiver is appointed by and is an officer of the Board, but he is also an officer of the court (*f*). Judicial notice is to be taken of his appointment (*g*). When the Board appoints any officer to act as deputy for or in the place of an official receiver, notice thereof must be given by letter to the court to which such official receiver is or was attached, specifying the duration of such acting appointment. During his tenure of office the deputy has all the status, rights, and powers and is subject to all the liabilities of an official receiver (*h*). Where an official receiver is removed from his office by the Board, notice of the removal order must be communicated by letter to the court to which he was attached (*i*).

Appointment.

Notice to
the court.

The Board may, by general or special directions, determine what acts or duties of the official receiver in relation to winding up are to be performed by him in person, and in what cases he may discharge his functions through the agency of his clerks or other persons in his regular employ, or under his official control (*k*).

Allocation
of duties.

700. An assistant official receiver, appointed by the Board of Trade, is an officer of the court, like the official receiver to whom he is assistant, and, subject to the directions of the Board, he may represent the official receiver in all proceedings in court, or in any administrative or other matter. Judicial notice is to be taken of his appointment; and he may be removed in the same manner as an official receiver (*l*).

Assistant
official
receiver.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (2) (*b*); see p. 424, *post*.

(*e*) *Ibid.*, s. 146 [Companies Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (2)]; Companies (Winding-up) Rules, r. 2.

(*f*) Companies (Winding-up) Rules, r. 201; *Bottomley v. Brougham*, [1908] 1 K. B. 584; *Burr v. Smith*, [1909] 2 K. B. 306, C. A.

(*g*) Companies (Winding-up) Rules, r. 198.

(*h*) *Ibid.*

(*i*) *Ibid.*, r. 199.

(*k*) *Ibid.*, r. 200.

(*l*), r. 201.

SECT. 16.
Winding up
by the
Court.

In the absence of the official receiver any officer of the Board of Trade duly authorised for the purpose by the Board, and any clerk of the official receiver duly authorised by him in writing, may by leave of the court act on behalf of the official receiver, and take part for him in any public or other examination and in any unopposed application to the court (*m*).

(ii.) *Duties and Powers in general.*

Receiver in
debenture-
holders'
action.

701. The official receiver's services may be required in proceedings outside a winding up. Thus, where an application is made to the court to appoint a receiver on behalf of the debenture-holders or other creditors of a company which is being wound up by the court, the official receiver may be so appointed (*n*).

Ex officio
provisional
liquidator.

702. On a winding-up order being made the official receiver, by virtue of his office, becomes the provisional liquidator of the company (*o*). He continues to act as such until he or another person becomes liquidator and is capable of acting as such (*p*), after which no one else can be appointed provisional liquidator (*q*). The official receiver takes possession of the assets (*r*); but where a company against which a winding-up order has been made has no available assets, he is not to be required to incur any expense in relation to the winding up without the express directions of the Board of Trade (*s*). The official receiver as provisional liquidator has, after the winding-up order, the powers of a permanent liquidator with reference to settling a list of contributories, and probably most, if not all, of the other powers of a permanent liquidator (*t*).

Permanent
liquidators.

If no application is made to the court for the appointment of a

(*m*) Companies (Winding-up) Rules, r. 202.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 162 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (6)]; see *Strong v. Carlyle Press*, [1893] 1 Ch. 268, C. A.; *British Linen Co. v. South American and Mexican Co.*, [1894] 1 Ch. 108, C. A.; *Re Stubbs (Joshua), Ltd., Barney v. Stubbs (Joshua), Ltd.*, [1891] 1 Ch. 475, 481, C. A.; *Perry v. Oriental Hotels Co.* (1870), 5 Ch. App. 420; *Re Pound (Henry), Son and Hutchins* (1889), 42 Ch. D. 402, C. A.; *Re Vimbos, Ltd.*, [1900] 1 Ch. 470; *Re Maudslay, Sons and Field, Maudslay v. Maudslay, Sons and Field*, [1900] 1 Ch. 602; and p. 378, *ante*.

(*o*) As to his being interim provisional liquidator, see p. 421, *ante*.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (3) (b).

(*q*) *Re North Wales Gunpowder Co.*, [1892] 2 Q. B. 220, C. A.; *Re Reid (John) & Sons, Ltd.*, [1900] 2 Q. B. 634.

(*r*) In the rules "liquidator" includes an official receiver when acting as liquidator (Companies (Winding-up) Rules, r. 2). And he is acting as liquidator from the time when the winding-up order is pronounced and then begins to act as provisional liquidator (*Re English Bank of the River Plate*, [1892] 1 Ch. 391, 393). As liquidator, he must take into his custody or under his control all the property and things in action to which the company is or appears to be entitled (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 150 (1)). This is clear from another rule which requires the official receiver, when another person's appointment as liquidator is complete, to forthwith put the latter into possession of all property of the company of which the official receiver may have custody (Companies (Winding-up) Rules, r. 161 (1)); see p. 444, *post*.

(*s*) Companies (Winding-up) Rules, r. 203.

(*t*) *Re English Bank of the River Plate*, *supra*. In the Companies (Winding-up) Rules, unless the context or subject-matter otherwise requires, "liquidator" includes the official receiver when acting as liquidator (*ibid.*, r. 3).

permanent liquidator in the place of the official receiver, or if no liquidator is appointed by the court, the official receiver will be the liquidator (*u*). If a vacancy occurs in the office of a liquidator appointed by the court, the official receiver, by virtue of his office, is the liquidator during the vacancy (*a*).

SECT. 16.
Winding up
by the
Court.

Where there is no committee of inspection, its functions devolve on the Board of Trade, but, subject to the Board's direction, may be discharged by the official receiver (*b*).

Committee
of inspection.

Besides the duties mentioned above he has many separate duties to perform in his character of official receiver, the nature of which appears below.

703. An appeal to the court from an act or decision of the official receiver, acting otherwise than as liquidator of a company, must be brought within twenty-one days from the time when the decision or act appealed against is done, pronounced, or made (*c*).

Appeal from
official
receiver.

(iii.) *Statement of Affairs.*

704. Having, as liquidator, commenced to collect the assets of the company (*d*) by taking possession, and, as official receiver, performed his duties with reference to the winding-up order and the advertisement thereof, his next duties as official receiver are with reference to (1) the statement of affairs; (2) the submission of his preliminary report to the court; and (3) the summoning of the first meetings of creditors and contributories.

Duties as
to statement
of affairs.

705. Where the court has made a compulsory winding-up order, there must be made out and submitted to the official receiver a statement as to the affairs of the company in the prescribed form (*e*), verified by affidavit, and showing the particulars of its assets, debts, and liabilities, the names, residences, and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the official receiver may require (*f*). The statement must be made out in duplicate, one copy of which must be verified by affidavit (*g*). The official receiver must cause the verified statement of affairs to be filed with the registrar of the court in which the winding up is proceeding (*h*).

Submission
and verifica-
tion of
statement.

(*u*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 152; see p. 438, *post*.

(*a*) *Ibid.*, s. 149 (7).

(*b*) *Ibid.*, s. 160 (9); Companies (Winding-up) Rules, r. 205; as to the committee of inspection, see p. 438, *post*.

(*c*) Companies (Winding-up) Rules, r. 206.

(*d*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 150 (1), 163 (1).

(*e*) The form is prescribed by the Companies (Winding-up) Rules, r. 50; for the form, see *ibid.*, Form 26.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (1)].

(*g*) Companies (Winding-up) Rules, r. 50 (1).

(*h*) *Ibid.*, r. 50 (1).

SECT. 16.

**Winding up
by the
Court.**

Persons who
must submit
and verify
statement.

706. The statement must be submitted and verified by one or more of the persons who are at the time of the winding-up order the directors, and by the person who is at that time the secretary or other chief officer of the company, or by such of the persons being or having been directors or officers of the company or having taken part in the formation of the company at any time within one year before the winding-up order, as the official receiver, subject to the direction of the court, may require to submit and verify the same (i). Even if a man has ceased to be legally a director, but has been *de facto* acting as a director within the prescribed period of a year, he is within this provision (j). Every person who has been required by the official receiver to submit and verify a statement of affairs must be furnished by him with forms and instructions for the preparation of the statement (k). He may from time to time hold personal interviews with every such person for the purpose of investigating the company's affairs, and it is the duty of every such person to attend on him at such time and place as he may appoint and give him all information that he may require (l).

Time for
submitting
statement.

707. The statement must be submitted within fourteen days from the date of the order, or within such extended time as the official receiver or the court may for special reasons appoint (m). When any person requires any extension of time for submitting the statement of affairs, he must apply to the official receiver, who may, if he thinks fit, give a written certificate extending the time, which must be filed with the proceedings in the winding up and renders an application to the court unnecessary (n).

Expenses
of persons
making
statement.

708. Any person making or concurring in making the statement and affidavit required is allowed and paid by the official receiver, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official receiver may consider reasonable, subject to an appeal to the court (o). Before incurring any such costs or expenses he must apply to the official receiver for his sanction, and submit a statement of the estimated costs and expenses which it is intended to incur. Except by order of the court, no person is to be allowed out of the assets of the company any costs or expenses which have not before being incurred been sanctioned by the official receiver (p).

Attendances
as to state-
ment.

709. After the statement of affairs has been submitted to the official receiver it is the duty of each person who has made or

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (2)].

(j) *Re New Par Consols*, [1898] 1 Q. B. 573.

(k) Companies (Winding-up) Rules, r. 50 (1).

(l) *Ibid.*, r. 50 (2).

(m) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (3)].

(n) Companies (Winding-up) Rules, r. 51.

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (4)].

(p) Companies (Winding-up) Rules, r. 54.

concurred in making it, if and when required, to attend on the official receiver and answer all such questions as may be put to him, and give all such further information as may be required of him by the official receiver in relation to the statement (q).

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Court.

710. Any person who, without reasonable excuse, makes default in complying with the above-mentioned requirements is liable to a fine not exceeding £10 for every day during which the default continues (r). Any such default may be reported by the official receiver to the court (s) with a view to the defaulter being ordered to submit the statement and committed in default (t). Applications for orders must be made to the winding-up judge himself, who must be satisfied that the person required to make the statement had the materials for so doing (a). Penalties.

711. Any person stating himself in writing to be a creditor or contributory of the company is entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement of affairs, and to a copy thereof or extract therefrom; but any person untruthfully so stating himself to be a creditor or contributory is guilty of a contempt of court and punishable accordingly on the application of the liquidator or of the official receiver (b). Inspection.

712. The official receiver must, before summoning the first meeting of creditors and contributories, as soon as practicable, send to each creditor mentioned in the statement of affairs, and to each person appearing from the company's books or otherwise to be a contributory of the company, a summary of the statement of affairs, including the causes of the company's failure, and any observations thereon which the official receiver thinks fit to make; but the proceedings at a meeting are not invalidated by reason of any summary or notice required by the rules not having been sent or received before the meeting (c). Summary.

(iv.) *Preliminary Report.*

713. As soon as practicable after receipt of the statement of the company's affairs the official receiver must submit a preliminary report to the court (1) as to the amount of capital issued, subscribed and paid up, and the estimated amount of assets and liabilities; and (2) if the company has failed, as to the causes of the failure; and (3) whether in his opinion further inquiry is desirable as to any Official receiver's preliminary report.

(q) Companies (Winding-up) Rules, r. 52.

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (5)].

(s) Companies (Winding-up) Rules, r. 53.

(t) *Re New Par Consols*, [1898] 1 Q. B. 573; *Re New Par Consols* (No. 2), [1898] 1 Q. B. 669, O. A.

(a) *Re Columbian Gold Mines*, [1894] W. N. 92.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (6)]; see the similar provisions in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 16 (4); and title **BANKRUPTCY AND INSOLVENCY**, Vol. II., p. 71.

(c) Companies (Winding-up) Rules, r. 120 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 7 (5)].

SECT. 16. matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof (*d*).

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by the
Court.**

A public examination cannot be ordered on the preliminary report; a further report is necessary (*e*). One of the objects of requiring the preliminary report, is to bring before the court early information important in guiding its judgment as to the persons who ought to be privately examined (*f*).

(v.) *Summoning First Meetings of Creditors and Contributories.*

**Official
receiver's
duties as
to first
meetings.**

714. When a compulsory winding-up order has been made, the official receiver must summon separate first meetings of the creditors and contributories to determine whether or not application is to be made to the court to appoint a liquidator (in his place), and a committee of inspection (*g*).

First meetings of creditors and contributories must be held within twenty-one days, or if a special manager has been appointed, then within one month, after the date of the winding-up order, or within such further time as the court may approve. The dates of such meetings are to be fixed, and they must be summoned by the official receiver (*h*). He must forthwith give notice of the days fixed by him for the first meetings to the Board of Trade, which must gazette the same (*i*).

The first meetings are to be summoned by notices (*k*), which may be in the prescribed forms. The notices to creditors must state a time within which the creditors must lodge their proofs in order to entitle them to vote at the first meeting of creditors (*l*).

The official receiver must also give to each of the directors and other officers of the company who, in his opinion, ought to attend the first meetings of creditors and contributories seven days' notice of the time and place appointed for each meeting; this notice may either be delivered personally or sent by prepaid post letter, as may be convenient. It is the duty of every director or officer who receives notice of such meeting to attend, if so required, by the official receiver (*m*).

(vi.) *Books and Accounts.*

**Record and
cash books.**

715. The official receiver, until a liquidator is appointed by the court, must keep a book called the "record book," in which he

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 148 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (1)].

(*e*) *Ibid.*, s. 148 (2); *Re Great Kruger Gold Mining Co., Ex parte Barnard*, [1892] 3 Ch. 307, C. A.; *Ex parte Barnes*, [1896] A. C. 146; *Re Civil, Naval, and Military Outfitters, Ltd.*, [1899] 1 Ch. 215, C. A. This further report should be made on the personal responsibility of the official receiver, not under the direction of the Board of Trade (Practice Note, [1894] W. N. 44).

(*f*) *Ex parte Barnes, supra*.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 152 (1). As to these meetings, see further, p. 466, *post*.

(*h*) Companies (Winding-up) Rules, r. 115.

(*i*) *Ibid.*, r. 116.

(*k*) *Ibid.*, r. 117.

(*l*) *Ibid.*, r. 118; see *ibid.*, Forms 21, 22.

(*m*) *Ibid.*, r. 119; as to sending to creditors and contributories a summary of the statement of affairs. see *ibid.* r. 120: and p. 427, *ante*.

must record the matters which are required to be entered by the liquidator when appointed (*n*), and also a "cash book" in the prescribed form, in which day-to-day entries of receipts and payments must be made (*o*). When another person is appointed liquidator, he has thenceforth to keep the record and cash books, which he receives from the official receiver (*p*), and when he resigns, or is released or removed from office, he must deliver to the official receiver, if no new liquidator is appointed, all books kept by him and all other books, papers and accounts relating to his office (*q*).

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Court.

Where a liquidator is appointed by the court the official receiver must account to him; and if the liquidator is dissatisfied with the account, or any part of it, he may report the matter to the Board of Trade, which is to take such action (if any) thereon as it may deem expedient (*r*). If the Board refuses to interfere, he may apply to the court for directions (*s*). It is the official receiver's duty to communicate to the liquidator all such information respecting the estate and affairs of the company as may be necessary or conducive to the due discharge of the liquidator's duties (*a*).

Accounting to
liquidator.

When the official receiver is liquidator, the provisions of the rules as to liquidators and their accounts do not apply to him, but he is to account in such manner as the Board of Trade from time to time directs (*b*).

(vii.) *Further Report to the Court and Public Examination.*

716. After the official receiver has submitted his preliminary report to the court (*c*), he may also, if he thinks fit, make a further report, or further reports (*d*), stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the court (*e*).

Official
receiver's
further
report.

It is on this report, and not the preliminary report, that a public examination may be ordered (*f*). The official receiver must state in effect that in his judgment fraud has been committed by the

(*n*) Companies (Winding-up) Rules, r. 166; see p. 451, *post*.

(*o*) *Ibid.*, r. 167 (1); and see p. 451, *post*.

(*p*) *Ibid.*, rr. 168, 167 (1).

(*q*) *Ibid.*, r. 175 (1).

(*r*) *Ibid.*, r. 204 (1), (2). As to giving possession to the liquidator, see p. 444, *post*.

(*s*) *Re Smith, Ex parte Fox* (1886), 17 Q. B. D. 4.

(*a*) Companies (Winding-up) Rules, r. 161 (3). But the official receiver must not, except under special circumstances, pass on notes and documents obtained when the statement of affairs is being prepared (*Re Lake George Mines, Ltd.*, [1904] 1 Ch. 803).

(*b*) Companies (Winding-up) Rules, r. 204 (3).

(*c*) See p. 427, *ante*.

(*d*) Facts elicited at the public examination of one person may justify a second report as to another person; see *Ex parte Barnes*, [1896] A. C. 146, 157.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 148 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (2)].

(*f*) *Re Great Kruger Gold Mining Co., Ex parte Barnard*, [1892] 3 Ch. 307.

SECT. 16. persons he names in the promotion of the company or in relation to the company since its formation (g); and the report must set out the facts, showing a *prima facie* case (h).

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by the
Court.

The further report must state, in a narrative form, the facts and matters which the official receiver desires to bring to the notice of the court, and his opinion as required by the Act (i). The making of the report is a function which the official receiver performs as an officer of the court, and therefore the report is absolutely privileged as regards libel proceedings by persons therein named (k).

The official receiver may apply to the court to fix a day for the consideration of the report, and on such application the court appoints a day on which the report is to be considered (l).

Consideration
of report.

The consideration of the report must be before the judge of the court personally in chambers; the official receiver must personally, or by counsel or solicitor, attend the consideration of the report, and give the court any further information or explanation with reference to the matters stated in the report which the court may require (m).

Order for
public
examination.

717. When the official receiver has made his further report, stating that in his opinion a fraud has been committed by any person in promotion or formation of the company, or by any director or other officer of the company in relation to the company since its formation (n), the court may, after consideration of the report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the court on a day appointed by the court for that purpose and be publicly examined as to the promotion or formation, or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof (o).

The application for an order for public examination may be

C. A.; *Ex parte Barnes*, [1896] A. C. 146; *Re Civil, Naval, and Military Outfitters, Ltd.*, [1899] 1 Ch. 215, C. A.

(g) *Ex parte Barnes*, *supra*; compare *Re Trust and Investment Corporation of South Africa*, *Re Bertram Luipaard's Vlei Gold Mining Co.*, [1892] 3 Ch. 332, C. A.; *Re Laxon & Co. (3)*, [1893] 1 Ch. 210; *Re Birkdale Steam Laundry and Carpet Beating Co.*, [1893] 2 Q. B. 386; *Re General Phosphate Corporation*, *Re Northern Transvaal Gold Mining Co.*, *Re Delhi Steamship Co.*, [1895] 1 Ch. 3, C. A.

(h) *Re Civil, Naval, and Military Outfitters, Ltd.*, *supra*.

(i) Companies (Winding-up) Rules, r. 59.

(k) *Bottomley v. Brougham*, [1908] 1 K. B. 584; *Burr v. Smith*, [1909] 2 K. B. 306, C. A.; Practice Note, [1894] W. N. 44.

(l) Companies (Winding-up) Rules, r. 60.

(m) *Ibid.*, r. 61.

(n) The section does not apply where the only charges against the company are of having committed frauds in the course of its business with the outside world, and not connected with its promotion or formation (*Re Medical Battery Co.*, [1894] 1 Ch. 444, 447).

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (3)]. Oral evidence outside the report cannot be received (*Re Great Kruger Gold Mining Co.*, *Ex parte Barnard*, [1892] 3 Ch. 307, 327, 331, C. A.).

made *ex parte* (p). The official receiver must act independently of the Board of Trade in respect of public examinations (q).

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Court.

Application
to discharge
order.

718. The person ordered to be examined can only apply to discharge the order for want of jurisdiction in making it (r); and notice of motion to discharge the order must be made within a reasonable time (s). The court will not, on an application to discharge, allow rebutting evidence on the question of fraud or otherwise to be adduced, or hold any half trial of the questions involved (t). Where the order is discharged the official receiver will be ordered to pay costs *simpliciter*, and not merely out of the assets of the company (a).

719. A public examination must be held before the judge. In the High Court, however, the judge may direct that the whole or any part of the examination shall be held before the registrar, or before any of the persons mentioned below (b). A public examination in the High Court generally takes place before the Registrar in Companies Winding-Up. If the court so directs, and subject to general rules, it may be held before any judge of county courts, or before any officer of the Supreme Court being an official referee, master, or registrar in bankruptcy, or before any district registrar of the High Court named for the purpose by the Lord Chancellor, or, in the case of companies being wound up by a palatine court, before a registrar of that court. The powers of the court as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held (c).

Before whom
examination
to be held.

The judge may, if he thinks fit, either in the order for examination or by any subsequent order, give directions as to the special matters on which any such person is to be examined (d).

720. On the order for public examination being made, the official receiver must apply for the appointment of a day on which the examination is to be held (e). A day and place are then appointed for holding the public examination; and notice of the day and place so appointed must be given by the official receiver to the person to be examined by sending such notice in a registered letter addressed to his usual or last known address (f).

Time and
place of
examination.

The official receiver must also give notice of the time and place

(p) *Re Great Kruger Gold Mining Co., Ex parte Barnard*, [1892] 3 Ch. 307; *Re Trust and Investment Corporation of South Africa, Re Bertram Luipaard's Vlei Gold Mining Co.*, [1892] 3 Ch. 332.

(q) Practice Note, [1894] W. N. 44; *Re New Zealand Loan and Mercantile Agency Co.*, [1894] W. N. 200.

(r) *Re New Travellers' Chambers, Ltd.*, [1895] 1 Ch. 395.

(s) *Re Civil, Naval, and Military Outfitters, Ltd.*, [1899] 1 Ch. 215, C. A.; *Re National Stores, Ltd.*, [1900] 1 Ch. 27, C. A.

(t) *Re New Travellers' Chambers, Ltd.*, *supra*; *Re National Stores, Ltd.*, *supra*.

(a) *Re Hounslow Brewery Co.*, [1896] W. N. 45.

(b) Companies (Winding-up) Rules, r. 62.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (9) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (9)].

(d) Companies (Winding-up) Rules, r. 62 (b).

(e) *Ibid.*, r. 63.

(f) *Ibid.*, r. 64; and see *ibid.*, Forms 32, 33.

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appointed for the examination to the creditors and contributories by advertisement in such newspapers as the Board of Trade from time to time directs, or, in default of any such direction, as the official receiver thinks fit, and must also forward notice of the appointment to the Board to be gazetted (*g*).

Failure to
attend
examination.

721. If any person directed to attend for public examination fails to attend, and no good cause is shown by him for such failure, or if before the day appointed for the examination the official receiver satisfies the court that such person has absconded, or that there is reason for believing that he is about to abscond with the view of avoiding examination, the court may, upon its being proved to its satisfaction that notice of the order and of the time and place appointed for attendance was duly served, without any further notice issue a warrant for his arrest, or make such other order as the court thinks just (*h*). A warrant of arrest issued by the High Court is to be issued in the Central Office of the Supreme Court pursuant to an order of the court directing such issue (*i*).

Conduct
of the
examination.

722. A person ordered to be publicly examined is, at his own cost, before his examination, to be furnished with a copy of the official receiver's report. He may at his own cost employ a solicitor with or without counsel, who shall be at liberty to put to him such questions as the court may deem just for the purpose of enabling him to explain or qualify any answers given by him (*k*). He is to be examined on oath, and must answer all such questions as the court may put or allow to be put to him (*l*). The discretionary power of allowing a question to be put is in no way limited by the other provisions of the statute, but must be judicially and carefully exercised in all the circumstances of each particular case (*m*).

The official receiver is to take part in the examination, and for that purpose may, if specially authorised by the Board of Trade in that behalf, employ a solicitor with or without counsel (*n*). The liquidator, where the official receiver is not the liquidator, and any creditor or contributory, may also take part in the examination either personally or by solicitor or counsel (*o*); and the court may put such questions to the person examined as the court thinks fit (*p*).

Refusal to
answer.

723. If a person examined before a registrar or other officer of the court, who has no power to commit for contempt of court,

(*g*) Companies (Winding-up) Rules, r. 65 (1).

(*h*) *Ibid.*, r. 66 (1); and see Form 40.

(*i*) *Ibid.*, r. 66 (2).

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (7)].

(*l*) *Ibid.*, s. 175 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (7)].

(*m*) *Re London and Globe Finance Co.* (1902), 50 W. R. 253.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (4)].

(*o*) *Ibid.*, s. 175 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (5)].

(*p*) *Ibid.*, s. 175 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (6)].

refuses to answer to the satisfaction of such officer any question which he may allow to be put, the officer is to report the refusal to the judge. The person in default is thereupon in the same position, and is to be dealt with in the same manner, as if he had made default in answering before the judge (*q*). Such report is to be in writing, but without affidavit, and must set forth the question put, and the answer (if any) given by the person examined (*r*). The registrar or other officer must, before the conclusion of the examination at which the default is made, name the time when and the place where the default will be reported to the judge. Upon receiving the report the judge may take such action thereon as he thinks fit. If the judge is sitting at the time when the default is made, it may be reported immediately (*s*).

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724. Notes of the examination are to be taken down in writing, and must be read over to or by, and signed by, the person examined. They may thereafter be used in evidence against him (*t*), and are to be open to the inspection of any creditor or contributory at all reasonable times (*u*).

Notes of
examination.

If the court, or the officer of the court before whom the examination is directed to be held, is, in any case and at any stage, of opinion that it is desirable to appoint a person (other than the person before whom an examination is taken) to take down the evidence of any person examined, in shorthand or otherwise, the court or officer aforesaid may make such appointment. The person at whose instance the examination is taken nominates a person for the purpose, and the person nominated is to be appointed, unless the court or officer appointed otherwise orders. Every person so appointed is to be paid a sum not exceeding one guinea a day, and a sum not exceeding 8*d.* per folio of ninety words for any transcript of the evidence that may be required, and such sums are to be paid by the party at whose instance the appointment is made, or out of the assets of the company, as may be directed by the court (*a*).

The notes of every public examination must, after being signed, be filed with the registrar (*b*).

725. The court may, if it thinks fit, adjourn the examination from time to time (*c*). The registrar, or other person taking the examination, may adjourn the examination of any person, or any part of the examination, to be held before the judge, where he is of opinion that the examination held before him is being unduly protracted, or for any other sufficient cause (*d*).

Adjournment.

(*q*) Companies (Winding-up) Rules, r. 72 (1).

(*r*) *Ibid.*, r. 72 (2); for form of report see *ibid.*, Form 38.

(*s*) *Ibid.*, r. 72 (3).

(*t*) See *ibid.*, r. 70; and p. 484, *post*.

(*u*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (7) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (7)].

(*a*) Companies (Winding-up) Rules, r. 71.

(*b*) *Ibid.*, r. 67; and see *ibid.*, Forms 36, 37.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (8) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (8)].

(*d*) Companies (Winding-up) Rules, r. 62 (*c*).

SECT. 16. Where an adjournment of the public examination has been directed, notice of the adjournment is not, unless otherwise directed by the court, to be advertised in any newspaper; it is sufficient to publish in the *London Gazette* a notice of the time and place fixed for the adjourned examination (e).

Costs of examination. **726.** If any person personally examined is, in the opinion of the court, exculpated from any charges made or suggested against him, the court may allow him such costs as in its discretion it may think fit (f).

(viii.) *Remuneration and Costs.*

Remuneration. **727.** Where the official receiver acts as provisional liquidator or liquidator, he is paid the fees prescribed (g), and for them he is accountable as the Treasury directs (h). Some of these fees are in respect of realising the assets, and others in respect of remuneration (i). Where another person is appointed as liquidator, he must pay the official receiver any balance due to him for fees, costs, and charges properly incurred, and for them the official receiver has a lien on the assets (k).

Liability for costs. **728.** The official receiver is in no case personally liable for the costs of or in relation to an application to vary the list of contributories (l), or an appeal from his decision rejecting any proof wholly or in part (m). He may, however, be ordered to pay the costs when an order obtained by him for public examination has been reversed. When he is also liquidator he is subject to the rules as to costs affecting other liquidators (n).

SUB-SECT. 6.—*Board of Trade.*

Appointment of officers. **729.** The Board of Trade, as a State department (o), has many statutory powers and duties with respect to the winding up of

(e) Companies (Winding-up) Rules, r. 65 (2).

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 8 (7)]. As to the practice on public examinations, see also title *BANKRUPTCY AND INSOLVENCY*, Vol. II., p. 71—74.

(g) See Order of December 2nd, 1903, Table B; *Re A. B. & Co.* (No. 2), [1900] 2 Q. B. 429, O. A.

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 237 (3). As to the power of the Board of Trade to fix the remuneration of its officers, see p. 435, *post*.

(i) As to the priority of them on distributing the assets of the company, see Companies (Winding-up) Rules, r. 187 (1).

(k) *Ibid.*, r. 161; see p. 444, *post*.

(l) *Ibid.*, r. 81 (2).

(m) *Ibid.*, r. 114.

(n) See p. 450, *post*. When the official receiver and liquidator took out a misfeasance summons, he was ordered to pay the costs in the winding-up court and the Court of Appeal of the ultimately successful application of the respondent to stay the proceedings (*Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617, O. A.; see *Re Powell (W.) & Sons*, [1896] 1 Ch. 681; *Re Hounslow Brewery Co.*, [1896] W. N. 45). The official receiver should only allow his name to be used in proceedings under an indemnity as to costs in a clear case, or where authorised by the committee of inspection (*Re Anglo-Sardinian Antimony Co.*, [1894] W. N. 156, 166).

(o) See title *CONSTITUTIONAL LAW*, Vol. VII., pp. 102, 103.

companies. The concurrence of its President is required to the making of general rules as to winding up (*p*). The Board appoints, removes, defines the duties of, and fixes the salaries of officers who are concerned in the winding up of companies, such as the official receivers (*q*) and the Registrar of Joint Stock Companies (*r*).

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Court.

The Board of Trade may, with the approval of the Treasury, appoint and remove such additional officers as may be required by the Board for the execution of the winding-up provisions of the Act of 1908; and it may with the like concurrence direct whether any and what remuneration is to be allowed to any officer of, or person attached to, the Board performing any duties under such winding-up provisions. And the Lord Chancellor, with the like concurrence, is to direct whether any, and what, remuneration is to be allowed to any person (other than an officer of the Board) performing any duties in relation to winding up (*a*).

730. The Board of Trade has a general statutory surveillance of liquidators, of whom it may make inquiries to be answered on oath, and whose books and vouchers it may locally investigate (*b*). A liquidator must notify his appointment to the Board, and must give security to its satisfaction (*c*). The Board must keep with the Bank of England an account, called the Companies Liquidation Account, of moneys received by the Board in respect of winding-up proceedings (*d*), as well as an account of the receipts and payments in each winding up (*e*). The Board prescribes how the liquidator is to pay his money into the Companies Liquidation Account; it may authorise him to have a special banking account (*f*), and, in case of irregularities in his payments, may disallow his remuneration, and even remove him from office (*g*). The Board inspects and audits his accounts (*h*), and takes care that he complies with the statutory requirements as to information concerning pending liquidations (*i*). It prescribes how moneys payable by him are to be paid, and provides him with the necessary cheques (*j*), and, finally grants him his release (*k*). The Board may even prescribe the form of notice of a voluntary liquidator's appointment (*l*), besides having surveillance of the disposition of assets in a voluntary winding up (*m*).

Surveillance
of liquidators.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 237.

(*q*) *Ibid.* ss. 146, 233, 289; see p. 423, *ante*.

(*r*) *Ibid.* ss. 243, 289; see p. 59, *ante*.

(*a*) *Ibid.*, s. 233 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 27].

(*b*) *Ibid.* s. 159.

(*c*) *Ibid.* s. 149 (3) (*c*); see p. 440, *post*.

(*d*) *Ibid.* s. 229; see p. 459, *post*.

(*e*) *Ibid.*, s. 231; see p. 436, *post*.

(*f*) See p. 460, *post*.

(*g*) *Ibid.*, s. 154; see pp. 449, 461, *post*.

(*h*) *Ibid.*, s. 155; see p. 452, *post*.

(*i*) *Ibid.*, s. 224; see p. 455, *post*.

(*j*) Companies (Winding-up) Rules, r. 164; Board of Trade Regulations, 1909, r. 6; see p. 460, *post*.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) s. 157; see p. 463, *post*.

(*l*) *Ibid.*, s. 187; see p. 573, *post*.

(*m*) *Ibid.*, s. 224; see p. 457, *post*.

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Court.

All special managers appointed by the court have to give security to the satisfaction of the Board of Trade (n).

Where there is no committee of inspection, the Board performs the functions of that body (o).

The Board has also an active voice as to the investment of funds in the Companies Liquidation Account generally, or in respect of any particular company, and as to the realisation of the securities (p).

The official receiver requires the Board's special authority to employ solicitors or counsel at a public examination (q) or to incur any expense in relation to the winding up of a company which has no available assets (r).

The officers of the winding-up courts have to make to the Board returns of business, and from those returns the Board causes books to be prepared, which, under its regulations, are open for public information and searches (s).

Separate
accounts
for each
winding up.

731. An account is to be kept by the Board of Trade of the receipts and payments in each winding up. When the cash balance standing to the credit of the account of any company is in excess of the amount which, in the opinion of the committee of inspection, is required for the time being to answer demands in respect of that company's estate, the Board is, on the request of the committee, to invest the amount not so required in Government securities for the benefit of the company (a). For this purpose the committee must sign a certificate and request, and the liquidator must transmit the certificate and request to the Board (b).

The dividends on the investments are to be paid to the credit of the company (c).

When the balance at the credit of any company's account exceeds £2,000, and the liquidator gives notice to the Board that the excess is not required for the purposes of the liquidation, the company is entitled to interest on the excess at the rate of 2 per cent. per annum (d).

When any part of the money so invested is, in the opinion of the committee of inspection, required to answer any demands in respect of the estate of the company, the Board is, on the request of the committee, to raise such sum as may be required by the sale of

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 161 (2); Companies (Winding-up) Rules, r. 57; see p. 422, *ante*.

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 160 (9); see p. 464, *post*.

(p) *Ibid.*, ss. 230, 231; see p. 458, *post*.

(q) *Ibid.*, s. 175 (2); see p. 432, *ante*.

(r) Companies (Winding-up) Rules, r. 203.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 235 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 29 (1)].

(a) *Ibid.*, s. 231 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 17 (1)].

(b) Companies (Winding-up) Rules, r. 168 (1). For form of certificate and request, see *ibid.*, Form 84.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 231 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 17 (3)].

(d) *Ibid.*, s. 231 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63)].

part of the securities (*e*). For this purpose the committee must sign a certificate and request to that effect, and the liquidator must transmit such certificate and request to the Board of Trade (*f*). Where in a winding up by the court in which there is no committee of inspection a case has in the opinion of the liquidator arisen for an investment of funds or a sale of securities, the liquidator must sign and transmit to the Board a certificate and a request (*g*).

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Court.

732. All documents purporting to be orders or certificates made or issued by the Board of Trade for the purposes of the Act of 1908, and to be sealed with the Board's seal, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by its President, must be received in evidence and deemed to be such orders or certificates without further proof unless the contrary is shown; and a certificate signed by the President that any order made, certificate issued, or act done is the order, certificate, or act of the Board, is conclusive evidence of the fact so certified (*h*).

Authentica-
tion of Board
of Trade's
documents.

733. The Treasury may issue to the Board of Trade in aid of the votes of Parliament, out of the receipts arising in respect of the winding up of companies from fees, fee stamps, and dividends on investments by the Treasury under the Act, any sums necessary to meet the charges estimated by the Board in respect of salaries and expenses under the Act in relation to the winding up of companies (*i*).

Treasury
allowances
to Board
of Trade.

734. The accounts of the Board of Trade in relation to the winding up of companies are audited by the Treasury (*k*). The Treasury is required to lay annually before Parliament an account of the receipts and expenditure in respect of proceedings under the Act in relation to the winding up of companies (*l*).

Audit of
account.

735. The Board of Trade must also cause a general annual report of matters within the Act of 1908 to be prepared and laid before Parliament (*m*). An action of libel does not lie against an officer of the Board in respect of statements contained in a report prepared by him for and delivered to the Board in the performance of his duties, on winding-up matters, for the purpose of its being laid before Parliament as part of the Board's general annual report (*n*).

Annual
report of
Board of
Trade.

(*e*) Companies (Consolidation Act, 1908 (8 Edw. 7, c. 69), s. 231 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 17 (2)].

(*f*) Companies (Winding-up) Rules, r. 168 (2).

(*g*) *Ibid.*, r. 168 (3).

(*h*) Companies (Consolidation Act, 1908 (8 Edw. 7, c. 69), s. 236 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 30].

(*i*) *Ibid.*, s. 232 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 19].

(*k*) *Ibid.*, s. 234 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 28 (2)].

(*l*) *Ibid.*, s. 234 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 28 (1)].

(*m*) *Ibid.*, s. 283 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 29 (2); Companies Act, 1907 (7 Edw. 7, c. 50), s. 47].

(*n*) *Burr v. Smith*, [1909 2 K. B. 306 O. A.

SECT. 16.

Winding up
by the
Court.Different
kinds of
liquidators.SUB-SECT. 7.—*Liquidators and Committee of Inspection.*(i.) *Different Kinds of Liquidators.*

736. There are three kinds of liquidators in a winding up by order of the court, namely, (1) an interim provisional liquidator, who may be appointed at any time after the winding-up petition has been presented (o); (2) the official receiver acting as provisional liquidator *ex officio* from the time when the winding-up order is made until he is displaced by the appointment of some other person as permanent liquidator, or himself becomes permanent liquidator by reason that no other person is appointed (p); and (3) the liquidator proper, or permanent liquidator, who may be the official receiver himself or some other person appointed by the court after the first meetings of the creditors and contributories have been held and the result of their views on the question who is to be the liquidator has been reported to, and brought before, the court (q).

(ii.) *Appointment of Liquidator and Committee of Inspection.*Purpose of
liquidator's
appointment.

737. The court appoints a liquidator for the purpose of conducting the proceedings in winding up a company which the court has ordered to be wound up by the court and performing such duties in reference thereto as the court may impose (r).

First
meetings to
nominate
liquidator.

738. When a winding-up order has been made by the court, the official receiver must summon separate first meetings of the creditors and contributories of the company for the purpose of (1) determining whether or not an application is to be made to the court for appointing a liquidator in the place of the official receiver; and (2) determining whether or not an application is to be made to the court for the appointment of a committee of inspection to act with the liquidator, and who are to be the members of the committee if appointed (s).

As soon as possible after the first meetings of creditors and contributories have been held, the official receiver or the chairman of the meeting, as the case may be, must report the result of each meeting to the court (t).

Application
to court
to make
appointments.

739. On the result of the first meetings of creditors and contributories being so reported, the court may, if the meeting of creditors and the meeting of contributories have each passed the same resolutions, or if the resolutions passed at the two meetings are identical in effect, upon the application of the official receiver

(o) See p. 420, *ante*.(p) See p. 422, *ante*, and p. 439, *post*.(q) See pp. 439, *post*. This sub-section only deals with liquidators proper or permanent.(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 94]. As to the official receiver acting as liquidator, see p. 424, *ante*.(s) *Ibid.*, s. 152 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 6 (1)]. As to the summoning and holding of the meeting, see p. 428, *ante*, and p. 466, *post*.(t) Companies (Winding-up) Rules, r. 55 (1); and see *ibid.*, Form 27.

forthwith make any appointment (u) or order necessary for giving effect to such resolutions (a).

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Court.

In any other case, the court must, on the application of the official receiver, fix a time and place for considering the resolutions and determinations (if any) of the meetings, deciding differences (if any), and making such order as shall be necessary (b). The time and place so fixed must be advertised by the official receiver in such manner as the court directs; but the first or only advertisement must be published not less than seven days before the time so fixed (c).

On the consideration of the resolutions and determinations of the meetings, the court is to hear the official receiver and any creditor or contributory (d); and if there is a difference between the determinations of the meetings of the creditors and contributories in respect of any of the matters above mentioned in the section, the court is to decide the difference (e).

If no other person is appointed liquidator, the official receiver is liquidator (f).

Proceedings
on appoint-
ment of
liquidator.

740. If a liquidator is appointed, a copy of the order appointing him must be transmitted to the Board of Trade by the official receiver (g).

If more than one liquidator is appointed by the court, the court is to declare whether any act which, by the Act of 1908, is required or authorised to be done by the liquidator is to be done by all or any one or more of the persons appointed (h).

(u) As a general rule a shareholder should not be appointed (*Re Northumberland and Durham District Banking Co.* (1858), 2 De G. & J. 508, O. A.). As to appointments in the case of amalgamated companies, see *Re Western Life Assurance Society, Ex parte Willett* (1870), 5 Ch. App. 396; *Re British Nation Life Assurance Association* (1872), L. R. 14 Eq. 492.

(a) Companies (Winding-up) Rules, r. 55 (2); Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 152 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 6 (1)]. Apparently the court can disregard even identical resolutions (*Re Land Development Association*, [1892] W. N. 23; *Re Johannesburg Land and Gold Trust Co.*, [1892] 1 Ch. 583; *Re Bloxwich Iron and Steel Co.*, [1894] W. N. 111; *Re Bank of South Australia* (No. 2) (1895), 2 Mans. 148); and the court can direct further meetings to be held if necessary (*Re Reynolds (Charles) & Co.*, [1895] W. N. 31; *Re Radford and Bright, Ltd.*, [1901] 1 Ch. 272; *Re Radford and Bright, Ltd.* (No. 2), [1901] 1 Ch. 735). It has been held that an appointment cannot be made until after meetings have been held (*Re Reid (John) & Sons, Ltd.*, [1900] 2 Q. B. 634; compare *North Wales Gunpowder Co.*, [1892] 2 Q. B. 220, 224, O. A.).

(b) Companies (Winding-up) Rules, r. 55 (2).

(c) *Ibid.*, r. 55 (3).

(d) *Ibid.*, r. 55 (4).

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 152 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 6 (1)]. There is no "difference" now where the resolutions of both meetings are the same, or identical in effect; compare *Re Johannesburg Land and Gold Trust Co.*, *supra* (decided on rules couched in different language from those now in force).

(f) Companies Consolidation Act, 1908 (8 Edw. 7, c. 69), s. 152 (3).

(g) Companies (Winding-up) Rules, r. 55 (5). For the form of order appointing a liquidator, see *ibid.*, Form 28. As to gazetting and advertising the appointment, see p. 440, *post*.

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 92]. The court can give the conduct of any particular matter or matters arising in a liquidation, whether it be compulsory or under supervision, to one or more of several liquidators (*Re Midland Land*

SECT. 16.

(iii.) *Security of Liquidator.*

by the
Court.

Liquidator's
security.

741. A liquidator other than the official receiver cannot act until he has notified his appointment to the Registrar of Joint Stock Companies, and has given security in the prescribed manner to the satisfaction of the Board of Trade (i). The following provisions as to security apply (j), namely: (1) the security must be given to such officers or persons and in such manner as the Board may from time to time direct; (2) the security need not be given in each separate winding up, but may be given either specially in a particular winding up, or generally, to be available for any winding up in which the person giving security may be appointed either as liquidator or special manager; (3) the Board is to fix the amount and nature of such security, and may from time to time, as it thinks fit, either increase or diminish the amount of special or general security which any person has given; (4) the certificate of the Board (k) that a liquidator has given security to its satisfaction is to be filed with the registrar; (5) the cost of furnishing the required security by a liquidator, including any premiums which he may pay to a guarantee society, must be borne by him personally, and not charged against the assets of the company as an expense incurred in the winding up (l).

Failure to
give security.

742. If a liquidator fails to give the required security within the time stated for that purpose in the order appointing him, or any extension thereof, the official receiver must report such failure to the court. The court may thereupon rescind the order appointing the liquidator (m), and direct that another liquidator is to be appointed. The same meetings must then be summoned and the same proceedings taken as in the case of a first appointment of a liquidator (n).

(iv.) *Gazetting and Advertising Appointments.*

Gazetting and
advertising
appoint-
ments.

743. As soon as the liquidator has given security, the Board of Trade must cause notice of the appointment (o) to be gazetted. The expense of gazetting the notice must be paid by the liquidator, but may be charged by him on the assets of the company (p).

Every appointment of a liquidator or committee of inspection

and Investment Corporation, [1887] W. N. 58). As to the powers and duties of several joint liquidators in a voluntary winding up, see *Re London and Mediterranean Bank, Ex parte Birmingham Banking Co.* (1868), 3 Ch. App. 651; *Re London and Mediterranean Bank, Ex parte Agra and Masterman's Bank* (1871), 6 Ch. App. 206.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (3) (o) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (3)].

(j) These provisions also apply in the case of a special manager; see p. 422, ante.

(k) See Companies (Winding-up) Rules, Form 29.

(l) *Ibid.*, r. 57. The security may be fixed before the winding-up order (*Re Mercantile Bank of Australia*, [1892] 2 Ch. 204). As to the rights of a surety in regard to the accounts, see *Re Birmingham Brewing, Malting and Distilling Co.* (1883), 52 L. J. (CH.) 358.

(m) Companies (Winding-up) Rules., r. 58 (1).

(n) *Ibid.*, r. 58 (3); and see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149.

(o) See Companies (Winding-up) Rules, Form 103 (7).

(p) *Ibid.*, r. 55 (5); see *ibid.*, Forms 28, 103 (7).

must be advertised by the liquidator in such manner as the court directs, immediately after the appointment has been made and the liquidator has given the required security (*g*).

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by the
Court.

(v.) *Position of Liquidator.*

744. The acts of a liquidator are valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification (*r*). Validity of liquidator's acts.

745. In a winding up where a person other than the official receiver is liquidator, he is to be described by the style of the liquidator of the particular company in respect of which he is appointed, and not by his individual name (*s*). Style of liquidator.

746. The liquidator, whether he is the official receiver or some other person, is an officer of the court (*t*), at any rate for some purposes (*a*). He is the receiver and manager of the company's assets, and also fills the character of an accountant to make up the books and accounts, so as to ascertain each contributory's or member's share of liability, and of surplus, if any (*b*). In receiving calls the liquidator receives them as a statutory trustee (*c*). Status of liquidator.

Since, in a winding up, the assets of the company are to be collected and applied in discharge of its liabilities, its property is in the nature of trust property, affected with an obligation to be dealt with by the liquidator in a particular way, and this *quasi*-trust is constituted for the benefit of all the creditors (*d*). But the liquidator is not a trustee for each creditor or contributory of the company, and in a strict sense he is not a trustee at all (*e*).

747. A liquidator stands in a fiduciary position towards the company. Thus, where he has sold its property nominally to another company, but really to himself, he is accountable as a trustee for the company for the secret profit (*f*). His fiduciary position is recognised by rules, which are practically copied from those which Fiduciary position of liquidator.

(*g*) Companies (Winding-up) Rules, r. 55 (6), and Form 30.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (10) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67].

(*s*) *Ibid.*, s. 149 (9) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 94]; Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (3).

(*t*) See p. 423, *ante*; *Gooch's Case* (1872), 7 Ch. App. 207, 211; *Re Opera, Ltd.*, [1891] 2 Ch. 154; reversed on other grounds, [1891] 3 Ch. 260, C. A.

(*a*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 173; Companies (Winding-up) Rules, rr. 75 (1), 83; *Re Hill's Waterfall Estate and Gold Mining Co.*, [1896] 1 Ch. 947, 954.

(*b*) *Gooch's Case*, *supra*; and as to the liquidator being a receiver, see Companies (Winding-up) Rules, r. 75 (2); and p. 445, *post*.

(*c*) *Black & Co.'s Case* (1872), 8 Ch. App. 254, 262.

(*d*) *Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co.* (1874), 9 Ch. App. 557, 559, 560.

(*e*) *Knowles v. Scott*, [1891] 1 Ch. 717, 722, 723; compare *Re London and Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140, 144, C. A.

(*f*) *Silkstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167. But on winding up the property affected "has ceased to be beneficially the property of the company" (*Re Oriental Inland Steam Co., Ex parte Scinde Rail Co., supra*).

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already affected a trustee in bankruptcy (*g*). Except where specially provided he is not in any circumstances whatever to make any arrangement for, or accept from any person connected with, the company, or with its winding up, any gift, remuneration, or benefit whatever beyond the remuneration to which, under the Act and the rules, he is entitled as liquidator, nor is he to make any arrangement for giving up or to give up any part of such remuneration to any such person (*h*). Nor must he, while acting as liquidator, except by leave of the court, either directly or indirectly, by himself or any partner or agent, purchase any part of the company's assets (*i*). Any such purchase without leave may be set aside on the application of the Board of Trade or any creditor or contributory, and the court may make such order as to costs as it thinks fit (*j*). Where the liquidator carries on the business of the company, he is not, without the express sanction of the court, to purchase goods for the carrying on of such business from any person whose connection with the liquidator is of such a nature as would result in his obtaining any portion of the profit (if any) arising out of the transaction (*k*).

The cost of obtaining such sanction must be borne by the person in whose interest it is obtained, and is not payable out of the company's assets (*l*).

(vi.) *Duties of Liquidator.*

General duty
of liquidator.

748. The liquidator must, as an officer of the court, maintain an even and impartial hand between all the individuals whose interests are involved in the winding up. It is his duty to the whole body of creditors, the whole body of shareholders, and to the court to make himself thoroughly acquainted with the affairs of the company, and to suppress or conceal nothing coming to his knowledge in the course of his investigation which is material to ascertain the exact truth in every case before the court; and it is for the judge to see that he does his duty in this respect (*m*).

Right of
inspection.

After a winding-up order, creditors and contributories have no right to inspect the books and papers of the company except under an order of the court (*n*). As regards a person who is not a creditor or contributory, however much he may be interested, the liquidator is not even under such obligations as to allowing inspection as attach to the officers of a company before it is in liquidation (*o*).

Where a person is entitled to see books or papers the liquidator

(*g*) See title *BANKRUPTCY AND INSOLVENCY*, Vol. II., p. 127.

(*h*) *Companies (Winding-up) Rules*, r. 155.

(*i*) Compare the similar provision relating to members of the committee of inspection; see p. 465, *post*.

(*j*) *Ibid.*, r. 156; compare *Silkstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167.

(*k*) *Companies (Winding-up) Rules*, r. 157; as to goods supplied by a member of the committee of inspection to the liquidator, see *ibid.*, r. 158; and p. 465, *post*.

(*l*) *Ibid.*, r. 159.

(*m*) *Gooch's Case* (1872), 7 Ch. App. 207.

(*n*) *Companies (Consolidation) Act*, 1908 (8 Edw. 7, c. 69), s. 221 [*Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 156]; see p. 465, *post*.

(*o*) *Re Kent Coalfields Syndicate*, [1898] 1 Q. B. 754, O. A.

must give him not only access to them, but every assistance and facility in finding out what relevant books and papers he requires, placing any information already obtained at his service. He is not, however, obliged, at the instance of every person interested in every question arising, to make such fresh and careful investigation of books and documents in his possession as would be requisite to enable him to make the ordinary affidavit required from a party called on to make discovery (*p*).

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Court.

The court will not encourage a liquidator in resisting, especially on technical grounds as to procedure, claims to which there is manifestly no defence (*q*). The court will also insist on the liquidator, as its officer, acting in an upright manner even to the company's opponent, but he must not be generous at other persons' expense (*a*).

Court's
control of
liquidator.

749. Subject to the provisions of the Act of 1908, the liquidator must, in the administration of the company's assets and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection, directions by the creditors or contributories in general meeting being, in case of conflict, deemed to override any directions of the committee of inspection (*b*). He may, however, apply to the

Control of
liquidator by
committee of
inspection
etc.

(*p*) *Gooch's Case* (1872), 7 Ch. App. 207.

(*q*) *General Share and Trust Co. v. Welley Brick and Pottery Co.* (1882), 20 Ch. D. 280, C. A.

(*a*) *Re Condon, Ex parte James* (1874), 9 Ch. App. 609; *Re Opera, Ltd.*, [1891] 2 Ch. 154; [1891] 3 Ch. 260, C. A. This principle applies both as regards the liquidator and a trustee in bankruptcy. In *Re Condon, Ex parte James, supra*, followed and perhaps extended in *Re Carnac, Ex parte Simmonds* (1885), 16 Q. B. D. 308, C. A., an execution creditor had paid money to a trustee believing that the latter was legally entitled to it, but the court relieved the former against his mistake in law, and ordered the trustee as its officer to repay him the money, as "the Court of Bankruptcy ought to be as honest as other people"; and see *Re Brown, Dixon v. Brown* (1886), 32 Ch. D. 597; *Re Temple Fire and Accident Assurance Co.* (1910), 129 L. T. Jo. 115. The court will not relieve where money has been paid, not to the trustee, but to creditors of a person, on and with a view to accept a composition, and with knowledge that an act of bankruptcy has been committed, where bankruptcy subsequently ensues (*Re Hall, Ex parte Official Receiver*, [1907] 1 K. B. 875, C. A.). The principle of *Re Condon, Ex parte James, supra*, is, however, not confined to cases of money paid to a liquidator, trustee, or other officer of the court under a mistake of law, but applies to every case in which it would be contrary to fair dealing to allow the officer to retain money for distribution among the creditors; thus, premiums which kept alive a policy will be repaid (*Re Tyler, Ex parte Official Receiver*, [1907] 1 K. B. 865, C. A.). As to satisfying obligations to landlords, see *Balfe v. Blake* (1850), 1 I. Ch. R. 365; *Neate v. Pink* (1851), 3 Mac. & G. 476; *Jacobs v. Van Boelen, Ex parte Roberts* (1889) 34 Sol. Jo. 97; as to recouping a person who has paid rent, see *Re Humphreys, Ex parte Kennard* (1870), 21 L. T. 684. But the honour of the court, by insisting on its officer acting generously, cannot be satisfied at the expense of someone else who is not in law or equity bound to satisfy it out of his means, as, for instance, debenture-holders (*Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411, 419, C. A.; *Re Opera, Ltd., supra*); and see *Hand v. Blow*, [1901] 2 Ch. 721, C. A., where the court disallowed the claim for rent of the head lessor against a receiver appointed by the court at the instance of a mortgagee by sub-demise, who had been in possession.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 158 (1), (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 23]. As to the

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Winding up
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court in the manner prescribed for directions in relation to any particular matter arising under the winding up. Subject to the provisions of the Act, he must use his own discretion in the management of the estate and its distribution among the creditors (b). Any person aggrieved by his act or decision may apply to the court, which may confirm, reverse, or modify the act or decision complained of (c).

Control by
Board of
Trade.

750. The liquidator, even if not the official receiver and therefore not its officer, is also subject to the surveillance of the Board of Trade. If he does not faithfully perform his duties and duly observe all the requirements imposed on him by statute, rules, or otherwise with respect to the performance thereof, or if complaint is made to the Board by any creditor or contributory in regard thereto, the Board is to inquire into the matter, and take such action thereon as it thinks expedient. At any time it may require the liquidator to answer any inquiry in relation to the winding up, and may, if it thinks fit, apply to the court to examine him or any other person on oath concerning the winding up. The Board may also direct a local investigation to be made of his books and vouchers (d).

An application by the Board to the court to examine on oath the liquidator or any other person is to be made *ex parte*, and to be supported by a report to the court, filed with the registrar, stating the circumstances in which the application is made, and signed by any person duly authorised to sign documents on behalf of the Board. For the purposes of such application the report will be *prima facie* evidence of the statements therein contained (e).

Liquidator's
possession of
assets.

751. In a winding up by the court the liquidator must take into his custody, or under his control, all the property and things in action to which the company is or appears to be entitled (f). When he has notified his appointment to the Registrar of Joint Stock Companies, and given security, the official receiver must forthwith put him into possession of all property of the company of which the official receiver has custody. The liquidator must, however, before the assets are handed over to him, have discharged any balance due to the official receiver on account of fees, costs, and charges properly

committee of inspection, see p. 464, *post*; and as to the meetings of creditors and contributories, see p. 466, *post*.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 158 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 24].

(d) *Ibid.*, s. 159 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 25].

(e) Companies (Winding-up) Rules, r. 207.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 150 (1). A liquidator is entitled to the possession of the register of shareholders and the minute book of the company; and the company's former solicitor has no lien on them, nor has he a lien on documents which came into his hands after the commencement of the winding up, but he may have on documents, such as letters of application, which came into his hands before such commencement, and, if he acquires such a lien, the liquidator is not entitled to the possession of the documents thereby covered by the lien, but can obtain such production of the documents as may be necessary for the purposes of the liquidation (*Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, 420, C. A.; *Re Anglo-Maltese Hydraulic Dock Co.* (1885), 54 L. J. (CH.) 730).

incurred by him, and on account of any advances properly made by him in respect of the company, together with interest on such advances at the rate of £4 per cent. per annum. He must also pay all fees, costs, and charges of the official receiver which may not have been discharged by the liquidator before being put into possession of the property of the company, whether incurred before or after he has been put into such possession (*g*). Until such balance has been paid and the other liabilities have been discharged the official receiver has a lien on the company's assets (*h*).

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Court.

As soon as may be after making a winding-up order the court is to cause the assets of the company to be collected and applied in discharge of its liabilities (*i*). The duties thus imposed on the court must be discharged by the liquidator as an officer of the court subject to its control (*j*). For the purpose of the discharge by the liquidator of those duties he is, for the purpose of acquiring or retaining possession of the property of the company, in the same position as if he were a receiver of the property appointed by the High Court; and the court may, on his application, enforce such acquisition or retention accordingly (*k*).

Collection
and applica-
tion of assets
by liquidator.

The court or the liquidator may in certain cases require property, to which the company is *prima facie* entitled, to be delivered to the liquidator (*l*).

Delivery of
assets to
liquidator.

752. It is the duty of the official receiver, if so requested by the liquidator, to communicate to him all such information respecting the estate and affairs of the company as may be necessary or conducive to the due discharge of the liquidator's duties (*m*). The liquidator must give the official receiver such information and such access to and facilities for inspecting the books and documents of the company, and generally such aid, as may be requisite for enabling that officer to perform his duties (*n*).

Information
by and to
liquidator and
official
receiver.

(*g*) Companies (Winding-up) Rules, r. 161 (1).

(*h*) *Ibid.*, r. 161 (2).

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 163 (1) [Companies Act, 1862, s. 98].

(*j*) Companies (Winding-up) Rules, r. 75 (1).

(*k*) *Ibid.*, r. 75 (2). The possession of a receiver appointed by the court is the possession of the court, and the court will not allow it to be disturbed without its own leave (*Angel v. Smith* (1804), 9 Ves. 335; *Ames v. Birkenhead Docks (Trustees)* (1855), 20 Beav. 332, 350; *Russell v. East Anglian Rail. Co.* (1850), 3 Mac. & G. 104). Even a person with a paramount title must apply to the court for liberty to assert it (*Evelyn v. Lewis* (1844), 3 Hare, 472; *Re Mead, Ex parte Cochrane* (1875), L. R. 20 Eq. 282). Disturbance of a liquidator's possession is a contempt of court (*Re Pound (Henry), Son, and Hutchins* (1889), 42 Ch. D. 402, 411, C. A.; *Re Stubbs (Joshua), Ltd., Barney v. Stubbs (Joshua), Ltd.*, [1891] 1 Ch. 475, C. A.); and the court will protect its officer by injunction (*Dixon v. Dixon*, [1904] 1 Ch. 161, 163). If the liquidator finds another receiver in possession he ought not to bring proceedings to oust him without the court's leave (*Ward v. Swift* (1848), 6 Hare, 309, 312); and see title CONTEMPT OF COURT, Vol. VII., pp. 289, 290.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 164 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 100]; see p. 473, *post*.

(*m*) Companies (Winding-up) Rules, r. 161 (3).

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 153 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 4 (3)].

SECT. 16.

(vii.) Powers of Liquidator.

Winding up
by the
Court.(1) Powers
exercisable
without
sanction.

753. The liquidator has (without the sanction either of the court or the committee of inspection) the following powers, namely: (1) to sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels (o); (2) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal; (3) to prove, rank, and claim in the bankruptcy, insolvency, or sequestration of any contributory, for any balance against his estate, and to receive dividends in the bankruptcy, insolvency, or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors (p); (4) to draw, accept, make, and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made, or indorsed by or on behalf of the company in the course of its business (q); (5) to raise on the security of the assets of the company any money requisite (r); (6) to take out in his official name letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company (s); (7) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets, except the things mentioned below which require the sanction of the court or the committee of inspection (t).

(2) Powers
exercisable
with sanction.

754. With the sanction either of the court or of the committee of inspection, the liquidator has power (1) to bring or defend any action or other legal proceeding in the name and on behalf of the company; (2) to carry on the business of the company, so far as may be necessary for the beneficial winding up thereof; (3) to employ a solicitor or other agent to take any proceedings or do any business which the liquidator is unable to take or do himself; but the sanction in this case must be obtained before the employment, except in

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (2) (a).

(p) As to set-off in case of bankruptcy of contributories, see *Grissell's Case* (1866), 1 Ch. App. 528; *Gill's Case* (1879), 12 Ch. D. 755; *Re Duckworth* (1867), 2 Ch. App. 578; *Re G. E. B.*, [1903] 2 K. B. 340, C. A. And see *Re West Coast Gold Fields, Ltd.*, *Rowe's Trustee's Claim*, [1906] 1 Ch. 1, C. A.

(q) See *Smith, Fleming & Co.'s Case* and *Gledstan's Case* (1866), 1 Ch. App. 538; *Re Contract Corporation, Claim of Ebbw Vale Co.* (1869), L. R. 8 Eq. 14.

(r) The power to raise and secure money cannot be exercised to the prejudice of debenture-holders (*Re Regent's Canal Ironworks Co.*, *Ex parte Grissell* (1875), 3 Ch. D. 411, C. A.). As to the position of a liquidator who advances his own money to the company, see *Re Bushell, Ex parte Izard* (No. 1) (1883), 23 Ch. D. 75, 80, C. A.

(s) The money due is, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, to be deemed to be due to the liquidator himself (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 96, as amended by Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (2)]).

(t) *Ibid.*, s. 151 (2) (b), (c), (d), (e), (f), (g).

cases of urgency, and it must then be shown that no undue delay took place in obtaining the sanction (*u*); (5) to pay any classes of creditors in full, and make certain compromises and arrangements (*v*).

The exercise by the liquidator of the above powers (whether with or without the sanction of the court or the committee of inspection) is subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers (*w*).

An order in general terms giving the liquidator power to do all acts without the previous sanction or interference of the court may be made (*x*).

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Winding up
by the
Court.

755. The sanction to bringing or defending legal proceedings should be obtained before they are initiated, although there is power to give the sanction subsequently; and the sanction does not dispense with the necessity of obtaining express sanction to the employment of a particular solicitor (*y*). Proceedings in the name of the company or of the liquidator, or of the official receiver, are in some cases allowed to be taken by other persons (*z*). A liquidator may, without obtaining the sanction either of the court or the committee of inspection, bring or defend proceedings in the winding up (*a*); this includes the service of a bankruptcy notice, which, if served by the liquidator, must be made out in the name of the company, and not in his own name (*b*).

Litigation by
liquidator.

There is no such office as that of solicitor to the liquidator (*c*). The appointment of the partner of the liquidator as solicitor will not be sanctioned, unless he consents to act without remuneration (*d*).

Employment
of solicitors.

(*u*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 95, as amended by Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (1), (4)]. As to carrying on business, see p. 506, *post*.

(*v*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 214; and see p. 602, *post*.

(*w*) *Ibid.*, s. 151 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (3)].

(*x*) *Re Rochdale Property and General Finance Co.* (1879), 12 Ch. D. 775; compare the limited order in *Re Watson & Sons, Ltd.*, [1891] 2 Ch. 55; *Re London Quays and Warehouses Co.* (1868), 3 Ch. App. 394; and see *Re Britannia Permanent Benefit Building Society*, [1890] W. N. 170.

(*y*) *Re London Metallurgical Co.*, [1897] 2 Ch. 262. As to the form of authority, see *Re Vavasour*, [1900] 2 K. B. 309.

(*z*) *Re Bank of Gibraltar and Malta* (1865), 1 Ch. App. 69; *Re Imperial Bank of China, India and Japan* (1866), 1 Ch. App. 339; *Cape Breton Co. v. Fenn* (1881), 17 Ch. D. 198, C. A.; *Re Cape Breton Co.* (1881), 19 Ch. D. 77, C. A.; *Re Anglo-Sardinian Antimony Co.*, [1894] W. N. 156; Practice Note, [1894] W. N. 166; *Re New Zealand Loan and Mercantile Agency Co.*, [1894] W. N. 200.

(*a*) *Re Silver Valley Mines* (1882), 21 Ch. D. 381, 387, C. A.

(*b*) *Re Winterbottom, Ex parte Winterbottom* (1886), 18 Q. B. D. 446; *Re Nance, Ex parte Ashmead*, [1893] 1 Q. B. 590, C. A.; *Re Shirley, Ex parte Mackay* (1888), 58 L. T. 237; unless the judgment makes the money payable to him (*Re Bassett, Ex parte Lewis* (1895), 43 W. R. 427); and see *Re Murietta* (1896), 3 Mans. 35.

(*c*) *Ibid.* As to the taxation of costs, see p. 565, *post*. As to priority of costs in the distribution of assets, see pp. 523 *et seq.*, *post*. As to contributories applying that the solicitor should be changed, see *Re Coopers, Ltd.* (1897), 14 T. L. R. 144, C. A.

(*d*) *Re Universal Private Telegraph Co.* (1870), 19 W. R. 297.

SECT. 16. Where the managing clerk of a solicitor is a member of the committee, the appointment of the solicitor as solicitor to the liquidator is improper, and will be set aside (*e*). If the solicitor gives notice that he elects not to be remunerated by the scale charge, the liquidator should apply to the judge for directions (*f*). The solicitor acting for him in a winding up, whether by the court or in a voluntary liquidation, even where the appointment has been sanctioned by the court, has no personal claim against the liquidator for the costs, although the liquidator has obtained an order that the costs shall be taxed and paid by him to the solicitor (*g*). Where the attendance of the solicitor is required on any proceeding in court or chambers, the liquidator need only appear in person when the court directs him to do so (*h*). The solicitor's retainer is not revoked by the removal of the liquidator who retained him (*i*).

Rules govern-
ing exercise
of powers.

756. General rules have been made for enabling or requiring the liquidator as an officer of the court, and subject to the control of the court, to exercise or perform all or any of the powers and duties conferred and imposed on the court in respect of the matters following, namely: (1) holding and conducting meetings to ascertain the wishes of creditors and contributories (*k*); (2) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets (*l*); (3) requiring delivery of property or documents to the liquidator (*m*); (4) making calls (*n*); (5) fixing a time within which debts and claims must be proved (*o*). But the liquidator is not, without the special leave of the court, to rectify the register of members, or to make any call without either the special leave of the court or the sanction of the committee of inspection (*p*).

(viii.) *Remuneration and Costs of Liquidator.*

Remunera-
tion of outside
liquidator.

757. Where a person other than the official receiver is appointed liquidator, he receives such salary or remuneration by way of percentage or otherwise as the court directs; and if more such persons than one are appointed liquidators, their remuneration is distributed among them in such proportions as the court directs (*a*).

(*e*) *Re Gallard, Ex parte Gallard*, [1896] 1 Q. B. 68, C. A.

(*f*) *Re United Kingdom Land and Building Association* (1888), 40 Ch. D. 471.

(*g*) *Re Anglo-Moravian Hungarian Junction Rail. Co., Ex parte Watkin* (1875), 1 Ch. D. 130, C. A.; *Re Trueman's Estate, Hooke v. Piper* (1872), L. R. 14 Eq. 278. As to the solicitor's lien, see *Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, C. A.; *Re Union Cement and Brick Co., Ex parte Pulbrook* (1869), 4 Ch. App. 627.

(*h*) Companies (Winding-up) Rules, r. 153.

(*i*) *R. v. London (Lord Mayor), Ex parte Boaler*, [1893] 2 Q. B. 146.

(*k*) See pp. 466 *et seq.*, *post*.

(*l*) See pp. 487 *et seq.*, *post*.

(*m*) See p. 474, *post*.

(*n*) See p. 500, *post*.

(*o*) See p. 507, *post*.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 173 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 13].

(*a*) *Ibid.*, s. 149 (8) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 93]. The Court of Appeal has suggested that the remuneration ought to be apportioned

Unless the court otherwise orders, the liquidator's remuneration is to be fixed by the committee of inspection, and must be in the nature of a commission or percentage of which one part is payable on the amount realised, after deducting the sums (if any) paid to secured creditors (other than debenture-holders) out of the proceeds of their securities, and the other part on the amount distributed in dividend (*b*). If the Board of Trade is of opinion that the remuneration of a liquidator as fixed by the committee of inspection is unnecessarily large, the Board may apply to the court to fix the amount (*c*). If there is no committee of inspection the remuneration of the liquidator must, unless the court otherwise orders, be fixed by the scale of fees and percentages for the time being payable on realisations and distributions by the official receiver as liquidator (*d*).

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by the
Court.

Where a liquidator or special manager in a winding up by the court receives remuneration for his services as such, no payment is allowed on his accounts in respect of the performance by any other person of the ordinary duties which are required by statute or rules to be performed by himself (*e*). Where a liquidator is a solicitor he may contract that the remuneration for his services as liquidator shall include all professional services (*f*).

A liquidator is liable to be disallowed all or part of his remuneration if he retains, without proper explanation, for more than ten days the sum he is allowed to retain, instead of paying the same into the Companies Liquidation Account (*g*).

Disallowance
of remunera-
tion.

758. As regards costs, where a winding-up order is discharged (as void) the liquidator under it is not entitled as against any person to any remuneration or costs (*h*). His only claim is as against the assets of the company, and then only so far as they exist without interfering with the rights of secured creditors (*i*). Where, however, the property is realised or preserved in the winding-up proceedings for their benefit the costs of realisation and preservation may be retained out of the fund in priority to

Where wind-
ing-up order
invalid.

according to the work actually done by each of the liquidators (*Re Tawd Vale Colliery Co.* (unreported), June, 1903; and compare *Re Langham Hotel Co., Ex parte Liquidator* (1869), 20 L. T. 163). As to the order of priority in which the remuneration is payable, see Companies (Winding-up) Rules, 1909, r. 187; p. 526, *post*; and compare the cases as to voluntary liquidation at p. 581, *post*.

(*b*) Companies (Winding-up) Rules, r. 154 (1). As to the meaning of "realised," see *Re Christie, Ex parte Christie*, [1900] 1 Q. B. 5. As to secret profits by a liquidator, see p. 441, *ante*.

(*c*) Companies (Winding-up) Rules, r. 154 (2).

(*d*) *Ibid.*, r. 154 (3); and see Order of December 2nd, 1903; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 125, 126.

(*e*) Companies (Winding-up) Rules, r. 186 (1).

(*f*) *Ibid.*, r. 186 (2).

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 154 (2).

(*h*) *Re Plumstead Water Co., Ex parte Harding* (1862), 11 W. R. 99, C. A.; *Re Allison, Johnson and Foster, Ltd., Ex parte Birkenshaw*, [1904] 2 K. B. 327.

(*i*) *Re Lloyd (David) & Co., Lloyd v. Lloyd (David) & Co.* (1877), 6 Ch. D. 339, C. A.; *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191; *Re Oriental Hotels Co., Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126, 133; *Re Anglo-Austrian Printing and Publishing Union, Brabourne v. Same*, [1895] 2 Ch. 891

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Winding up
by the
Court.

Costs of
outside litigation.

their claims (*k*), if the costs can be distinguished from the general costs of the winding up (*l*).

759. Where a liquidator sues or defends actions or other proceedings in the name of the company he is not a party to the action, and cannot be ordered to pay the costs personally (*m*). An order for costs will be made against the liquidator personally, even if he is also the official receiver, when he is a party to proceedings as liquidator (*n*); but the order will be without prejudice, if the proceedings are not then in the winding up, to any application he may make to have the costs allowed out of the estate (*o*). Where the proceedings are actually in the winding up the court may order that he be repaid the costs out of the company's assets (*p*); or there may be a simple order to pay the costs (*q*). The liquidator is, as a general rule, entitled to his costs of litigation out of the estate. He may, however, be deprived of them for making a mistake, or where the proceedings are improperly taken by him, although with the sanction of the committee of inspection (*r*); but the order is subject to appeal (*s*). In proceedings with reference to the settlement of persons on the list of contributories, successful applicants to have their names removed from the list have only been allowed costs out of the assets (*t*).

A liquidator who is unsuccessful on appeal, whether he is appellant or respondent, may be ordered to pay the costs (*a*).

(*k*) *Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411, 427, C. A.; *Ford v. Chesterfield (Earl)* (1856), 21 Beav. 426; *Wright v. Kirby* (1857), 23 Beav. 463; *Re Marine Mansions* (1867), L. R. 4 Eq. 601, 611; *Re Oriental Hotels Co., Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126, 133; *Re Johnson, Ex parte Royle* (1875), L. R. 20 Eq. 780; *Re Wrexham, Mold and Connah's Quay Railway*, [1900] 1 Ch. 261, C. A.

(*l*) *Re Professional Life Assurance Co.* (1867), 3 Ch. App. 167, 175.

(*m*) *Fraser v. Province of Brescia Steam Tramways Co.* (1887), 56 L. T. 771; compare *Freehold Land and Brickmaking Co. v. Spargo*, [1869] W. N. 160. As to the claims of the solicitor acting in the winding up against the liquidator, see p. 447, *ante*.

(*n*) *Re Powell (W.) & Sons*, [1896] 1 Ch. 681, followed by STIRLING, J., in chambers, in *Re Western Counties Steam Bakeries and Milling Co.* (1896), May 4 (unreported).

(*o*) *Sichell's Case* (1867), 3 Ch. App. 119; *Re City and County Investment Co.* (1879), 13 Ch. D. 475, C. A.; compare *Re Regent United Service Stores, Ex parte Bentley* (1879), 12 Ch. D. 850, 857.

(*p*) *Campbell's Case* (1876), 4 Ch. D. 470.

(*q*) *Re Hounslow Brewery Co.*, [1896] W. N. 45; *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617, 632, C. A.

(*r*) *Re Smith, Ex parte Brown* (1886), 17 Q. B. D. 488, C. A.; *Re Silver Valley Mines* (1882), 21 Ch. D. 381, C. A.; and see *Clifton's Case* (1854), 5 De G. M. & G. 743, C. A.; *Re China Steamship and Labuan Coal Co., Drummond's Case* (1869), 21 L. T. 317.

(*s*) *Re Silver Valley Mines, supra*; *Re Raynes Park Golf Club, Ex parte Official Receiver*, [1899] 1 Q. B. 961.

(*t*) *Salisbury-Jones and Dale's Case*, [1895] 1 Ch. 333, C. A., overruling *Re Staffordshire Gas and Coke Co.*, [1893] 3 Ch. 523. The liquidator, however, in discharging the duties of the court as to settling the list of contributories is acting as the officer of the court; see *Companies (Winding-up) Rules*, r. 75 (1). And see *Smallpage's and Brandon's Cases* (1885), 30 Ch. D. 598 (creditor's successful claim); *Wescomb's Case* (1874), 9 Ch. App. 553.

(*a*) *Re Hickman, Ex parte Strawbridge* (1883), 25 Ch. D. 266, C. A.; *Ferrao's*

A successful litigant in proceedings, either with the liquidator, or with the company through its liquidators, or with the company after liquidation has begun, is *prima facie* entitled to be paid immediately the costs ordered to be paid to him, and to be paid in full. The onus is on the liquidator to show that immediate payment cannot be made, or that other persons have claims in priority or ranking *pari passu* (b).

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Winding up
by the
Court.

A liquidator taking proceedings in his own name will not be ordered to give security for costs (c).

Security for
costs by
liquidator.

(ix.) Books, Accounts, and Audit.

760. Every liquidator of a company in winding up by the court must keep, in the manner prescribed, proper books in which he must cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed. Any creditor or contributory may, subject to the control of the court, personally or by his agent inspect any such books (d).

Liquidator's
duty to keep
books.

After a liquidator has been appointed by the court, he must keep a book called the "record book," in which he is to record all minutes, all proceedings had and resolutions passed at any meeting of creditors or contributories, or of the committee of inspection, and all such matters as may be necessary to give a correct view of his administration of the company's affairs. He is not bound, however, to insert in the record book any document of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors or contributories); nor need he exhibit such document to any person other than a member of the committee of inspection, or the official receiver, or the Board of Trade (e).

Record book.

The official receiver, until a liquidator is appointed by the court, and thereafter the liquidator, must keep a book to be called the "cash book" (which is to be in such form as the Board of Trade may from time to time direct), in which he must (subject to the

Cash book.

Case (1874), 9 Ch. App. 355; *Re City and County Investment Co.* (1879), 13 Ch. D. 475, C. A.; *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617, 632, C. A. The question whether he is to get them out of the estate is left to the judge controlling the winding up (*Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (1868), 4 Ch. App. 112, 117; *Wescomb's Case* (1874), 9 Ch. App. 553; *Re Silver Valley Mines* (1882), 21 Ch. D. 381, 387, 392, C. A.).

(b) *Re London Metallurgical Co.*, [1895] 1 Ch. 758; *Re Home Investment Co.* (1880), 14 Ch. D. 167; *Re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33, C. A.; compare *Re Marlborough Club Co., Ex parte Percival* (1868), L. R. 6 Eq. 519; *Re Dronfield Silkestone Coal Co. (No. 2)* (1883), 23 Ch. D. 511; *Re National Building and Land Co., Ex parte Clitheroe* (1885), 15 L. R. Ir. 47. The order of priority mentioned in the Rules does not affect the matter (*ibid.*). As to the priority of costs out of the assets, see Companies (Winding-up) Rules, r. 187. Costs of outside litigation are not mentioned in the priorities there referred to, but are covered by the words "subject to any order of the court" (*Re London Metallurgical Co., supra*). As to costs, see further, p. 526, *post*.

(c) *Re Powell (W.) & Sons*, [1896] 1 Ch. 681; compare *Re Angerstein, Ex parte Angerstein* (1874), 9 Ch. App. 479.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) s. 156 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 21].

(e) Companies (Winding-up) Rules, r. 166. As to inspection of the record book, see *Re Solomons, Ex parte Solomons*, [1904] 2 K. B. 917 (a bankruptcy case).

SECT. 16. rules as to trading accounts) enter from day to day the receipts and payments made by him (*f*).

Winding up
by the
Court.

Where he carries on the business of the company, the total weekly amount of the receipts and payments on the distinct trading account which he is required to keep must be incorporated in the cash book (*g*).

Submission
and audit of
books.

761. The liquidator must submit the cash book, together with the record book and any other requisite books and vouchers, to the committee of inspection (if any) when required, and not less than once every three months (*h*).

The committee of inspection must, not less than once every three months, audit the liquidator's cash book and certify therein under their hands the day on which it was audited (*i*).

If the committee of inspection fail to attend the meeting called for audit, a memorandum to that effect should be inserted in the cash book, and the accounts should be forwarded without delay (*k*).

Official
receiver's
account to
liquidator.

762. Where a liquidator is appointed in a winding up by the court, the official receiver is to account to the liquidator (*l*). If the liquidator is dissatisfied with the account or any part thereof, he may report the matter to the Board of Trade, which is to take such action (if any) thereon as it may deem expedient (*m*).

Transmission
of books to
Board of
Trade.

763. The liquidator must, at the expiration of six months from the date of the winding-up order, and at the expiration of every succeeding six months thereafter until his release, transmit to the Board of Trade a copy of the cash book for such period in duplicate, together with the necessary vouchers and copies of the certificates of audit by the committee of inspection (*n*).

For the purpose of audit he must furnish the Board with such vouchers and information as may be required by the Board, which may at any time require the production of and inspect any books or accounts kept by him (*o*).

Summary of
liquidator's
accounts.

764. With his first accounts, and the copy cash book in duplicate, the necessary vouchers, and the copy of the committee

(*f*) Companies (Winding-up) Rules, r. 167 (1). As to the books to be kept by the official receiver, see p. 428, *ante*.

(*g*) *Ibid.*, r. 171 (1).

(*h*) *Ibid.*, r. 167 (2).

(*i*) *Ibid.*, r. 169. For the form of certificate of audit, see *ibid.*, Form 86.

(*k*) Board of Trade Audit Directions.

(*l*) The provisions of the rules as to liquidators and their accounts do not apply to the official receiver when he is liquidator, but he accounts in such manner as the Board of Trade from time to time directs (Companies (Winding-up) Rules, r. 204 (1) (2)).

(*m*) *Ibid.*, r. 204 (3).

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) s. 155 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 20 (1) (2)]; Companies (Winding-up) Rules, r. 170 (1). As to the summary of the statement of affairs which is to accompany the copy cash book, see p. 453, *post*; and as to the summary of his accounts which is to accompany them, see *ibid.*, r. 173 (1); and p. 453, *post*.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 155 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 20 (3)].

of inspection's certificate of audit (*p*), the liquidator must forward to the Board of Trade a summary of the company's statement of affairs, showing thereon in red ink the amounts realised, and explaining the cause of the non-realisation of such assets as may be unrealised (*q*). At the end of every six months he must also forward to the Board, with his accounts, a report upon the position of the liquidation of the company in such form as the Board directs (*r*).

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Court.

With his accounts he must also transmit to the Board a summary of them in such form as the Board may from time to time direct. On the approval of such summary by the Board, he must transmit to the Board as many printed copies, duly stamped for transmission by post, and addressed to the creditors and contributories, as may be required for transmitting such summary to each creditor and contributory. The cost of printing and posting such copies is to be a charge upon the assets of the company (*s*).

765. The first and other accounts of the liquidator sent by the liquidator to the Board of Trade must be verified by him by affidavit (*t*). Where he has not since the date of his appointment or since the last audit of his accounts by the Board, as the case may be, received or paid any sum of money on account of the assets of the company, he must, at the time when he is required to transmit his accounts to the Board, forward to the Board an affidavit of no receipts or payments (*a*).

Verification
of liquidator's
accounts.

766. An *ad valorem* fee is payable at audit, according to the scale (*b*), on the gross amount of assets realised and brought to credit. There is a prescribed form of request to the Board of Trade to charge this account against the company and credit it to the Board of Trade fees account. This fee is payable in money, and a transfer of the amount payable will be made from the funds standing to the credit of the matter in the Companies Liquidation Account. If there are no funds or insufficient funds to the credit of such account, a special remittance must be made to meet the fee. The fee must be charged in the cash book as a payment and as withdrawn from bank on the date on which the request is forwarded (*c*).

Audit fee.

The prescribed practice as to the liquidator's account is as follows:—In the liquidator's account as sent in, each payment appearing therein must be numbered; the periods covered by payments for rates, taxes, and wages must be clearly stated; the

Board of
Trade audit.

(*p*) See p. 452, *ante*.

(*q*) Companies (Winding-up) Rules, r. 170 (1).

(*r*) *Ibid.* The form prescribed is printed in copyable ink, so that a press copy may be taken.

(*s*) *Ibid.*, r. 173. The summary is to be sent in draft for approval (Board of Trade Audit Directions (r. 1)).

(*t*) Companies (Winding-up) Rules, r. 170 (3). For the form of affidavit, see *ibid.*, Form 87. The terms of the affidavit render it imperative that moneys received by a liquidator's solicitor or other agent (and for which the liquidator is responsible) should be included in the account (Board of Trade Audit Directions).

(*a*) Companies (Winding-up) Rules, r. 174.

(*b*) The scale fixed by Order of December 2nd, 1903.

(*c*) Board of Trade Audit Directions.

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following are required at each audit, namely, vouchers for all payments charged in the account, which must be arranged in the order in which the payments are entered; the record book entered up to date; allocaturs for all taxable charges; the auctioneer's sale accounts, if any; the trading account and special manager's account (if any), together with vouchers for payments charged therein; detailed accounts of incidental expenses charged in the account where not set out in detail in the account itself; the report in the prescribed form; the bank pass book, where a special bank account has been authorised, with a certificate by the bankers as to the amount standing to the credit of the account on the date to which the account submitted for audit is made up.

At the first audit the liquidator must furnish an office copy of the front sheet and of lists B, C, F and H of the statement of affairs, showing thereon, in red ink, the amounts realised, and explaining the cause of the non-realisation of such assets as may be unrealised, and two copies of the cash book from the date of the winding-up order, including the receipts and payments of the official receiver. One copy must be a complete copy of the cash book, including the analysis of the receipts and payments, and must be verified by affidavit. The other copy for filing must be on foolscap sheets and must not include the analysis columns. At subsequent audits the balance must be brought forward and the account continued from the date to which the previous account was made up. The original cash book need not be forwarded unless specially asked for (d).

Board of
Trade certifi-
cate of audit.

767. The Board of Trade is to cause the account to be audited (e); and when the account has been audited the Board is to certify the fact upon the account. One copy thereupon is to be filed and kept by the Board, and the duplicate copy, bearing a like certificate, is filed with the court. Each copy is to be open to the inspection of any creditor, or of any person interested (f).

The Board is to cause the account, when audited, or a summary thereof, to be printed, and send a printed copy of the account or summary by post to every creditor and contributory (g).

Enforcing
Board of
Trade audit.

768. There is ample power in the court, if the requirements as to audit are not complied with, to enforce compliance with such requirements on the application of the Board of Trade, which may take such action as it may think expedient (h).

Local
investigation.

The Board may also direct a local investigation to be made of the liquidator's books and vouchers (i).

(d) Board of Trade Audit Directions.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 155 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63)], s. 20 (3)].

(f) Companies (Winding-up) Rules, r. 172; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 155 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 20 (4)].

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 155 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 20 (5)].

(h) *Ibid.*, s. 159 (1).

(i) *Ibid.*, s. 159 (3). And the Board may at any time require the liquidator to answer any inquiry in relation to any winding up in which he is engaged, and may apply to the court to examine him or any other person on oath concerning the winding up (*ibid.*, s. 159 (2)).

769. When the assets of the company have been fully realised and distributed, the liquidator must forthwith send in his accounts to the Board of Trade, although the six months (*j*) have not expired (*k*).

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Court.

770. Upon a liquidator resigning, or being released or removed from his office, he must deliver over to the official receiver, or, as the case may be, to the new liquidator, all books kept by him, and all other books, documents, papers, and accounts in his possession relating to the office of liquidator, and until such delivery his release does not take effect (*l*).

Delivery up
of books and
papers.

771. The Board of Trade may, at any time during the progress of the liquidation, on the application of the liquidator or the official receiver, direct that such of the books, papers, and documents of the company or of the liquidator as are no longer required for the purpose of the liquidation may be sold, destroyed, or otherwise disposed of (*m*).

Destruction
of books etc.

(*x*.) *Information as to Pending Liquidation.*

772. Where a company is being wound up, whether by the court or voluntarily or under supervision (*n*), if the winding up is not concluded (*o*) within one year after its commencement (*p*), the liquidator must send to the Registrar of Joint Stock Companies statements with respect to the proceedings in and position of the liquidation (*q*).

Half-yearly
statements by
liquidator.

The statements must be sent twice in every year as follows:—The first statement, commencing at the date when a liquidator was first appointed and brought down to the end of twelve months from the commencement of the winding up, must be sent within thirty days from the expiration of such twelve months, or within such extended period as the Board of Trade may sanction, and the subsequent statements must be sent at intervals of half a year, each statement being brought down to the end of the half-year for

(*j*) See p. 452, *ante*.

(*k*) Companies (Winding-up) Rules, r. 170 (2).

(*l*) *Ibid.*, r. 175 (1).

(*m*) *Ibid.*, r. 175 (2).

(*n*) *Re Stock and Share Auction and Banking Co., Re Spiral Wood Cutting Co., Re Hull Land and Property Investment Co.*, [1894] 1 Ch. 736.

(*o*) The winding up is, for the purposes of this enactment, deemed to be concluded—(1) in the case of a company wound up by order of the court, at the date on which the order dissolving the company has been reported by the liquidator to the Registrar of Joint Stock Companies, or at the date of the order of the Board of Trade releasing the liquidator; (2) in the case of a company wound up voluntarily, or under the supervision of the court, at the date of the dissolution of the company, unless at such date any of its funds or assets remain unclaimed or undistributed in the hands or under the control of the liquidator, or any person who has acted as liquidator, in which case the winding up is not deemed to be concluded until such funds or assets have either been distributed or paid into the Companies Liquidation Account (Companies (Winding-up) Rules, r. 188).

(*p*) As to the commencement of the winding up, see p. 419, *ante*.

(*q*) Companies (Winding-up) Act, 1908 (8 Edw. 7, c. 69), s. 224 (1) [Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (1)]. Creditors and contributories have the right of inspecting the statements on payment of a fee (*ibid.*, s. 224 (2)).

SECT. 16. which it is sent. The prescribed form (r), with such variations as
 Winding up circumstances may require, must be used (s).

by the
 Court.

Contents of
 liquidator's
 statements.

773. Every statement must contain a detailed account of all the liquidator's realisations and disbursements in respect of the company, not including payments into the Companies Liquidation Account (other than unclaimed dividends), or payments into or out of bank, or temporary investments by the liquidator, or the proceeds of such investments when realised, which must be shown by means of the bank pass book and by a separate statement. When the liquidator carries on a business, a trading account must be forwarded as a distinct account, and the totals of receipts and payments on the trading account must alone be set out in the statement (a). When dividends or instalments of compositions are paid to creditors, or a return of surplus assets is made to contributories, the total amount of each dividend, instalment, or return must be entered in the statement of disbursements; and the liquidator must forward separate accounts showing the amount of the claim of, and of dividend payable to, each creditor, and of surplus assets payable to each contributory (b). Every statement must be sent in in duplicate, and must be verified by an affidavit in the prescribed form, with such variations as circumstances require (c).

The statement must be sent even where a liquidator has not during any period for which a statement has to be sent received or paid any money on account of the company, but in such case with such statement he must also send an affidavit of no receipts or payments in the prescribed form (d).

(xi.) *Unclaimed or Undistributed Assets.*

Payment in
 of unclaimed
 or undistrib-
 uted assets.

774. If it appears from any such statement of the liquidator or otherwise that he has in his hands or under his control (e) any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their receipt, the liquidator must forthwith pay the same to the Companies Liquidation Account at the Bank of

(r) Companies (Winding-up) Rules, Form 92.

(s) *Ibid.*, r. 189.

(a) For the form of this account, see *ibid.*, Form 94.

(b) *Ibid.*, Form 92.

(c) *Ibid.*, r. 189; and for the form of affidavit, see *ibid.*, Form 93. If a liquidator fails to comply with the requirements of s. 224 of the Act he is liable to a fine not exceeding £50 for each day during which the default continues (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (2)]).

(d) Companies (Winding-up) Rules, r. 190; as to the statement and as to the affidavit, see *ibid.*, Forms 92, 93.

(e) Money invested or deposited at interest by a liquidator is deemed to be money under his control, and when such money forms part of the minimum balance payable into the Companies Liquidation Account pursuant to *ibid.*, r. 191 (2), it must be realised or withdrawn and the proceeds paid into the Companies Liquidation Account; but Government securities may, with the permission of the Board of Trade, be transferred to the control of the Board to be realised as and when required (*ibid.*, r. 191 (6)).

England. He is then entitled to the prescribed certificate of receipt for the money so paid, and that certificate is an effectual discharge to him in respect thereof (*f*).

As regards unclaimed dividends, the whole amount must be paid in (*g*). As regards money representing other unclaimed or undistributed assets, the minimum balance of such money which the liquidator has had in his hands or under his control (*h*) during the six months immediately preceding the date to which the statement of receipts and payments is brought down, less such part (if any) thereof as the Board of Trade may authorise him to retain for the immediate purposes of the liquidation, must be paid in within fourteen days from the date to which the statement is brought down (*i*).

Money at the credit of the account of the official liquidator of a company with the Bank of England is deemed to be money under his control. When such money has remained unclaimed or undistributed for six months after the date of receipt, it must be transferred to the Companies Liquidation Account, by cheque or order of the official liquidator and master attached to the judge in whose chambers the winding up is proceeding. An application to the Board for payment out of moneys so transferred must be signed by the official liquidator and counter-signed by the master (*j*).

All moneys representing unclaimed or undistributed assets or dividends in the hands of the liquidator at the date of the dissolution of the company must forthwith be paid by him into the Companies Liquidation Account (*k*).

All payments in by a liquidator of undistributed assets must be made under a paying-in order of the Board (*l*).

775. Every person who has acted as liquidator of any company, whether the liquidation has been concluded or not, must furnish to the Board of Trade particulars of any money in his hands or under his control representing unclaimed or undistributed assets of the company and such other particulars as the Board may require for the purpose of ascertaining or getting in any money payable into the Companies Liquidation Account at the Bank of England; and the Board may require such particulars to be verified by affidavit (*m*). The Board may at any time order any such person to submit to

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Amount to be
paid in.

Particulars of
unclaimed or
undistributed
assets.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63, s. 15 (3))]. As to what are undistributed assets in the case of a scheme of arrangement, see *Re Land Mortgage Bank of Florida*, [1898] 1 Ch. 444. As to payment out to shareholders, see *Elkins v. Capital Guarantee Society* (1900), 16 T. L. R. 423, C. A. Money paid in under the above provision cannot be attached by a garnishee order (*Spence v. Coleman*, [1901] 2 K. B. 199, C. A.).

(*g*) See p. 456.

(*h*) Companies (Winding-up) Rules, r. 191 (1).

(*i*) *Ibid.*, r. 191 (2).

(*j*) *Ibid.*, r. 191 (5). There is not in any winding up commenced since 1890 any official known as the official liquidator, and the rule seems to apply to cases where the winding up was by order of the court and commenced before January 1st, 1891.

(*k*) *Ibid.*, r. 191 (3).

(*l*) *Ibid.*, r. 191 (4).

(*m*) *Ibid.*, r. 192. For the form of affidavit, see *ibid.*, Form 97.

SECT. 16. **Winding up by the Court.** it an account verified by affidavit of the sums received and paid by him as liquidator of the company, and may direct and enforce an audit of the account (*n*).

Court's power as to discovery etc.

For the purposes of ascertaining and getting in any money so payable into the Bank of England, the court has, and at the instance of the Board may exercise, all the powers which may be exercised with respect to the discovery and realisation of the property of a debtor (*o*). An application by the Board for this purpose must be made by motion (*p*).

Payment out of assets.

776. Any person claiming to be entitled to any money so paid into the Bank of England may apply to the Board of Trade for payment of the same, and the Board, on a certificate by the liquidator that the person claiming is entitled, may make an order for the payment to that person of the sum due (*q*). The application must be made in the prescribed form and manner, and must, unless the Board otherwise directs, be accompanied by the certificate of the liquidator that the person claiming is entitled, and such further evidence as the Board directs (*r*). Any person dissatisfied with the decision of the Board in respect of any such claim may appeal to the High Court (*s*).

A liquidator who requires to make payments out of money paid into the Bank of England in pursuance of the above-mentioned statutory provision, either by way of distribution or in respect of the cost of the proceedings, must apply in such form and manner as the Board may direct, and the Board may thereupon either make an order for payment to the liquidator of the sum required, or may direct cheques to be issued to the liquidator for transmission to the persons to whom the payments are to be made (*t*).

(xii.) *Banking Accounts and Inves'ment of Funds.*

Liquidator's payment into Companies Liquidation Account.

777. A liquidator of a company which is being wound up by the court must not pay any sums received by him as liquidator into his private banking account (*a*). Except where the Board of Trade has authorised a special bank account (*b*), he must in such manner and at such times as the Board, with the concurrence of the Treasury, directs, pay the money received by him to

(*n*) Companies (Winding-up) Rules, r. 193 (1); and see *ibid.*, Forms 92, 93.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (4)]; Companies (Winding-up) Rules, r. 193 (2); and see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 27, 102 (5), 162; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 105, 125, 239, 240, 241, 325.

(*p*) Companies (Winding-up) Rules, r. 194.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (5)].

(*r*) Companies (Winding-up) Rules, r. 195.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (7) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (5)].

(*t*) Companies (Winding-up) Rules, r. 196.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 154 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 11 (6)].

(*b*) See p. 460, *post*.

the Companies Liquidation Account at the Bank of England (c), which is an account kept at that Bank by the Board, and to which all moneys received by the Board in respect of proceedings under the Act of 1908, in connection with the winding up of companies in England, must be paid (d).

All moneys received by the liquidator are required to be paid without deduction. Remittances are to be made once a week, or forthwith if a sum of £200 or more has been received. The remittances (which must not include half-pence) may be made direct to the Bank of England, Law Courts Branch, London, by cheque crossed "Bank of England, credit of Companies Liquidation Account" (e). They must be accompanied by a receivable order (f); and by the same post the counterpart or advice letter must be transmitted to the Accountant-General to the Board (g). All current bills of exchange must also be remitted to the Companies Liquidation Account (h). The Board is to furnish the liquidator with a certificate of receipt of the money so paid in (i).

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Winding up
by the
Court.

Mode of
payment in.

778. All payments out of moneys standing to the credit of the Board of Trade in the Companies Liquidation Account are to be made by the Bank of England in such manner as the Board

Payments
out of
Company's
Liquidation
Account.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 154 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 11 (2), (3)]. If the liquidator at any time retains for more than ten days a sum exceeding £50 or such other amount as the Board of Trade in any particular case authorises him to retain, then, unless he explains the retention to the satisfaction of the Board, he must pay interest on the amount so retained in excess at the rate of 20 per cent. per annum, and is liable to disallowance of all or such part of his remuneration as the Board thinks just, and to be removed from his office by the Board; he is also liable to pay any expenses occasioned by reason of his default (*ibid.*, s. 154 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 11 (4)]). The penal interest belongs to the estate, and not to the Treasury (*Re Sims, Ex parte Official Receiver*, [1907] 2 K. B. 36 (a bankruptcy case)).

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 229 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 11 (1)]. Whenever the cash balance standing to the credit of the Companies Liquidation Account is in excess of the amount which the Board of Trade requires for the time being to answer demands in respect of companies' estates, the Board is to notify the excess to the Treasury, and pay over the whole or any part of it as the Treasury requires to the Treasury, to such account as the Treasury directs, and the Treasury may invest the sums paid over, or any part thereof, in Government securities, to be placed to the credit of the said account; and when any part of the money so invested is, in the opinion of the Board, required to answer any demands in respect of companies' estates, the Board is to notify to the Treasury the amount so required, and the Treasury is thereupon to repay to the Board such sum as may be required to the credit of the Companies Liquidation Account, and for that purpose may direct the sale of such part of the securities as may be necessary. The dividends on the investments are to be paid to such account as the Treasury directs, and regard is to be had to the amount thus derived in fixing the fees payable in respect of winding-up proceedings in England (*ibid.*, s. 230 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 16]).

(e) Board of Trade Regulations, 1909, r. 1.

(f) Which is known as Form O, No. 7. These forms are supplied on application to the Comptroller of the Companies Department, Board of Trade, Great George Street, Westminster, S.W.

(g) Board of Trade Regulations, 1909, r. 2.

(h) *Ibid.*

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 154 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 11 (2)].

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Court.
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of Trade may from time to time direct (*k*). The Board has directed that cheques to the order of the payee for sums which become payable on account of the company may be obtained by the liquidator, on application by him on the prescribed form (*l*), for delivery by him to the parties entitled (*m*). In no circumstances does the Board hold itself responsible for payments made on the requisition of the liquidator (*n*). The Board has further directed that the comptroller is to be prepared to certify the balance standing to the credit of a company in the Companies Liquidation Account, on receiving from the liquidator a statement of the balance shown by the bank columns of the cash book (*o*). Moneys withdrawn from the bank must not be treated as receipts from realisations, but must appear only in the "drawn from bank" column of the cash book, the application of the money being entered in the "payments" column. Payments into the bank must appear only in the "paid into bank" column in the cash book (*p*); and all applications for the cancellation of cheques and money orders must be addressed to the comptroller and state the grounds upon which the cancellation is required (*q*).

Liquidator's
special bank
account.

779. If the committee of inspection satisfy the Board of Trade that, for the purpose of carrying on the business of the company or of obtaining advances, or for any other reason, it is for the advantage of the creditors or contributories that the liquidator should have a special bank account other than the Companies Liquidation Account, the Board, on the application of the committee of inspection, is to authorise the liquidator to make his payments into and out of such other bank as the committee may select, and thereupon those payments must be made in the prescribed manner (*r*). The Board may grant such authorisation for such time and on such terms as it thinks fit, and may at any time order the account to be closed if it is of opinion that the account is no longer required for the purposes mentioned in the application (*s*).

Where the liquidator is authorised to have a special bank account, he must forthwith pay all moneys received by him into that account at the appointed bank to the credit of the liquidator of the company; and the pass book with the special bank must be forwarded at each audit (*t*). All payments out of the special bank must be made by cheque payable to order, having marked or

(*k*) Companies (Winding-up) Rules, r. 164; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 229 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (5)].

(*l*) This form is called Form C, No. 6.

(*m*) Board of Trade Regulations, 1909, r. 6.

(*n*) *Ibid.*, r. 7.

(*o*) *Ibid.*, r. 8.

(*p*) *Ibid.*, r. 9.

(*q*) *Ibid.*, r. 10. As to the payment of dividends to creditors, see *ibid.*, r. 11, and p. 527, *post*. As to the payment of any surplus to contributories, see *ibid.*, r. 12; and p. 529, *post*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 154 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 11 (3)]. For form of application, see Companies (Winding-up) Rules, Form 82.

(*s*) Companies (Winding-up) Rules, r. 165 (2). For form of order authorising special bank account, see *ibid.*, Form 83.

(*t*) *Ibid.*, r. 165 (1); Board of Trade Regulations, 1909, r. 4.

written on the face of it the name of the company. Every cheque must be signed by the liquidator and countersigned by at least one member of the committee of inspection, and by such other person, if any, as the committee may appoint (a).

SECT. 16.
Winding up
by the
Court.

(xiii.) *Resignation or Removal of Liquidator.*

780. A liquidator appointed by the court may resign his office (b). If he desires to resign he must summon separate meetings of the creditors and contributories of the company to decide whether or not the resignation shall be accepted. If the creditors and contributories by ordinary resolutions both agree to accept his resignation, he must file with the Registrar in Companies Winding-Up a memorandum of his resignation, and send notice to the official receiver, upon which the resignation takes effect. In any other case the liquidator must report to the court the result of the meetings and send a report to the official receiver. The court may, on the application of the liquidator or the official receiver, then determine whether or not the resignation is to be accepted, and may give such directions and make such orders as in the opinion of the court are necessary (c).

Resignation
of liquidator.

781. The liquidator vacates his office if a receiving order in bankruptcy is made against him (d).

Removal.

He is liable to be removed from his office by the Board of Trade if he retains in his hands for more than ten days money which ought within that period to have been paid into the Companies Liquidation Account (e).

He may be removed by the court, on the official receiver's report, for failing to keep up his security. The court may make such order as to costs as it thinks fit (f), and it may direct that another liquidator is to be appointed (g).

He may also be removed by the court on cause shown (h). Thus, he may be removed whenever the court is satisfied that it is for the general advantage of those interested in the assets of the company that he should be removed (i). Though the court may not have a

(a) Companies (Winding-up) Rules, r. 165 (1). As to the payment of dividends to creditors, see Board of Trade Regulations, 1909, r. 11; and p. 527, *post*. As to payment of any surplus to contributories, see *ibid.*, r. 12; and p. 529, *post*.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (6) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 93]. As to the effect of his release, see p. 463, *post*. As to the official receiver acting during a vacancy, see p. 425, *ante*.

(c) Companies (Winding-up) Rules, r. 162.

(d) *Ibid.*, r. 163. For the purposes of the Act and Rules he is deemed to have been removed (*ibid.*); and see p. 462, *post*. If the receiving order is rescinded, he is deemed not to have vacated his office (*Re Newman, Ex parte, Official Receiver*, [1899] 2 Q. B. 587).

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 62), s. 11 (4)].

(f) Companies (Winding-up) Rules, r. 58 (2).

(g) *Ibid.*, r. 58 (3). As to the mode of appointment, see p. 438, *ante*.

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (6) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 93, where the words were "on due cause shown"].

(i) *Re Eytton (Adam), Ltd., Ex parte Charlesworth* (1887), 36 Ch. D. 299, C. A.; compare *Re Tavistock Iron Works Co.* (1871), 19 W. R. 672, where proceedings were continued contrary to the wishes of the creditors; *Re Scotch Granite Co.* (1867), 17 L. T. 533.

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by the
Court.

general discretion, its jurisdiction is not confined to cases where there is personal unfitness in the liquidator (*k*), but extends to cases where the unfitness is occasioned by his connection with other parties, or by the circumstances of the particular case (*l*). In considering whether a liquidator should be removed, importance is attached to such factors as, for instance, that the majority of the company's creditors will be paid off by a large creditor if his nominee is appointed (*m*), or that the majority is dissatisfied with the existing liquidator, especially if some of them are willing to act without remuneration (*n*),

A contributory in arrear as to his calls cannot apply for a liquidator's removal (*o*).

A liquidator may appeal from an order for his removal (*p*).

Vacancy in
office of
liquidator.

782. A vacancy in the office of a liquidator appointed by the court must be filled by the court (*q*). When a liquidator dies or resigns, or is removed, another liquidator may be appointed in his place in the same manner as in the case of a first appointment (*r*). On the request of not less than one-tenth in value of the creditors or contributories, the official receiver is to summon meetings for the purpose of determining whether or not the vacancy shall be filled (*s*).

(*k*) See the cases cited in note (*i*), p. 461, *ante*.

(*l*) *Re Sir John Moore Gold Mining Co.* (1879), 12 Ch. D. 325, C. A.; *Re Charterland Gold Fields, Ltd.* (1909), 26 T. L. R. 132.

(*m*) *Re Eyton (Adam), Ltd., Ex parte Charlesworth* (1887), 36 Ch. D. 299, C. A.

(*n*) *Re Oxford Building and Investment Co.* (1883), 49 L. T. 495; *Re Association of Land Financiers* (1878), 10 Ch. D. 269; compare *Re Civil Service and General Stores*, [1884] W. N. 158. Not only must the court in winding-up matters generally regard the wishes of creditors and contributories (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 89), s. 145), but it may do so especially as regards the appointment of liquidators (*ibid.*, s. 201). The mode of appointing liquidators after considering the resolutions of the first meetings shows that the tendency now is for the court to rely more on the wishes of those interested than on its own discretion. The words "on cause shown" were used also in s. 83 (4) of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71); see *Ex parte Hewitt* (1884), 14 Q. B. D. 147; *Re Pouley, Ex parte Sheard* (No. 1) (1880), 16 Ch. D. 107, 109, C. A.; *Re Old Wheal Neptune Mining Co., Ex parte Pulbrook, Ex parte Rawlings* (1864), 2 De G. J. & Sm. 348; *Re Marseilles Extension Railway and Land Co.* (1867), L. R. 4 Eq. 692; *Re British Nation Life Assurance Association* (1872), L. R. 14 Eq. 492.

(*o*) *Re Norwich Provident Insurance Society*, [1879] W. N. 216. As to circular sent by an applicant shareholder to other shareholders, see *Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860, disapproving *Re Crown Bank, Re O'Malley* (1890), 44 Ch. D. 649, and *Coats (J. & P.) v. Chadwick*, [1894] 1 Ch. 347.

(*p*) *Re Eyton (Adam), Ltd., Ex parte Charlesworth, supra*.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (7) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 93].

(*r*) See p. 438, *ante*.

(*s*) Companies (Winding-up) Rules, r. 55 (7). The rule proceeds as follows: "But none of the provisions of this rule shall apply where the liquidator is released under s. 157 of the Act, in which case the official receiver shall remain liquidator." Under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 157, a release may be granted, not only where the liquidator has fully realised and distributed the assets and made his final return (in which case it would be absurd to appoint a new outside liquidator), but also if the liquidator has resigned or been removed from his office. Either of these events may happen shortly after the liquidator's appointment. On its happening the official receiver becomes liquidator. The effect of this proviso, if read literally, would be that if a release is granted to the resigning or removed liquidator, then no other outsider is to be appointed liquidator, but

(xiv.) *Release of Liquidator.*SECT. 16.
**Winding up
by the
Court.**Liquidator's
application
for release.

783. When the liquidator has realised all the property of the company, or so much thereof as can, in his opinion, be realised, without needlessly protracting the liquidation, and has distributed a final dividend, if any, to the creditors, and has adjusted the rights of the contributories amongst themselves, and made a final return, if any, to the contributories (t), or has resigned, or has been removed from his office (a), he may apply to the Board of Trade for his release (b). Before making the application he must give notice of his intention so to do to all the creditors who have proved their debts, and to all the contributories, and with the notice must send a summary of his receipts and payments as liquidator (c).

On the application being made the Board causes a report on his accounts to be prepared. This report, on his complying with all the Board's requirements, is taken into consideration, together with any objection which may be urged by any creditor, or contributory, or person interested, against the release; and the release is either granted or withheld, subject to an appeal to the High Court (d).

784. The Board of Trade's order releasing the liquidator discharges him from all liability in respect of any act done or default made by him in the administration of the affairs of the company, or otherwise in relation to his conduct as liquidator. The order may, however, be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact (e).

Effect of
release.

Where the liquidator has not previously resigned or been removed, his release operates as a removal of him from his office (f).

When the Board has granted the release, a notice of the order granting it must be gazetted (g).

Gazetting
release.

the official receiver is to remain liquidator. The rule would appear to be in direct conflict with s. 149 (7) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). But it will be noticed that by *ibid.*, s. 157 (4), the release of a liquidator who has not previously resigned or been removed (i.e., a liquidator who has made his final return) operates as his removal (see *infra*), and the above proviso is probably intended to apply only to that case.

(t) See pp. 500, 527 *et seq.*

(a) See p. 462, *ante*.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 157 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 22 (1)]; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 112, 113; *Re Prager, Ex parte Société Cockrill* (1876), 3 Ch. D. 115; *Re Ware, Ex parte Carter* (1878), 8 Ch. D. 731, C. A.

(c) Companies (Winding-up) Rules, r. 197 (1). For form of notice to creditors and contributories, see *ibid.*, Form 98; for form of summary, *ibid.*, Form 100; and for form of application to the Board, *ibid.*, Form 99.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 157 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 22 (1)]. As to appeals, see Companies (Winding-up) Rules, r. 206. As to his duty to hand over books etc., see p. 455, *ante*.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 157 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 22 (3)]; and see *Re Harris, Ex parte Hasluck*, [1899] 2 Q. B. 93; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 112, 113, *ante*.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 157 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 22 (4)].

(g) Companies (Winding-up) Rules, r. 197 (2). The liquidator must provide the requisite stamp fee for the *Gazette*, which he may charge against the company's assets (*ibid.*).

SECT. 16. **785.** Where the release is withheld, the court may, on the application of any creditor, or contributory, or person interested, make such order as it thinks just, charging the liquidator with the consequences of any act or default which he may have done or made contrary to his duty (*h*).

**Winding up
by the
Court.**

(xv.) *Committee of Inspection.*

**Constitution
of committee
of inspection.**

786. The committee of inspection (*i*) consists of creditors and contributories of the company, or persons holding general powers of attorney from creditors or contributories, in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the court (*k*). If there is no committee of inspection, the Board of Trade may act as such on the application of the liquidator (*l*). The functions of the committee may, subject to the directions of the Board, be then exercised by the official receiver (*m*). The liquidator cannot, however, make a call, when there is no committee of inspection, without obtaining the leave of the court (*n*).

**Amending
constitution
of committee.**

Where any creditors or contributories with a substantial interest, whether as individuals or as a class, are, through no fault of their own, unrepresented on the committee of inspection, the court may direct the liquidator to summon a meeting of the creditors or contributories to consider whether a representative of the aggrieved person or class should be substituted for an existing member of the committee; or it may order fresh first meetings to be summoned to determine whether a committee should be appointed and who should be its members (*o*).

**Powers and
duties of
committee.**

787. The committee of inspection has powers and duties with reference to the liquidator's remuneration (*p*); the employment by the liquidator of a solicitor or agent (*q*); litigation by the liquidator in the company's name (*r*); the carrying on of the company's business by the liquidator (*s*); the opening by the liquidator of a special banking account (*t*); the liquidator's record book and cash book

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 157 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 22 (2)]; see *Re Hill's Waterfall Estate and Gold Mining Co.*, [1896] 1 Ch. 947.

(*i*) As to the mode of appointment, see p. 438, *ante*.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 160 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (1)]. No defect or irregularity in the appointment or election of a member of the committee vitiates any act done by him in good faith (Companies (Winding-up) Rules, r. 217 (2)).

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 160 (9) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (9)].

(*m*) Companies (Winding-up) Rules, r. 205.

(*n*) *Ibid.*, r. 83 (5).

(*o*) *Re Radford and Bright, Ltd.*, [1901] 1 Ch. 272; *Re Radford and* o. 2, [1901] 1 Ch. 735.

(*p*) See p. 449, *ante*.

(*q*) See p. 446, *ante*.

(*r*) See p. 446, *ante*.

(*s*) See p. 506, *ante*.

(*t*) See p. 460, *ante*.

and the audit thereof (*a*); the making of calls (*b*); the investment of the company's moneys and the realisation of the investments (*c*); the giving of directions as to the administration and distribution of the company's assets (*d*); compromises and general schemes of liquidation (*e*).

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Winding up
by the
Court.

788. The committee of inspection is to meet at such times as it from time to time appoints, and, failing such appointment, at least once a month. The liquidator or any member of the committee may also call a meeting of the committee whenever he thinks necessary (*f*). The committee may act by a majority of its members present at a meeting, but must not act unless a majority of the committee are present (*g*).

Meeting of
committee.

789. Any member may resign by notice in writing signed by him and delivered to the liquidator (*h*). If a member becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office becomes vacant (*i*). Any member may be removed by an ordinary resolution at a meeting of creditors (if he represents creditors), or of contributories (if he represents contributories), of which seven days' notice has been given, stating the object of the meeting (*k*). On a vacancy occurring the liquidator must forthwith summon a meeting of creditors or of contributories, as the case may require, to fill it, and the meeting may, by resolution, reappoint the same or appoint another creditor or contributory to fill the vacancy (*l*). Notwithstanding any vacancy in the committee (*m*), the continuing members, if not less than two, may act.

Resignation,
removal and
filling up
vacancies.

790. A member of the committee of inspection, like a liquidator, is forbidden to purchase assets of the company without the court's leave (*n*). No member of the committee is, except under

Purchase
etc. by
committee-
men.

(*a*) See p. 452, *post*.

(*b*) See p. 500, *ante*.

(*c*) See p. 458, *post*.

(*d*) See pp. 443, 446, *ante*.

(*e*) See pp. 602 *et seq.*, *post*.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 160 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (2)].

(*g*) *Ibid.*, s. 160 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (3)].

(*h*) *Ibid.*, s. 160 (4) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (4)].

(*i*) *Ibid.*, s. 160 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (5)].

(*k*) *Ibid.*, s. 160 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (6)].

(*l*) *Ibid.*, s. 160 (7) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (7)]; and see the similar provisions of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 22; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 113—117.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 160 (8) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 9 (8)].

(*n*) See Companies (Winding-up) Rules, r. 156; p. 442, *ante*; and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 116.

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and with the sanction of the court, directly or indirectly, by himself, or any employer, partner, clerk, agent, or servant, entitled to derive any profit from any transaction arising out of the winding up, or to receive out of the assets any payment for services rendered by him in connection with the administration of the assets, or for any goods supplied by him to the liquidator for or on account of the company. If it appears to the Board of Trade that any such profit or payment, without such sanction, has been made, it may disallow such payment or recover such profit, as the case may be, on the audit of the liquidator's accounts (o). The cost of obtaining such sanction must be borne by the person in whose interest it is obtained, and is not to be payable out of the company's assets (p). Where the sanction of the court to a payment to a member of the committee for services rendered by him in connection with the administration of the company's assets is obtained, the order of the court must specify the nature of the services, and the sanction is only to be given where the service performed is of a special nature (q).

These provisions do not apply to actual out-of-pocket expenses necessarily incurred by the committee of inspection, which are payable out of the company's assets, subject to the approval of the Board of Trade (r).

SUB-SECT. 8.—*Meetings of Creditors and Contributories.*

(i.) *First Meetings.*

Summoning
first meetings

791. What are called first meetings of creditors and contributories are to be summoned by the official receiver to determine whether application is to be made for appointing a liquidator in his place, and for the appointment of a committee of inspection, and who are to be the members of the committee (a). Rules have been made having special reference to these first meetings (b).

(ii.) *Court Meetings.*

Meetings
ordered by
the court.

792. Where the court is authorised to regard the wishes of creditors or contributories, as proved to it by any sufficient evidence (c), it may, if it thinks fit, for the purpose of ascertaining

(o) Companies (Winding-up) Rules, r. 158. The sanction must be obtained before the business is undertaken (*Re Gallard, Ex parte Harris* (1888), 21 Q. B. D. 38).

(p) Companies (Winding-up) Rules, r. 159.

(q) *Ibid.*, r. 160. The Lord Chancellor, with the concurrence of the Treasury, has power to direct whether any, and if so what, remuneration is to be allowed to persons (other than Board of Trade officers) performing duties in relation to a winding up (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 233 (3)).

(r) See Companies (Winding-up) Rules, r. 187 (1).

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 152 (1).

(b) See Companies (Winding-up) Rules, rr. 115—119. As to summoning such meetings, see p. 428, *ante*. As to voting at such meetings, see pp. 468 *et seq.*, *post*; as to proxies, see pp. 468 *et seq.*, *post*. As to the general rules which are to some extent applicable to such meetings, see p. 467, *post*.

(c) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 145, 201; see p. 413, *ante*.

those wishes, direct meetings of the creditors or contributories to be held, and may appoint a person to act as chairman and to report the result of the meeting to the court. At such meetings, in the case of creditors, regard is to be had to the value of each creditor's debt, and in the case of contributories to the number of votes conferred on each contributory by the articles (*d*).

Winding up
by the
Court.

(iii.) *Liquidators' Meetings.*

793. The third class of meetings comprises those which are summoned by the liquidator apart from any direction by the court. In administering the assets of the company and distributing them among its creditors, the liquidator must have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting. Any such directions are, in case of conflict, deemed to override any directions given by the committee of inspection (*e*).

Meetings
called by the
liquidator.

The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it is his duty to summon meetings at such times as the creditors or contributories, by resolution, either at the meeting appointing the liquidator or otherwise, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be (*f*).

(iv.) *General Rules as to Meetings.*

794. The costs of summoning a meeting of creditors or contributories at the instance of any person other than the official receiver or liquidator must be paid by the person at whose instance it is summoned. Before the meeting is summoned he must deposit with the official receiver or liquidator (as the case may be) such sum as may be required by him as security for the payment of such costs. Such costs are to be repaid out of the assets of the company if the court so orders or the creditors or contributories, as the case may be, by resolution so direct (*g*).

Costs of
summoning
meetings.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 219 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 91, 149]. These meetings are called "court meetings," and, subject to any express directions of the court, Companies (Winding-up) Rules, rr. 123—149, as to which see *infra*, apply to such meetings, so far as practicable (*ibid.*, r. 122; compare s. 173 (*a*) of the Act of 1908).

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 158 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 23 (1)].

(*f*) *Ibid.*, s. 158 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 23 (2)]; Companies (Winding-up) Rules, r. 122; and see s. 173 of the Act of 1908. The Companies (Winding-up) Rules, rr. 123—149, apply so far as practicable (*ibid.*, r. 122), as to which see *infra*.

(*g*) Companies (Winding-up) Rules, r. 126. The costs of summoning a meeting, including all disbursements for printing, stationery, postage and the hire of room, are to be calculated at the following rate for each creditor or contributory, to whom notice is required to be sent, namely, 2s. per creditor or contributory for the first twenty creditors or contributories, 1s. per creditor or contributory for the next thirty creditors or contributories, 6d. per creditor or contributory for any number of creditors or contributories after the first fifty

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by the
Court.

Mode of
summoning
meeting.

795. The official receiver or liquidator is to summon all meetings of creditors and contributories by giving not less than seven days' notice of the time and place in the *London Gazette* and in a local paper. Not less than seven days before the day appointed for the meeting, he is to send by post to every person appearing by the company's books to be a creditor of the company notice of the meeting of creditors, and to every person appearing by the company's books or otherwise to be a contributory of the company notice of the meeting of contributories. The notice to each creditor must be sent to the address given in his proof, or if he has not proved, to the address given in the statement of affairs, or to such other address as may be known to the person summoning the meeting. The notice to each contributory must be sent to the address mentioned in the company's books as the address of such contributory, or to such other address as may be known to the person summoning the meeting (*h*).

Where a meeting of creditors or contributories is summoned by notice, the proceedings and resolution at the meeting are, unless the court otherwise orders, to be valid notwithstanding that some creditors or contributories may not have received the notice (*i*).

Evidence as
to notice
being sent.

A certificate by the official receiver or other officer of the court, or by his clerk, or an affidavit by the liquidator, or his solicitor, or the clerk of either, that the notice of any meeting has been duly posted is sufficient evidence of such notice having been duly sent to the person to whom the same was addressed (*a*).

Proxies at
meetings.

Forms to be
sent with
notice.

796. A creditor or contributory may vote by proxy (*b*); and rules have been made regulating the use of proxies (*c*).

General and special forms of proxy must be sent to the creditors and contributories with the notice summoning the meeting. Neither the name nor description of the official receiver or liquidator or any other person is to be printed or inserted in the body of any instrument of proxy before it is so sent (*d*).

Every instrument of proxy must be in accordance with the forms (*e*). The written part must be in the handwriting of the person giving the proxy, or of some manager or clerk or other person in his regular employment, or of a commissioner of oaths (*f*).

Proxy of
blind or
incapable
creditor.

The proxy of a creditor blind or incapable of writing may be accepted, if he has attached his signature or mark to it in the presence of a witness, who adds to his signature his description and residence. All insertions in the proxy must, however, be in the handwriting of the witness; and the witness must certify at the

(*h*) Companies (Winding-up) Rules, r. 123.

(*i*) *Ibid.*, r. 130.

(*a*) *Ibid.*, r. 124; and see *ibid.*, Forms 76, 77.

(*b*) *Ibid.*, r. 139. The provisions as to proxies do not, unless directed by the court, apply to a court meeting of creditors or contributories prior to the first meeting (*ibid.*). As to proxies, and the stamps on them, see pp. 258, 259, *ante*.

(*c*) *Ibid.*, rr. 140—149.

(*d*) *Ibid.*, r. 141.

(*e*) See *ibid.*, Forms 80 and 81.

(*f*) *Ibid.*, r. 140. The person appointed as proxy cannot act as attesting witness (*Re Parrott, Ex parte Cullen*, [1891] 2 Q. B. 151).

foot of the proxy that all such insertions have been made by him at the request of the creditor and in his presence before he attached his signature or mark (*g*).

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Winding up
by the
Court.

797. A creditor or a contributory may give (1) to his manager or clerk or any other person in his regular employment a general proxy, which must state the relation in which the person to act under it stands to the creditor or contributory (*h*); or (2) to any person a special proxy to vote at any specified meeting or adjournment thereof for or against the appointment or continuance in office of any specified person as liquidator or member of the committee of inspection, and on all questions relating to any matter other than those above referred to and arising at the meeting or an adjournment thereof (*i*).

Persons who
may be
proxies.

No person is to be appointed a general or special proxy who is a minor (*k*).

Where a limited company is a creditor, any person who is duly authorised under its seal to act generally on its behalf at meetings of creditors and contributories and to appoint himself or any other person to be its proxy may fill in and sign the form of proxy on its behalf, and appoint himself to be its proxy. A proxy so filled in and signed by him is to be received and dealt with as the proxy of the creditor company (*l*).

A creditor or a contributory may appoint the official receiver or liquidator to act as his general or special proxy (*m*). Where an official receiver who holds any proxies cannot attend the meeting for which they are given, he may, in writing, depute some person under his official control to use the proxies on his behalf, and in such manner as he may direct (*n*). Where it appears to the satisfaction of the court that any solicitation has been used by or on behalf of a liquidator in obtaining proxies or in procuring his appointment as liquidator except by the direction of a meeting of creditors or contributories, the court, if it thinks fit, may order that no remuneration be allowed to the person by whom or on whose behalf the solicitation was exercised, notwithstanding any resolution of the committee of inspection or of the creditors or contributories to the contrary (*o*).

Official
receiver or
liquidator
as proxy.

798. A proxy intended to be used at the first meeting of creditors or contributories, or an adjournment thereof, must be lodged with the official receiver not later than the time mentioned for that purpose in the notice convening the meeting or the adjourned meeting, which time shall not be earlier than twelve o'clock at

Lodging of
proxies.

(*g*) Companies (Winding-up) Rules, r. 149; and see *ibid.*, r. 139.

(*h*) *Ibid.*, r. 142. For the form of general proxy, see *ibid.*, Form 80. As to appointing the official receiver or liquidator, see *infra*.

(*i*) *Ibid.*, r. 143. For the form of special proxy see *ibid.*, Form 81. Apart from the rules, proxies can only be given to members of the class (*Re Mairas Irrigation and Canal Co.*, [1881] W. N. 120).

(*k*) Companies (Winding-up) Rules, r. 147 (3); and see *ibid.*, r. 139.

(*l*) *Ibid.*, r. 147 (4).

(*m*) *Ibid.*, r. 145.

(*n*) *Ibid.*, r. 146.

(*o*) *Ibid.*, r. 144.

- SECT. 16.** noon of the day but one before, nor later than twelve o'clock at
Winding up noon of the day before, the day appointed for such meeting, unless
by the the court otherwise directs (*p*).
Court. Other proxies must be lodged with the official receiver or liquidator
Lodging of not later than four o'clock in the afternoon of the day before the
proxies. meeting or adjourned meeting at which it is to be used (*q*).
- Conduct of** **799.** The meetings are to be held at such place as is, in the opinion
meetings. of the official receiver or liquidator, most convenient for the majority
of the creditors or contributories, or both. Different times or places,
or both, may if thought expedient be named for the meetings of
creditors and of contributories (*r*).
- Chairman.** Where a meeting is summoned by the official receiver or the
liquidator, he, or someone nominated by him, is to be chairman of
the meeting. At every other meeting of creditors and contributories
the chairman is to be such person as the meeting by resolution
appoints (*s*).
- Quorum.** A meeting may not act for any purpose, except the election of a
chairman, the proving of debts and the adjournment of the meeting,
unless there are present personally or by proxy at least three credi-
tors entitled to vote, or three contributories. If the number of the
creditors entitled to vote, or of the contributories, as the case may
be, does not exceed three, all must be present (*t*). Unless a quorum
of creditors or contributories is present within half an hour from the
time appointed for the meeting, the meeting must be adjourned
to the same day in the following week at the same time and place,
or to such other day as the chairman may appoint, not being less
than seven or more than twenty-one days (*u*).
- Adjournment.** The chairman may, with the consent of the meeting, adjourn it
from time to time and from place to place; but the adjourned
meeting must be held at the same place as the original place of
meeting, unless in the resolution for adjournment another place is
specified or unless the court otherwise orders (*a*).
- 800.** A person cannot vote as a creditor (1) in the case of a first
meeting of creditors, or of an adjournment thereof, unless he has
lodged with the official receiver, not later than the time mentioned
in the notice convening the meeting, a proof of his debt; (2) in
the case of a court meeting (not being one held prior to the first
meeting of creditors), or liquidator's meeting of creditors, unless he
has lodged with the official receiver or liquidator a proof of the
debt which he claims to be due to him from the company, and
such proof has been admitted, wholly or in part, before the date on
which the meeting is held (*b*).
- Except in the case of a court meeting of creditors held before the

suitors
to vote.

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- (*p*) Companies (Winding-up) Rules, r. 147 (1).
(*q*) *Ibid.*, r. 147 (2).
(*r*) *Ibid.*, r. 125.
(*s*) *Ibid.*, r. 127. For authority to a deputy to act as chairman and as proxy,
see *ibid.*, Form 79.
(*t*) *Ibid.*, r. 132 (1).
(*u*) *Ibid.*, r. 132 (2).
(*a*) *Ibid.*, r. 131. For memorandum of adjournment, see *ibid.*, Form 78.
(*b*) *Ibid.*, r. 133.

first meeting, a secured creditor must, for the purpose of voting, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and he is entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt, he is deemed to have surrendered his security, unless the court on application is satisfied that the omission to value the security has arisen from inadvertence (c). The official receiver or liquidator may, within twenty-eight days after a proof estimating the value of a security has been used in voting at a meeting, require the creditor to give up the security for the benefit of the creditors generally, on payment of the value so estimated, with an addition of 20 per cent. The creditor may, however, at any time before being required to give it up, correct the valuation by a new proof and deduct the new value from his debt. In that case the addition of 20 per cent. is not to be made if the security is required to be given up (d).

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Winding up
by the
Court.

Secured
creditors.

No person acting under either a general or a special proxy (e) is to vote in favour of any resolution which would directly or indirectly place himself, his partner or employer, in a position to receive any remuneration out of the estate of the company otherwise than as creditor rateably with the other creditors. Where, however, any person holds special proxies to vote for the application to the court in favour of the appointment of himself as liquidator, he may use the said proxies and vote accordingly (f).

Holder of
proxy.

A creditor cannot vote in respect of any unliquidated (g) or contingent debt, or any debt the value of which is not ascertained (h). In respect of any debt on or secured by a current bill of exchange or promissory note held by him, he cannot vote, except in the case of a court meeting of creditors held prior to the first meeting, unless he is willing to treat the liability to himself of the prior parties to the instrument (i), as a security in his hands. In this case the value must be estimated, and for the purposes of voting, but not for the purposes of dividend, deducted from his proof (j).

Votes in
respect of
unliquidated
and other
claims.

801. The chairman of the meeting has power, except in the case of a court meeting of creditors held prior to the first meeting, to admit or reject a proof for the purpose of voting; but his decision is subject to appeal to the court. If he is in doubt whether a proof should be admitted or rejected, he must mark it as objected to and allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained (k).

Chairman's
power as to
proofs.

(c) Companies (Winding-up) Rules, r. 135; see p. 520, *post*.

(d) *Ibid.*, r. 136.

(e) As to who may vote by proxy, see p. 468, *ante*.

(f) Companies (Winding-up) Rules, r. 146.

(g) As to the meaning of "unliquidated," see *Re Canadian Pacific Colonisation Corporation*, [1891] W. N. 122; compare *Re Dummelow, Ex parte Ruffle* (1873), 8 Ch. App. 997.

(h) Companies (Winding-up) Rules, r. 133.

(i) This does not apply to any prior party against whom a receiving order has been made (*ibid.*, r. 134).

SECT. 16.	802. A resolution is to be deemed to be passed at a meeting
Winding up by the Court.	when a majority in number and value of the creditors or contributories, as the case may be, present personally or by proxy, and voting on the resolution, have voted in favour of it. In the case of the contributories their value is determined according to the number of votes conferred on each contributory by the regulations of the company (<i>l</i>).
Resolutions at meetings.	
Minutes of meeting.	The chairman must cause minutes of the proceedings at the meeting to be drawn up and fairly entered in a book kept for that purpose. The minutes must be signed by him or by the chairman of the next ensuing meeting (<i>m</i>).
Registration of resolutions.	The official receiver, or, as the case may be, the liquidator, is to file with the registrar a copy, certified by him, of every resolution of a meeting of creditors or contributories (<i>n</i>).

SUB-SECT. 9.—*Property available for Distribution amongst Creditors and Contributories.*

(i.) *In General.*

Assets in winding up.

803. Winding up is a proceeding by means of which the dissolution of a company is brought about and in the course of which its assets are collected and realised and applied in payment of its debts, and, when these are satisfied, in returning to its members the sums which they have contributed to the company, or paying them other moneys due to them in their character of members. The proceeding is not confined to cases where a company is insolvent, but may be adopted as a means of enabling the corporators or members to reincorporate with extended objects or further powers, or more efficient means of management.

The assets include all contributions which the liquidator is entitled to obtain from members, or persons who have been members within a certain time before the winding up commenced, and all assets which have been misappropriated as against creditors, and which a creditor has a right to have recouped (*o*). These contributions and assets, with the other property of the company, form a common fund to be applied in the manner directed by the Act (*p*), and after satisfying the claims of its secured creditors, who are not bound to avail themselves of the winding-up proceedings, but may pursue the remedies which they possessed before it commenced (*q*).

(*l*) Companies (Winding-up) Rules, r. 128. Where there was a majority in number one way and a majority in value the other, the court decided in favour of the majority in value (*Re Bloxwich Iron and Steel Co.*, [1894] W. N. 111).

(*m*) Companies (Winding-up) Rules, r. 138.

(*n*) *Ibid.*, r. 129.

(*o*) *Stringer's Case* (1869), 4 Ch. App. 475.

(*p*) *Webb v. Whiffin* (1872), L. R. 5 H. L. 711, 720, 724; *Morris' Case* (1871), 7 Ch. App. 200, 204. As to the liquidator's duty to collect the assets, see p. 441, ante.

(*q*) *Re Lloyd (David) & Co.*, *Lloyd v. Lloyd (David) & Co.* (1877), 6 Ch. D. 339; *Re Oriental Hotels Co.*, *Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126, 133; *Re Anglo-Austrian Printing and Publishing Union*, *Brabourne v. Same*, [1895] 2 Ch. 891; *Re Pound (Henry)*, *Son and Hutchins* (1889), 42 Ch. D. 402, C. A.

Subject to the rights of the secured creditors, and to the rights of certain creditors to be paid in priority, the assets in winding up are subject to a trust for the benefit of all the creditors, and must be distributed upon the footing of equality (r).

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Winding up
by the
Court.

804. Winding up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and equitable, is taken out of the bankrupt and is vested in his trustee; whereas on a winding up the estate, legal or equitable, then in the company still remains in it until its dissolution, unless disposed of in due course of winding up (s).

Non-vesting
of assets in
liquidator.

805. The court may, at any time after making a winding-up order, require any contributory for the time being settled on the list of contributories, and any trustee (a), receiver, banker, agent, or officer of the company, to deliver forthwith, or within such time as the court directs, to the liquidator, any money (b), property, or books and papers (c) in his hands to which the company is *prima facie* entitled (d). These powers of the court are exercisable by the liquidator as an officer of the court by notice in writing (e).

Delivery of
assets and
documents to
liquidator.

The court may order any contributory, purchaser, or other person from whom money is due to the company to pay the same into the Bank of England or any of its branches to the account of the liquidator, instead of to the liquidator; and the order may be enforced in the same manner as if it had directed payment to the liquidator (f). All moneys and securities paid or delivered into the Bank of England, or any of its branches, in the event of a

Order to
pay money
into Bank of
England.

(r) *Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co.* (1874), 9 Ch. App. 557; see *Re Smith, Knight & Co., Ex parte Ashbury* (1868), L. R. 5 Eq. 223. As to the priority of the Crown, etc., see p. 516, *post*.

(s) *Ibid.*; *Re Ebsworth v. Tidy's Contract* (1889), 42 Ch. D. 23, 49, 52. As to unregistered companies, see p. 653, *post*.

(a) The term "trustee" does not include a constructive trustee (*Re United English and Scottish Assurance Co., Ex parte Hawkins* (1868), 3 Ch. App. 787, where a creditor of the company had obtained payment by a garnishee order on the company's bank); compare *Re Direct London and Exeter Rail. Co., Hollingworth's Case* (1849), 3 De G. & Sm. 102; *Re Tring, Reading, and Basingstoke Rail. Co. Cox's Case* (1850), 3 De G. & Sm. 180.

(b) The money must be money belonging to the company (*Re Imperial Land Co. of Marseilles, Re National Bank* (1870), L. R. 10 Eq. 298; and see *Re Imperial Mercantile Credit Co.* (1867), L. R. 5 Eq. 264; *Re Ulster Land Co., Ltd.*, (1886), 17 L. R. Ir. 591).

(c) The liquidator is not entitled to the possession of books or papers on which the company's solicitor had before the winding up acquired a valid lien, but he can obtain inspection of such books and papers under s. 174 of the Act of 1908 (*Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, C. A.; *Engel v. South Metropolitan Brewing and Bottling Co.*, [1892] 1 Ch. 442; see p. 474, *post*).

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 164 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 100].

(e) *Ibid.*, s. 173 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 13]; Companies (Winding-up) Rules, r. 76; see *Re Oakwell Collieries Co.*, [1879] W. N. 65, where a director who had sold a colliery to the company was ordered to give possession. As to making the order *ex parte*, see *Re Commercial Union Wine Co.* (1865), 35 Beav. 35. As to proceedings against a contributory, see *Cardiff Preserved Coal and Coke Co. v. Norton* (1867), 2 Ch. App. 405.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 167 (!) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 103]; see *Re Leeds Banking Co.* (1886), 1 Ch. App. 150.

SECT. 16. winding up by the court are subject in all respects to the orders of the court (g).

Winding up
by the
Court.

(ii.) *Discovery of Property.*

Power of
court to order
private
examination.

806. The court may, after it has made a winding-up order, summon before it any officer of the company or any person known or suspected to have in his possession any of its property or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the trade, dealings, affairs, or property of the company (h), and require him to produce any books and papers in his custody or power relating to the company; but the production is to be without prejudice to any lien claimed by him on books or papers produced (i).

Procedure to
obtain order.

807. The attendance of a witness for examination (k) or the production of documents (l) must be procured by summons, and not by subpoena, the summons being obtained on the application of the liquidator or of a creditor or contributory (m). It is usual to intrust the examination to the liquidator; but if he declines to interfere, or the application is for his examination (n), the judge may intrust the examination to some creditor or contributory (o). An application by the liquidator is made *ex parte* and is not supported by an affidavit, a written statement being submitted to the registrar (p). Where the application is not by the liquidator, notice of it must be given to him, and it must be supported by an affidavit (q). The court may of its own motion, and without any application, order an examination (r). The court has a discretion as to ordering production of documents with which the Court of Appeal will not readily interfere (s). Orders may be made for the examination of a stockbroker who has acted for transferors or

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 167 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 104].

(h) *Ibid.*, s. 174 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 115]; see *Re Overend, Gurney & Co., Ex parte Musgrave* (1867), 16 L. T. 378. As to limiting the scope of the examination, see *Re Penysyflog Mining Co.* (1874), 30 L. T. 861.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174 (3) [Companies Act, 1862, s. 115]. The court has jurisdiction in the winding up to determine all questions relating to the lien (*ibid.*); and see, generally, title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 140—143.

(k) *Re Westmoreland Green and Blue Slate Co.* (1891), 66 L. T. 52; *Re English Joint Stock Bank* (1866), L. R. 3 Eq. 203.

(l) *Credit Co. v. Webster* (1885), 53 L. T. 419.

(m) *Whitworth's Case* (1881), 19 Ch. D. 118. It may be issued by a registrar (*Re Nougong Tea Co.* (1867), 16 L. T. 47).

(n) *Re Sir John Moore Gold Mining Co.* (1877), 37 L. T. 242; *Re Imperial Continental Water Corporation* (1886), 33 Ch. D. 314, C. A.

(o) *Whitworth's Case*, *supra*; *Re Gold Co.* (1879), 12 Ch. D. 77, 83, C. A.

(p) *Re Gold Co.*, *supra*, at pp. 82, 83.

(q) See the cases cited in note (n), *supra*; and compare *Whitworth's Case*, *supra*, at p. 119.

(r) *Re Land Securities Co.*, [1894] W. N. 91. As to a mere creditor of the company, see *Re Accidental and Marine Insurance Corporation* (1867), L. R. 5 Eq. 22.

(s) *Re Gold Co.*, *supra*; *Re Hargreaves (Joseph), Ltd.*, [1900] 1 Ch. 347, C. A.; compare *Heiron's Case* (1860), 15 Ch. D. 139, C. A.

transferees of shares (*t*); of a contributory's relatives (*u*) or his bankers (*w*), or his debtor (*x*), or of shareholders in another company (*y*); but not of a mere creditor (*z*). An order will not be made when the object is not to assist the winding-up, but to obtain information to assist the applicant in other proceedings (*a*).

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Winding up
by the
Court.

A person on whom the summons is served may apparently appeal against the order directing the summons to issue (*b*).

If a witness, after being tendered a reasonable sum for his expenses, refuses to come before the court at the time appointed, not having any lawful impediment (made known to the court at the time of its sitting, and allowed by it), the court may cause him to be apprehended and brought before it for examination (*c*).

Enforcing
order.

808. The examination of witnesses may be held in court or in chambers, as the court directs (*d*). A witness is examined on oath concerning the matters above mentioned, either by word of mouth or on written interrogatories. The court may reduce his answers to writing and require him to sign them (*e*).

Examination
of witnesses.

If the witness refuses to attend he may be ordered to pay the costs of compelling him to do so (*f*), and if on attending he refuses to answer proper questions, an order is made compelling him to attend

(*t*) *Re Imperial Mercantile Credit Association, Ex parte Clement* (1868), 18 L. T. 596; *Re Mexican and South American Co., Re Aston* (1859), 27 Beav. 474; *Re Mercantile Credit Association* (1868), 37 L. J. (CH.) 295; *Re Contract Corporation, Ex parte Carter* (1870), 40 L. J. (CH.) 15.

(*u*) *Fricker's Case* (1871), L. R. 13 Eq. 178; *Swan's Case* (1870), L. R. 10 Eq. 675.

(*w*) *Druitt's Case* (1872), L. R. 14 Eq. 6; *Re Smith, Knight & Co.* (1869), 4 Ch. App. 421; *Re Financial Insurance Co.*, (1867), 36 L. J. (CH.) 687.

(*x*) *Re Land Credit Co. of Ireland, Trower and Lawson's Case* (1872), L. R. 14 Eq. 8.

(*y*) *Re Contract Corporation* (1871), 6 Ch. App. 145.

(*z*) *Re Accidental and Marine Insurance Corporation* (1867), L. R. 5 Eq. 22; compare *Re English Joint Stock Bank* (1866), L. R. 3 Eq. 203, where the creditor had been agent. As to a surveyor of taxes, see *Re Hargreaves (Joseph), Ltd.*, [1900] 1 Ch. 347, C. A.

(*a*) *Re Imperial Continental Water Corporation* (1886), 33 Ch. D. 314, C. A.; *Re British Building Stone Co.*, [1908] 2 Ch. 450; compare *Archer's Case* (1902), 85 L. T. 698.

(*b*) *Re North Australian Territory Co.* (1890), 45 Ch. D. 87, C. A., dissenting from dicta in *Re Gold Co.* (1879), 12 Ch. D. 77, C. A., and *Whitworth's Case* (1881), 19 Ch. D. 118, C. A. See also *Heiron's Case* (1880), 15 Ch. D. 139, C. A.; *Re London and Lancashire Paper Mills Co.* (1888), 57 L. J. (CH.) 766; *Re Imperial Continental Water Corporation* (1886), 33 Ch. D. 314, C. A.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 115].

(*d*) Companies (Winding-up) Rules, r. 5 (2). Prior to the similar rule made in 1903 the examinations were always held in private, but in *Re New Zealand Loan and Mercantile Agency Co.* (1894), 10 T. L. R. 379, C. A., the examination was, by consent, ordered to be taken in court, and in two other cases a similar course was followed. If the examination is in chambers the public have no right to be present (*Re Western of Canada Oil, Lands and Works Co.* (1877), 6 Ch. D. 109; and see *Re Electric Telegraph Co. of Ireland, Ex parte Bunn* (1857), 3 Jur. (N. S.) 1013; *Re Nowgong Tea Co.* (1867), 16 L. T. 47).

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 117].

(*f*) *Re Land Credit Co. of Ireland, Trower and Lawson's Case, supra*; *Re Lisbon Steam Tramways Co.* (1876), 2 Ch. D. 375, 583.

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Court.

again at his own expense (*g*). The witness may refuse to answer matters in which he may incriminate himself, and matters involving professional confidence (*h*). If the question involves disclosure of matters with which the litigant parties have nothing to do, he may appeal to the judge to release him from answering, but the decision of the judge ought to be final (*i*). He must answer questions as to matters of hearsay (*j*), and cannot refuse to be examined because an action by the company is pending against him (*k*). He may, however, object to answer questions which are not put for the purposes of the winding up, but to aid the company or the applicant in an action against the witness or someone else (*l*), and cannot be examined touching the formation of the company (*m*).

Production
of books.

Production of books in the custody of the company's solicitor may be ordered, although his lien may be thereby prejudiced (*n*). The secretary of a company has no lien on its books for money due to him (*o*).

Attendance
and notes of
counsel.

809. A witness is entitled to have counsel and solicitor, but no other person (*p*), present on his behalf during his examination, and to be re-examined in order to explain his examination-in-chief (*q*). By the registrar's leave contributories or creditors may attend and take part in the examination, subject to their entering an appearance (*r*), but they cannot attend as of right (*s*).

Notes taken by counsel or other persons allowed to attend (not being the actual depositions) should only be taken or used for the purpose of the examination or re-examination, and should then be destroyed (*t*). Where a witness is attended by a solicitor who also

(*g*) *Re Land Credit Co. of Ireland, Trower and Lawson's Case* (1872), L. R. 14 Eq. 8; *Swan's Case* (1870), L. R. 10 Eq. 675; *Re Lisbon Steam Tramways Co.* (1876), 2 Ch. D. 575. His refusal to answer may be reported to and dealt with by the judge as in the case of a public examination (Companies (Winding-up) Rules, r. 72); see p. 432, *ante*.

(*h*) See, generally, title EVIDENCE.

(*i*) See *Whitworth's Case* (1881), 19 Ch. D. 118, C. A.

(*j*) *Re Ottoman Co.* (1867), 15 W. R. 1069.

(*k*) *Re Contract Corporation, Ex parte Bateman* (1866), 15 W. R. 245; *Re Metropolitan (Brush) Electric Light and Power Co., Ex parte Leaver* (1884), 51 L. T. 817; *Massey v. Allen* (1878), 9 Ch. D. 164.

(*l*) *Heiron's Case* (1880), 15 Ch. D. 139, C. A.; *Re Imperial Continental Water Corporation* (1886), 33 Ch. D. 314, C. A.; *Re North Australian Territory Co.* (1890), 45 Ch. D. 87, C. A.; *Re London Gas Meter Co., Ex parte Webber* (1871), 41 L. J. (CH.) 145; see *Re Lisbon Steam Tramways Co., supra*; *Re London and Northern Bank, Archer's Case* (1902), 50 W. R. 262.

(*m*) *Re London and Lancashire Paper Mills Co., Scott's Case* (1888), 59 L. T. 362.

(*n*) *Re South Essex Estuary and Reclamation Co., Ex parte Paine and Layton* (1869), 4 Ch. App. 215; *Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, C. A.

(*o*) *Barnton Hotel Co. v. Cook* (1899), 1 F. (Ct. of Sess.) 1190.

(*p*) *Re Western of Canada Oil, Lands, and Works Co.* (1877), 6 Ch. D. 109.

(*q*) *Re Breech-loading Armoury Co., Re Merchants' Co.* (1867), L. R. 4 Eq. 453; *Re Cambrian Mining Co.* (1881), 20 Ch. D. 376.

(*r*) *Re Greys Brewery Co.* (1883), 25 Ch. D. 400.

(*s*) *Re Norwich Equitable Fire Insurance Co.* (1884), 27 Ch. D. 515, C. A.

(*t*) *Re Heseltine (W.) & Son, Ltd., [1891] W. N. 25*; and see *Re Breechloading*

represents as third party in litigation with the company, the registrar may exact from the solicitor, as a condition of being present, an undertaking not to disclose any information without the leave of the court (a).

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The official receiver may attend in person, or by an assistant official receiver, any examination of a witness, on whosoever application the same has been ordered, and may take notes of the examination for his own use, and put such questions to the witness as the court may allow (b).

Official
receiver's
right to
attend.

810. The court or officer of the court before whom any examination is directed to be held may in any case and at any stage of the proceedings appoint someone to take down the evidence of the witness, in shorthand or otherwise, as in the case of a public examination (c). The notes of the depositions of a person examined privately as above mentioned, or under any order of the court before the court, or before any officer of the court, or person appointed to take such an examination, are not to be filed, or to be open to the inspection of any creditor, contributory, or other person, except the official receiver or liquidator, unless and until the court so directs. The court may from time to time give such general or special directions as it thinks expedient as to the custody and inspection of such notes and the furnishing of copies of or extracts therefrom (d).

Shorthand
notes of
evidence.

The depositions of the witness cannot be used as evidence (e) except against himself as admissions by him (f).

811. Where the witness is examined with a view to proceedings being taken against him, and the proceedings are taken and fail, the court may order the person who obtained leave to examine him to pay his costs of employing solicitor and counsel (g).

Costs of
abortive
private
examination

Armoury Co., Re Merchants' Co., supra; Re Cambrian Mining Co. (1881), 20 Ch. D. 376; Re Greys Brewery Co. (1883), 25 Ch. D. 400; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 141, 142; Re Walker, Ex parte Childe (1909), 100 L. T. 860. It is a contempt of court to publish the proceedings prematurely (*Re American Exchange in Europe, American Exchange in Europe v. Gillig (1889), 58 L. J. (CH.) 706.* And see *Re Sir John Moore Gold Mining Co. (1877), 37 L. T. 242.*

(a) *Haddock's Case, Hoyle's Case*, [1902] 2 Ch. 73, C. A.

(b) Companies (Winding-up) Rules, r. 73 (1). Clerks in the employ of the liquidator or his solicitor may be present (*Re Heseltine (W.) & Son, Ltd.*, [1891] W. N. 25).

(c) Companies (Winding-up) Rules, r. 71; and see p. 433, *ante*.

(d) *Ibid.*, r. 73 (2). Leave has been given to one of several defendants in an action by a company against them for misfeasance, after defence put in and before answering interrogatories, to inspect and take an office copy of his deposition (*Re Merchants' Fire Office*, [1899] 1 Ch. 432). As to the origin of the rule, see *Re Standard Gold Mining Co.*, [1895] 2 Ch. 545; *North Australian Territory Co. v. Goldsborough, Mort & Co.*, [1893] 2 Ch. 381, C. A.

(e) *Re Great Western Forest of Dean Coal Consumers' Co., Crawshaw's and Carter's Case (1885), 54 L. J. (CH.) 506; North Australian Territory Co. v. Goldsborough, Mort & Co., supra*, at p. 386; *Re Norwich Equitable Fire Insurance Co. (1884), 27 Ch. D. 515, 521, C. A.*

(f) *Pugh and Sharman's Case (1872), L. R. 13 Eq. 566.*

(g) *Re Appleton, French and Scrafton, Ltd.*, [1905] 1 Ch. 749.

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by the
Court.

Liability for
misfeasance.

(iii.) *Misfeasance Proceedings.*

812. Where in the course of winding up a company (*h*) it appears that any person who has taken part in the formation or promotion of the company (*i*), or any past or present director, manager, or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator (*j*), or of any creditor or contributory (*k*), examine into his conduct, and compel him to repay or restore the money or property with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the court thinks just (*l*).

Who are
the

813. The following are officers of the company, namely, its secretary (*m*); its auditors (*n*), except a person casually employed by the directors to prepare a balance-sheet (*o*); a solicitor when remunerated by fixed salary (*p*), but not when employed in the

(*h*) The section applies whether the winding up is by the court or voluntary (whether under supervision or not) (*Rance's Case* (1870), 6 Ch. App. 104).

(*i*) As to promoters, see p. 47, *ante*. The court may make an order under the section upon any person who may have helped to promote or form the company, although not an officer of the company when formed (*Re Sale Hotel and Botanical Gardens Co.*, [1898] W. N. 40, C. A.).

(*j*) The liquidator has more extensive rights than the company had as a going concern (*Waterhouse v. Jamieson* (1870), L. R. 2 Sc. & Div. 29, 32; *Webb v. Whiffin* (1872), L. R. 5 H. L. 711; *Re National Funds Assurance Co.* (1878), 10 Ch. D. 118, 123, 125). Where there is any doubt the liquidator's application can be amended by adding a creditor's name (*id.*; *Re British Guardian Life Assurance Co.* (1880), 14 Ch. D. 335, 346).

(*k*) A fully-paid shareholder cannot take proceedings unless he shows that the breach of duty has resulted in loss to the company's assets, and that he has a direct pecuniary interest in the success of the applications (*Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652). As to proceedings by a bankrupt contributory, see *Re Cape Breton Co.* (1881), 19 Ch. D. 77, C. A. If a contributory becomes bankrupt his trustee in bankruptcy represents him for all the purposes of the winding up and is a contributory accordingly (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 127); see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 137, 138.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 215 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 10 (1)]. Interest is sometimes given at the rate of 4 per cent. (*Re Sharpe*, *Re Bennett*, *Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, C. A.; *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502; *Gluckstein v. Barnes*, [1900] A. C. 240) from the date of the summons, but in some cases of misfeasance it is given at the rate of 5 per cent. (*Archer's Case*, [1892] 1 Ch. 322, C. A.; *Re Oxford Benefit Building and Investment Society*, *supra*; *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, 651, C. A.). Income tax is not allowed to be deducted (*Re National Bank of Wales, Ltd.*, *supra*).

(*m*) *McKay's Case* (1875), 2 Ch. D. 1, C. A.; *Re Stapleford Colliery Co.*, *Barrow's Case* (No. 2) (1880), 42 L. T. 12; *Re Mutual Aid Permanent Benefit Building Society*, *Ex parte James* (1883), 49 L. T. 530.

(*n*) *Re London and General Bank*, [1895] 2 Ch. 166, C. A.; *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787; *Re Kingston Cotton Mill Co.*, [1896] 1 Ch. 6, C. A.

(*o*) *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617, C. A.

(*p*) *Re Liberator Permanent Benefit Building Society* (1894), 71 L. T. 406.

ordinary way (*g*); and persons whose duty it is to invest moneys of the company and hold the investments (*r*), but not trustees of a debenture trust deed (*s*), or bankers (*t*). *De facto* directors or managers are liable if loss has resulted to the company through their acts of misfeasance (*u*). The executors of a deceased officer are not officers, and are therefore not liable to misfeasance proceedings (*a*); but the survivors of several directors are liable (*b*).

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Court.

814. The statutory provision is to be liberally construed (*c*), and misfeasance proceedings may be taken under it in the winding-up of an unregistered company (*d*), or of an industrial and provident society (*e*). It does not, however, create any new liability or new right; it only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary jurisdiction of the court (*f*).

Misfeasance
proceedings
only a
summary
method.

815. Misfeasance includes a breach by an officer of his duty to the company, the direct consequence of which has been a misapplication or loss of its assets for which he could be made responsible in an action (*g*). A misfeasance summons, however, cannot be sustained even where nominal damages could be recovered in an action for the breach of duty alleged, unless the breach has resulted in loss to the company's funds and assets, and the applicant has a direct pecuniary interest in the success of the application (*h*). Nor can it be sustained in the case of non-feasance, even where it is a breach of trust, unless loss to the assets has resulted therefrom (*i*), although the court may order the respondents to a misfeasance summons, even where the liquidator establishes no money claim against them, to pay the costs (*k*). It is unnecessary to allege or prove fraud (*l*),

What
amounts to
misfeasance.

(*g*) *Re Great Wheal Polgooth Co.* (1883), 53 L. J. (CH.) 42; *Carter's Case* (1886), 31 Ch. D. 496; *Re Kingston Cotton Mill Co.* (No. 1), [1896] 1 Ch. 6, 14, O. A.

(*r*) *Re British Guardian Life Assurance Co.*, [1880] W. N. 63; compare *Cornell v. Hay* (1873), L. R. 8 C. P. 328.

(*s*) *Astley v. New Tivoli, Ltd.*, [1899] 1 Ch. 151, 154.

(*t*) *Re Imperial Land Co. of Marseilles, Re National Bank* (1870), L. R. 10 Eq. 298.

(*u*) *Coventry and Dixon's Case* (1880), 14 Ch. D. 660, 670, C. A.; *Gibson v. Barton* (1875), L. R. 10 Q. B. 329.

(*a*) *Re British Guardian Life Assurance Co.* (1880), 14 Ch. D. 335.

(*b*) *Ibid.*; *Felton's Executor's Case* (1865), L. R. 1 Eq. 219.

(*c*) *Stringer's Case* (1869), 4 Ch. App. 475.

(*d*) *Davies' Case* (1890), 45 Ch. D. 537.

(*e*) *Re Ferndale Industrial Co-operative Society*, [1894] 1 Q. B. 828.

(*f*) *Coventry and Dixon's Case*, *supra*.

(*g*) *Re Kingston Cotton Mill Co.* (No. 2), [1896] 2 Ch. 279, 283, C. A.; *Re Anglo-French Co-operative Society, Ex parte Pelly* (1882), 21 Ch. D. 492, C. A.; *Flitcroft's Case* (1882), 21 Ch. D. 519, C. A.; *Re London and General Bank* (No. 2), [1895] 2 Ch. 673, 691, C. A.

(*h*) *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652.

(*i*) *Bute's (Marquis) Case*, [1892] 2 Ch. 100; *Re Liverpool Household Stores Association* (1890), 62 L. T. 873; *Re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450; *Re Montrotier Asphalte Co., Perry's Case* (1876), 34 L. T. 716; *Re Wedgwood Coal and Iron Co.* (1882), 31 W. R. 181.

(*k*) *Re Ireland & Co.*, [1905] 1 I. R. 133, C. A.

(*l*) *Re Sale Hotel and Botanical Gardens, Ltd., Ex parte Hesketh* (1898), 78 L. T. 368, C. A. As to what is "money or property of the company," see *ibid.*

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and it is immaterial that the offence is one for which the offender may be criminally responsible (*m*).

A transaction cannot be impeached in misfeasance proceedings where the object is not to obtain an undue advantage against the company, but to obtain an undue advantage in the stock market as against persons likely to purchase shares of the company there (*n*).

Where the company has been dissolved, the remedy by misfeasance application no longer exists (*o*).

Promoters
and directors.

816. A misfeasance summons may be properly brought against promoters in respect of undisclosed profits received by them (*p*). Such a summons may be brought against directors where they have received money from promoters in pursuance of an agreement to indemnify them against loss on qualification shares (*q*); or where they have received money from vendors to the company to pay for qualification shares (*r*). They may be made liable in respect of qualification shares received from an underwriter of an increase of capital who nominates the recipient as a director (*s*), and in respect of debentures or qualification or other shares received from or paid for by a promoter (*t*). They are also liable for presents, or remuneration improperly received out of the assets of the company (*a*), or for shares purchased from promoters at less than par

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 215 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 10 (2)].

(*n*) *Re Ambrose Lake Tin and Copper Mining Co., Ex parte Taylor, Ex parte Moss* (1880), 14 Ch. D. 390.

(*o*) *Pulsford v. Devenish*, [1903] 2 Ch. 625, 633.

(*p*) *Gluckstein v. Barnes*, [1900] A. C. 240; *Re Sale Hotel and Botanical Gardens Co., Ltd., Ex parte Hesketh* (1898), 78 L. T. 368, C. A.; *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1902] 2 Ch. 809, C. A.; *Lydney and Wigpool Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85, C. A.; see also p. 52, *ante*; and *Re Innes & Co., Ltd.*, [1903] 2 Ch. 254, C. A.; *Re Sunlight Incandescent Gas Lamp Co.* (1900), 16 T. L. R. 535; *Re Lady Forrest (Murchison) Gold Mine, Ltd.*, [1901] 1 Ch. 582.

(*q*) *Archer's Case*, [1892] 1 Ch. 322, C. A.

(*r*) *Hay's Case* (1875), 10 Ch. App. 593; *Carling, Hespeler and Walsh's Cases* (1875), 1 Ch. D. 115, C. A.; *Brown's Case* (1873), 9 Ch. App. 102; *Re Postage Stamp Automatic Delivery Co.*, [1892] 3 Ch. 566, C. A.

(*s*) *De Ruignie's Case* (1877), 5 Ch. D. 306, C. A.

(*t*) *Re Anglo-French Co-operative Society, Ex parte Pelly* (1882), 21 Ch. D. 492, C. A.; *Pearson's Case* (1877), 5 Ch. D. 336, C. A.; *Re Carriage Co-operative Supply Association* (1884), 27 Ch. D. 322, which case deals also with the joint and several liability of directors when all take with knowledge. As to the measure of damages in case of shares improperly received, see *Carling, Hespeler and Walsh's Cases*, *supra*; *McKay's Case* (1875), 2 Ch. D. 1, C. A.; *De Ruignie's Case*, *supra*; *Pearson's Case*, *supra*; *Weston's Case* (1879), 10 Ch. D. 579, C. A.; *Mitcalfe's Case* (1879), 13 Ch. D. 169, C. A.; *Nant-y-Glo and Blaina Ironworks Co. v. Grave* (1878), 12 Ch. D. 738; *Eden v. Ridsdals Railway Lamp and Lighting Co.* (1889), 23 Q. B. D. 368, C. A.; *Re Caerphilly Colliery Co., Ormerod's Case* (1877), 37 L. T. 244; *Shaw v. Holland*, [1900] 2 Ch. 305, C. A., where only the market value was given; and see p. 49, *ante*.

(*a*) *Re Newman (George) & Co.*, [1895] 1 Ch. 674, C. A.; *Re Eskern Slate and Slab Quarries Co., Clarke and Helden's Cases* (1877), 37 L. T. 222; *Re London Gigantic Wheel Co.* (1908), 24 T. L. R. 618, C. A.; *Merchants' Fire Office v. Armstrong* (1901), 17 T. L. R. 709, C. A.; and see p. 226, *ante*. As to travelling expenses, see *Young v. Naval, Military and Civil Service Co-operative Society of*

value (b). Directors who do not disclose the fact that they are vendors of property to the company are guilty of a breach of duty, and the company has a remedy against them (c).

A misfeasance summons is the proper mode of procedure where shares or debentures have been improperly issued to directors at a discount or undervalue (d); or where directors have improperly paid dividends out of capital (e); or where they have knowingly allotted snares to infants (f); or where they have improperly received directors' fees (g); or where they have generally acted *ultra vires* (h), or improperly invested or paid away the company's

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When liable.

South Africa, [1905], 1 K. B. 687; *Marmor, Ltd. v. Alexander*, [1908] S. C. 78. As to fees paid under a mistake of fact, see *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276.

(b) *Weston's Case* (1879), 10 Ch. D. 579, C. A.

(c) *Re Lady Forrest (Murchison) Gold Mine, Ltd.*, [1901] 1 Ch. 582, where it was said that the remedy was by rescission and not by misfeasance proceedings; and see *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652; *Re Cape Breton Co.* (1885), 29 Ch. D. 795, C. A.; *Ladywell Mining Co. v. Brookes* (1887), 35 Ch. D. 400, C. A.; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, 1235; *Burland v. Earle*, [1902] A. C. 83, P. C.; and p. 230, *ante*. But it has since been held that the director can, on a misfeasance summons, be made to pay damages (*Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1902] 2 Ch. 809, C. A.).

(d) *Campbell's Case* (1876), 4 Ch. D. 470; *Re London and Colonial Finance Corporation* (1897), 13 T. L. R. 576, C. A.; *Hirsche v. Sims*, [1894] A. C. 654, P. C.

(e) *Dovey v. Cory*, [1901] A. C. 471; *Re National Funds Assurance Co.* (1878), 10 Ch. D. 118; *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 2 Ch. 279, 331, C. A.; *Stringer's Case* (1869), 4 Ch. App. 475; *Rance's Case* (1870), 6 Ch. App. 104. The liability is joint and several (*Re National Funds Assurance Co.*, *supra*; *Flitcroft's Case* (1882), 21 Ch. D. 519, C. A.; *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502; *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787). It is said that the liquidator may recover against the directors although all the creditors have been paid off (*Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, C. A., affirmed *sub nom. Dovey v. Cory*, *supra*). But when in such a case there is enough in hand to pay the costs of winding up and the liquidator, the court may refuse, even on the liquidator's application, to order directors to pay what has been paid as dividend out of capital where the result would be that the money would go to those who had received the illegal dividend (*Re Tilling (G. J.) & Sons, Ltd.* (1906), *Times*, May 16). As to paying dividends out of capital, see further, p. 272, *ante*.

(f) *Re Crenver and Wheal Abraham United Mining Co., Ex parte Wilson* (1872), 8 Ch. App. 45.

(g) *Re Public Supply Association*, [1880] W. N. 106.

(h) Where the misfeasance is an act which is not *ultra vires* or dishonest, directors are not liable unless it is shown that they did not really exercise their judgment (*Re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577, 585). If they act within their powers with such care as is reasonably to be expected from them having regard to their knowledge and experience, and honestly for the benefit of the company, they are not liable (*Re National Bank of Wales, Ltd.*, *supra*, at p. 671; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, 435, 466, C. A.; *Re Denham & Co.* (1883), 25 Ch. D. 752). Where, however, the act is *ultra vires*, the directors, although they have acted quite honestly, are liable to replace the moneys which have been misapplied (*Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, C. A.); unless they act after making proper inquiry and exercising due care and on reasonable grounds, in which case they are not liable for paying dividends out of capital if it subsequently appears that in fact there were not sufficient profits (*Re Kingston Cotton Mill Co. (No. 2)*, *supra*); see p. 272, *ante*.

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Court.

Auditors.

Liquidators.

Defences to
misfeasance
proceedings.

moneys(i); or where they have improperly received commissions(k), or where an act benefiting directors is a fraudulent preference(l).

817. A misfeasance summons is a proper remedy where an auditor by his neglect of duty has enabled property of the company to be improperly paid away, as, for instance, in dividends(m).

818. A liquidator can apparently only be brought to account on a misfeasance summons when he has misapplied or become liable or accountable for moneys of the company, or been guilty of misfeasance or breach of trust in relation to the company. He is not liable in such proceedings for a breach of trust or misfeasance in relation to a particular shareholder(n), except where the assets have been distributed without providing for the claim of a particular creditor, at any rate where that creditor is the Crown in respect of income tax(o).

819. Claims against the company cannot be set off against the amount ordered to be paid(p), nor can the liquidator set off the amount against an assignee of a dividend owing to the respondent as a creditor of the company(q).

In the case of retention of secret profit the respondent's discharge in bankruptcy will not release him(a).

Except where the claim is founded upon any fraud or fraudulent breach of trust, to which the respondent was party or privy, or is to recover trust property or the proceeds thereof still retained by the respondent, or previously received by him and converted to his use(b), the Statute of Limitations can be

(i) *Re Lands Allotment Co.*, [1894] 1 Ch. 616, C. A.; *Re Imperial Land Co. of Marseilles*, *Re National Bank* (1870), L. R. 10 Eq. 298; *Re Neath Harbour Smelting and Rolling Works*, [1887] W. N. 87, 121.

(k) *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502.

(l) *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95, C. A.

(m) *Re London and General Bank* (No. 2), [1895] 2 Ch. 673, C. A.; *Re Kingston Cotton Mill Co.* (No. 2), [1896] 2 Ch. 279, C. A.; *Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787.

(n) *Re Hill's Waterfall Estate and Gold Mining Co.*, [1896] 1 Ch. 947, 953; compare *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652, 662.

(o) *Re New Zealand Joint Stock and General Corporation* (1907), 23 T. L. R. 238; *Re Watchmakers' Alliance and Ernest Goode's Stores, Ltd.* (1905), 5 Tax Cas. 117. Where assets have been distributed without regard to a creditor's claim, he may, even after dissolution of the company, obtain in an action damages against the liquidator for his breach of duty (*Pulsford v. Devenish*, [1903] 2 Ch. 625); and see *Silkstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167.

(p) *Re Anglo-French Co-operative Society, Ex parte, Pelly* (1882), 21 Ch. D. 492, C. A.; *Flitcroft's Case* (1882), 21 Ch. D. 519, C. A.; *Re Carriage Co-operative Supply Association* (1884), 27 Ch. D. 322.

(q) *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch. D. 587, C. A.; *Re Goy & Co., Ltd., Farmer v. Goy & Co., Ltd.*, [1900] 2 Ch. 149; *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1904] 2 Ch. 45; compare *Re Palmer's Decoration and Furnishing Co.*, [1904] 2 Ch. 743.

(a) *Emma Silver Mining Co. v. Grant* (1880), 17 Ch. D. 122. And see title **BANKRUPTCY AND INSOLVENCY**, Vol. II., p. 260.

(b) *Re Lands Allotment Co.*, [1894] 1 Ch. 616, C. A.; *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629, 663, C. A.; *Trustee Act*, 1888 (51 & 52 Vict.

pleaded, as, for instance, where an auditor has merely neglected his duties (c).

820. If it appears to the court during the proceedings that a director, or person occupying the position of director, of a company who is charged with negligence or breach of trust is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, the court may relieve him, either wholly or partly, from his liability on such terms as it may think proper (d).

821. Claims in respect of misfeasance being choses in action (e), which can be assigned by the liquidator in the name of the company, pass under an assignment of all its assets, property, and effects (f). They are comprised under a charge by debentures on the undertaking and property of the company, present and future, although subject to the liquidator's costs of any misfeasance proceedings actually taken (g). An order may be made in a debentureholder's action directing the receiver in the action to sell the misfeasance claims by auction (h).

822. In the High Court the application is by summons returnable in the first instance in chambers. The nature of the declaration or order for which application is made, and the grounds of the application, must be stated in the summons (i). Unless otherwise

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Court.**

Relief to
honest
directors.

Misfeasance
claims as
assets.

Procedure.

c. 59), s. 8; *Thorne v. Heard*, [1894] 1 Ch. 599, C. A.; *Re Gurney, Mason v. Mercer*, [1893] 1 Ch. 590. A secret profit received by a promoter may be "fraudulent," even in the absence of moral fraud (*Re Sale Hotel and Botanical Gardens Co., Ex parte Hesketh* (1897), 77 L. T. 681, reversed without affecting this point (1898), 78 L. T. 368, C. A.).

(c) *Leeds Estates Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787. As to the date from which the statute runs, see *ibid.*; *Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319, C. A.; *Re Cape Breton Co.* (1885), 29 Ch. D. 795, 810, C. A.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 279 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 32; Companies Act, 1900 (63 & 64 Vict. c. 48), s. 30]. This provision is taken from the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3, as to which see *Singlehurst v. Tapscott Steamship Co., Ltd.*, [1899] W. N. 133, C. A.; *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536; *Re Stuart, Smith v. Stuart*, [1897] 2 Ch. 583; *Re De Clifford's (Lord) Estate, De Clifford (Lord) v. Quilter, De Clifford (Lord) v. Lansdowne (Marquis)*, [1900] 2 Ch. 707; *Davis v. Hutchings*, [1907] 1 Ch. 356; *Re Grindey, Clews v. Grindey*, [1898] 2 Ch. 593, C. A.; *Hardbottle v. Glew* (1900), 45 Sol. Jo. 151. Where, as is usually the case, a director is paid for his services, the court is not so likely to give him relief as it would be to give it to a person acting gratuitously (*National Trustees Co. of Australasia v. General Finance Co. of Australasia*, [1905] A. C. 373, 381, P. C.).

(e) See title CHOSSES IN ACTION, Vol. IV., p. 364.

(f) *Re Park Gate Waggon Works Co.* (1881), 17 Ch. D. 234, C. A.; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151. As to the effect of a reconstruction scheme, see *Re Olympia, Ltd.* (1900), 16 T. L. R. 564.

(g) *Re Anglo-Austrian Printing and Publishing Union, Brabourne v. Same*, [1895] 2 Ch. 891.

(h) *Wood v. Woodhouse and Rawson United*, [1896] W. N. 4.

(i) The summons or notice of motion, or that and the accompanying affidavits (if any), should state the grounds on which it is suggested that the matters complained of constitute a wrongful act or misfeasance for which the respondents are responsible, fully and fairly stating the case which they have to meet; the proceedings are civil and not criminal, and while the respondents

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by the
Court.

Directions.

ordered by the court, the summons must be served in the same manner as an originating summons (*k*), on every person against whom an order is sought, not less than eight days before the day named in the summons for hearing the application (*l*). The court or a judge may direct any summons to be served on any party or person in a foreign country (*m*).

On the return of a summons in the High Court the court may give such directions as it thinks fit for the hearing of the summons before the judge in court, the taking of evidence wholly or in part by affidavit or orally, and the cross-examination, either before the judge on the hearing in court or in chambers, of any deponents to affidavits in support of or in opposition to the application (*n*).

In any court other than the High Court the application is by motion to the court (*o*). Notice of an intended motion must be served on every person against whom an order is sought, not less than eight days before the day named in the notice for hearing the motion (*p*).

Evidence.

823. Where the application is made by the official receiver or liquidator, he may make a report to the court stating any facts and information on which he proceeds, which are verified by affidavit or derived from sworn evidence in the proceedings. Where the application is made by any other person it must be supported by affidavit to be filed by him (*q*). Where the application is by motion (in a court other than the High Court) a copy of every report and affidavit intended to be used in support of the motion must be served on every person to whom notice of motion is given not less than four days before the hearing of the motion (*r*).

Use of notes
at public
examination.

824. Where in a public examination it appears that the persons examined, or some of them, have misapplied or retained, or become liable or accountable for, moneys or property of the company, or

are not made responsible for conduct which is not made the subject of complaint, the summons or notice of motion is not to be so closely adhered to and narrowly construed as to compel the court to dismiss it because it somewhat overstates the case and cannot be proved up to the hilt; and it can always be amended, and as regards amendment there is no hard-and-fast technical rule (*Re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577; *Re London and Colonial Finance Corporation* (1897), 13 T. L. R. 576, C. A.). The summons ought not to include a claim that the respondent is liable as a contributory (*Re Wragg (E. J.), Ltd.*, [1896] W. N. 166). As to costs at the hearing, see *Re Anglo-Austrian Printing and Publishing Union*, [1894] 2 Ch. 622.

(*k*) See title PRACTICE AND PROCEDURE.

(*l*) Companies (Winding-up) Rules, r. 68 (1).

(*m*) R. S. C., Ord. 11, r. 8 a. The procedure prescribed by Ord. 11, r. 8, applies to the service of a summons (*ibid.*). The court had formerly no jurisdiction to order the summons to be served out of the jurisdiction (*Re Anglo-African Steamship Co.* (1886), 32 Ch. D. 348; compare, however, *Re British Imperial Corporation* (1877), 5 Ch. D. 749; *Re Household Insurance Co.*, [1878] W. N. 26).

(*n*) Companies (Winding-up) Rules, r. 68 (2).

(*o*) *Ibid.*, r. 68 (1).

(*p*) *Ibid.*, r. 69. Service by a respondent of a notice claiming contribution from other persons cannot be allowed (*Re Land Securities Co.* (1896), 2 Mans. 127).

(*q*) Companies (Winding-up) Rules, r. 68 (1).

(*r*) *Ibid.*, r. 69.

have been guilty of misfeasance or breach of trust in relation to the company, then, in any misfeasance proceedings subsequently instituted, the verified notes of the examination of each person who was publicly examined are admissible in evidence (s) against any of the persons against whom the application is made, provided that he was or had the opportunity of being present at and taking part in the examination. Before any such notes are used the person intending to use them must, not less than fifteen days before the day appointed for hearing the application, give notice of his intention to each person against whom it is intended to use the notes, or any of them, specifying the notes or parts of the notes which it is intended to read against him, and furnish him with copies of such notes, or parts of notes (except notes of the person's own depositions). Every person against whom the application is made is at liberty to cross-examine or re-examine (as the case may be) any person, the notes of whose examination are read, in all respects as if such person had made an affidavit on the misfeasance application (t).

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by the
Court.

825. If the official receiver or liquidator institutes proceedings for misfeasance, the court has jurisdiction to order him personally to pay the costs (u). A liquidator will not be ordered to give security for the costs of a misfeasance summons on the ground of poverty (a).

Costs against
official
receiver or
liquidator.

826. An order for payment of money made against any respondent to a misfeasance summons is deemed to be a final judgment within the meaning of the Bankruptcy Act, 1883 (b).

Effect of
order.

(iv.) *Relation back of Liquidator's Title.*

827. Although the property of the company does not vest, on winding up, in its liquidator, the effect of a compulsory winding-up order is to give him certain retrospective rights (c). Any proceeding for rescinding contracts to take shares, commenced between the

Retrospective
effect of
winding-up
order.

(s) Subject to any order or direction of the court as to the manner and extent in and to which the notes are to be used, and subject to all just exceptions to the admissibility in evidence against any particular person or persons of any of the statements contained in the notes of the examinations.

(t) Companies (Winding-up) Rules, r. 69; *Re London and General Bank* (1894), 63 L. J. (CH.) 853. This rule is not *ultra vires*, but the notes are only evidence against the witness himself.

(u) *Re Powell (W.) & Sons*, [1896] 1 Ch. 681. But an appeal lies from an order against him to pay costs (*Re Raynes Park Golf Club, Ex parte Official Receiver*, [1899] 1 Q. B. 961). An official receiver ought not, in cases where he is indemnified against costs, to allow an application to be made unless he is satisfied of the propriety of the application (*Re Anglo-Sardinian Antimony Co.*, [1894] W. N. 156; and Practice Note, [1894] W. N. 166). As to applications by an official receiver to the court for leave to institute proceedings for misfeasance, see *Re New Zealand Loan and Mercantile Agency Co.*, [1894] W. N. 200.

(a) *Re Strand Wood Co., Ltd.*, [1904] 2 Ch. 1, O. A.; nor, apparently, in any other case (*Re Powell (W.) & Sons, supra*).

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 215 (3) [Companies (Winding-up) Act, 1893 (56 & 57 Vict. c. 58)]; see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1) (g); and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 25—32.

(c) As to when the winding up commences, see p. 419, *ante*. As to the effect of a winding-up order on executions, see p. 534, *ante*; and on the creation of a floating charge, see p. 388, *ante*.

SECT. 16. **Winding up by the Court.** dates of the presentation of the petition and the winding-up order, is defeated (*d*). Every disposition of the company's property (including choses in action), made after the presentation of the petition, is void unless the court otherwise orders (*e*). The court, in the exercise of its discretion, will not permit transactions *bonâ fide* entered into in the ordinary course of trade, and completed before the date of the winding-up order, to be annulled (*f*). The mere payment of debts will not, however, be sanctioned. A creditor who receives payment between the petition and the winding-up order is compelled to refund (*g*); and directors who make any improper payments out of the company's assets after the winding up commenced are themselves liable to the company for the moneys paid away (*h*). Where a creditor's petition for a winding up is adjourned on the terms of the company paying part of the debt and promising to pay the remainder, and, on failure to pay the remainder, the creditor brings on his petition and obtains a winding-up order, he is bound to repay the money already paid to him (*i*).

A debtor to the company may pay his debt after presentation of a petition and before the winding-up order, and the company can give a valid discharge for it (*k*).

Transfer of shares.

828. Every transfer of shares of a company, made after the presentation of the petition, whether after or before the winding-up order (*l*), is void unless the court otherwise orders (*m*). As between the parties to it, the validity of the transfer is not affected (*n*), although the court will not alter the register to give effect to it unless for strong reasons and for the benefit of the company and those interested in its assets (*o*).

Where a contract for transfer is made after the winding up commenced, both transferor and transferee being ignorant of the presentation of the petition, the court will not sanction the transfer and place the transferee on the register, because specific performance of the agreement would not be ordered (*p*).

(*d*) *Kent v. Freehold Land and Brick-making Co.* (1868), 3 Ch. App. 493.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205 (2).

(*f*) *Re Wiltshire Iron Co., Ex parte Pearson* (1868), 3 Ch. App. 443, 447. A charge on calls *bonâ fide* given by the directors in the interests of the company after the winding up commenced has been sanctioned and confirmed (*Gibbs and West's Case* (1870), L. R. 10 Eq. 312).

(*g*) *Re Civil Service and General Store, Ltd.* (1887), 58 L. T. 220; compare *Re Oriental Bank Corporation, Ex parte Guillemin* (1884), 28 Ch. D. 634. As to fraudulent preference, see p. 544, *post*.

(*h*) *Re Neath Harbour Smelting and Rolling Works* (1887), 56 L. T. 727.

(*i*) *Re Liverpool Civil Service Association, Ex parte Greenwood* (1874), 9 Ch. App. 511.

(*k*) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, 440.

(*l*) See *Re Onward Building Society*, [1891] 2 Q. B. 463, 474, C. A.; *Walker's Case* (1866), L. R. 2 Eq. 554.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205 (2).

(*n*) *Re Onward Building Society, supra*; *Chapman v. Shepherd, Whitehead v. Izod* (1867), L. R. 2 C. P. 228; *Rudge v. Bowman* (1868), L. R. 3 Q. B. 689.

(*o*) *Re Onward Building Society, supra*, at p. 483; *Re Discoverers' Finance Corporation, Lindlar's Case*, [1910] 1 Ch. 312.

(*p*) *Emmerson's Case* (1866), 1 Ch. App. 433, 435. As to cases where the

A transfer of shares made after the presentation of the petition is not avoided unless or until a winding-up order is made (q).

Any alteration in the status of members made after the presentation of the petition other than that occasioned by a transfer sanctioned by the court (r) is also void, unless the court otherwise orders (a). Thus, an arrangement, after the petition is presented, by which the shareholders on whose shares a sum of £3 per share is unpaid are to pay £3 per share, and the payment is to be treated either as a loan to the company or as payment of the amount unpaid on the shares, according as the company is able to continue its business or is wound up, is void (b).

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by the
Court.

Alteration of
members
status.

(v.) *Contributories.*

(a) *Who are Contributories.*

829. The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, including, in all proceedings for determining and also in all proceedings prior to the final determination of the persons who are to be deemed contributories, any person alleged to be a contributory (c). Every holder of fully paid up shares is a contributory (d), though he will not be placed on the list of contributories, except at his own desire, and he is not liable to make any contribution to the assets (e).

Definition.

A person who is merely a debtor to the company (f), or who is liable to indemnify a trustee on the register (g), is not a contributory.

transfer is made before the winding up commenced, but is not registered, see *Fyfe's Case* (1869), 4 Ch. App. 768; *Ward and Garfit's Case* (1867), L. R. 4 Eq. 189; and the cases cited at p. 497, *post*.

(q) *Re Tumacacori Mining Co.* (1874), L. R. 17 Eq. 534, 537.

(r) *Taylor, Phillips and Rickards' Case*, [1897] 1 Ch. 298, 306, C. A.

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205 (2).

(b) *Barge's Case* (1868), L. R. 5 Eq. 420.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 124 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 74]. As to who are contributories in the case of a company registered under Part VII. of the Act, see p. 41, *ante*; of an unregistered company, see p. 651, *post*; as to persons holding shares as trustees, see p. 492, *post*; as to whether a person whose shares have been forfeited for non-payment of calls can be placed on the list of contributories, see *Ladies' Dress Association v. Fulbrook*, [1900] 2 Q. B. 376, C. A.; *Needham's Case* (1867), L. R. 4 Eq. 135; *Marshall v. Glamorgan Iron and Coal Co.* (1868), L. R. 7 Eq. 129. As to members of guarantee companies, see *Baird's Case*, [1899] 2 Ch. 593. As to persons who have ceased to be members of unincorporated companies, see *Irvine and Fullarton Property Investment Building Society (Liquidator) v. Cuthbertson* (1905), 8 F. (Ct. of Sess.) 1. As to the liability in the case of a society within the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), see *Re United Service Shares Purchase Society*, [1909] W. N. 169.

(d) *Re National Savings Bank Association* (1866), 1 Ch. App. 547; *Re Anglesea Colliery Co.* (1866), *ibid.*, 555; compare *Re Driffeld Gas Light Co.*, [1898] 1 Ch. 451, 454. Where, by reason of default in complying with s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131) (now repealed by Companies Act, 1900 (63 & 64 Vict. c. 48), s. 33), shares registered in a member's name are regarded as unpaid, it is still necessary for the liquidator, in order to distribute surplus assets, to treat the shares as unpaid although no call can be made in respect of the shares (*Re Brutton and Burney, Ltd.*, *Re Burney's New Cross Brewery Co., Ltd.*, [1901] 1 Ch. 637, C. A.).

(e) *Leischild's Case* (1865), L. R. 1 Eq. 231; *Hastie's Case* (1868), L. R. 7 Eq. 3, 6.

(f) *Re European Society Arbitration Acts, Ex parte British Nation Life Assurance Association (Liquidators)* (1878), 8 Ch. D. 679, 708.

(g) *King's Case* (1871), 6 Ch. App. 196; *Williams' Case* (1875), 1 Ch. D.

SECT. 16.
Winding up
by the
Court.

Liability of
members to
contribute.

830. In the event of a company being wound up, every present and past member of it is, subject to the provisions referred to below, liable to contribute to its assets to an amount sufficient for (1) payment of its debts and liabilities; (2) payment of the costs, charges, and expenses of the winding up; and (3) the adjustment of the rights of the contributories among themselves (*h*). In the case of a company limited by shares his liability is limited to the extent of the amount unpaid on his shares, and in the case of a guarantee company only to the extent of his guarantee, and, if it has shares, the amount unpaid on them (*i*).

The expression "member" is not confined to the persons whose names were, when the winding up commenced, actually on the register as present or past members, but includes persons whose names ought to have been on the register at that date (*k*), and also persons to whom shares may have been validly transferred after the winding up commenced (*l*). It is immaterial whether the shares of a past member have been transferred or forfeited by him or his transferee within the year (*m*).

Liability of
past
members.

831. A past member is not liable to contribute (1) if he has ceased to be a member for one year or upwards before the commencement of the winding up; or (2) in respect of any debt or liability of the company contracted after he ceased to be a member; or (3) unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act of 1908 (*n*).

In most cases past members are not liable to contribute at all; for the present members are primarily liable to make all the contributions required, and it is only when they are unable to make such contributions that any past member is liable. In the case of a limited company, if the present members have contributed to the full extent of their limited liability, but their contributions are insufficient to discharge the company's liabilities, the past members are not liable to contribute, because the liability on the shares which they held has been discharged by the payments made by their present holders. To ascertain the

576; *Mitchell's Case* (1870), L. R. 9 Eq. 363; *Re National Bank of Wales, Ltd., Massey and Giffin's Case*, [1907] 1 Ch. 582. It is different when the *cestui que trust* has contracted with the company to take the shares (*Pugh and Sharman's Case* (1872), L. R. 13 Eq. 566; *Richardson's Case* (1875), L. R. 19 Eq. 588; *Re Wheal Surety Mining Co., Cox's Case* (1863), 4 De G. J. & Sm. 53, C. A.).

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38]. As to insurance companies under stat. (1844) 8 Vict. c. 110, repealed by Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205, compulsorily registering under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 209, see *Ramsay's Case* (1876), 3 Ch. D. 388, C. A.; and see p. 529, *post*.

(*i*) See pp. 492, 493, *post*.

(*k*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 163; and p. 494, *post*.

(*l*) *Taylor, Phillips and Rickards' Case*, [1897] 1 Ch. 298, C. A.

(*m*) *Greyke's Case* (1869), 5 Ch. App. 63; *Bridger's Case* and *Neill's Case* (1869), 4 Ch. App. 266; *Marshall v. Glamorgan Iron and Coal Co.* (1868), L. R. 7 Eq. 129.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38].

extent of the liability of a past member the amount of the contributions of the present members must first be ascertained and applied in payment of the company's debts, without regard to the date when the debts were contracted. Any debts then remaining unsatisfied must be classified in accordance with the dates at which they were severally contracted, in order to ascertain the liability of each past member. When the liability of past members has been so ascertained, their contributions form part of the general assets of the company, and must not be applied exclusively in payment of debts contracted before they retired, but must be applied in payment of all debts without regard to the dates at which these were contracted (o). If, before a past member has contributed to the assets, the debts in respect of which he is liable are in any way paid off or released, so that there remains no debt or liability contracted before he ceased to be a member, his liability to contribute is extinguished (p). A past member is not, in any circumstances, liable to contribute for the adjustment of the rights of the contributories *inter se*, but he may be liable to contribute towards the costs incurred in ascertaining and recovering the amount of their contributions (q).

SECT. 16.
Winding up
by the
Court.

Extent of
liability.

832. The liability of a married woman (r) who is placed on the list of contributories as a holder of shares belonging to her as her separate property is limited to that part of her separate estate to which no restraint on anticipation is attached (s).

Married
women.

The husband of a female contributory married before January 1st, 1883, is, during the continuance of the marriage, liable, as respects any liability attaching to any shares acquired by her before that date, to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he is a contributory accordingly (t).

(o) *Weston's Case* (1868), L. R. 6 Eq. 17; *Brett's Case* (1871), 6 Ch. App. 800; *Morris' Case* (1871), 7 Ch. App. 200; *Re Barned's Bank, Helbert v. Banner* (1871), L. R. 5 H. L. 28; *Webb v. Whiffin* (1872), L. R. 5 H. L. 711; *Brett's Case, Morris' Case* (1873), 8 Ch. App. 800; and see *Hudson's Case* (1871), L. R. 12 Eq. 1; *Nevill's Case* (1870), 6 Ch. App. 43; *Roberts v. Crowe* (1872), L. R. 7 C. P. 629. The relation between the A. contributory and the B. contributory is not that of principal and surety, but a statutory liability, from which the B. contributory is not released by a compromise entered into with the court's sanction between the liquidator and the A. contributory liable in respect of the same shares (*Re Barned's Bank, Helbert v. Banner, supra*).

(p) *Brett's Case, Morris' Case, supra*.

(q) *Marsh's Case* (1871), L. R. 13 Eq. 388, 391.

(r) As to a married woman being a shareholder, see p. 147, *ante*.

(s) *Belcher's Case*, [1883] W. N. 94; *Matthewman's (Mrs.) Case* (1866), L. R. 3 Eq. 781.

(t) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 128 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 78]; see also *ibid.*, s. 128 (2). On the marriage of a female contributory before 1883, the names of both husband and wife were placed on the list of contributories (*Re North of England Joint Stock Banking Co., Burlinson's Case* (1849), 3 De G. & Sm. 18); her name alone could not be placed on the list (*Bell's Case* (1879), 4 App. Cas. 547, 550), and her husband was liable as a contributory in his own right (*Re West of England Bank, Ex parte Hatcher* (1879), 12 Ch. D. 284; Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 6, 7; *Re West of England Bank, Ex parte Hatcher, supra*). See title HUSBAND AND

SECT. 16.
Winding up
by the
Court.
Bankrupt.

833. If a contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his trustee in bankruptcy represents him for all the purposes of the winding up, and is a contributory accordingly. He may be called on to admit to proof against the estate of the bankrupt, or otherwise to allow to be paid out of his assets in due course of law any money due from the bankrupt in respect of his liability to contribute to the assets of the company. The estimated value of the bankrupt's liability to future calls as well as calls already made may be proved against his estate (a). If he becomes bankrupt after he has been placed on the list, his name remains on it, but he is represented by his trustee (b).

Disclaimer.

If, however, adjudication takes place before the winding up commences, he cannot be placed on the list, nor can his trustee if he has disclaimed the shares (c). If the shares are disclaimed the liquidator can prove in the bankruptcy not only for all calls made before the disclaimer, but also for the damages caused by the disclaimer. Where it is probable that the whole amount unpaid on the disclaimed shares will have to be called up to liquidate the company's liabilities, and the shares are of no value, the measure of damages is the amount unpaid on the shares, and a proof can be brought in for that amount (d).

Set-off.

There is a right of set-off, under the bankruptcy law, in the case of a bankrupt contributory, whether the claim is made in bankruptcy or in winding up, and the assignee of the debt owing by the company, before the bankruptcy of the contributory, or after the bankruptcy, if the assignment is not for value (e), stands in the same position (f).

Death of
contributory.

834. If a contributory dies either before or after he has been placed on the list of contributories, his personal representatives and his heirs and devisees are liable in a due course of administration (g) to contribute to the assets of the company in discharge of

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 127 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 77, 75].

(b) *Re Cape Breton Co.* (1881), 19 Ch. D. 77, C. A. As to the case of a past member who becomes bankrupt, see *McEwen's Case* (1871), 6 Ch. App. 582. As to the effect of proof and payment of dividend in respect of uncalled liability, see *Re West Coast Gold Fields, Ltd., Rowe's Trustee's Claim*, [1906] 1 Ch. 1, C. A. As to effect, before the passing of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37, where there was no disclaimer, and an order of discharge had been granted, see *Re Pickering, Ex parte Pickering* (1868), 4 Ch. App. 58; *Hastie's Case* (1869), 4 Ch. App. 274; *Re Waddington, Ex parte Marshall* (1872), 7 Ch. App. 324; *Re Mercantile Mutual Marine Insurance Association* (1883), 25 Ch. D. 415.

(c) *Re West of England Bank, Ex parte Budden and Roberts* (1879), 12 Ch. D. 288. As to disclaimer of shares, see *Re Hooley, Ex parte United Ordnance and Engineering Co.*, [1899] 2 Q. B. 579; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 191, 196.

(d) *Re Hallett, Ex parte National Insurance Co.*, [1894] W. N. 156.

(e) *Re Anglo-Greek Steam Navigation and Trading Co., Carralli and Haggard's Claim* (1867), 4 Ch. App. 174.

(f) *Re Duckworth* (1867), 2 Ch. App. 578; *Re Universal Banking Corporation, Ex parte Strang* (1870), 5 Ch. App. 492. A bankruptcy notice issued by a liquidator who has obtained judgment for unpaid calls is not bad by reason of the debt being extinguished by set-off, if bankruptcy follows (*Re G. E. B.*, [1903] 2 K. B. 340, 352, C. A.).

(g) As to the right of retainer, see *Re Hubback, International Marine Hydro-pathic Co. v. Hawes* (1885), 29 Ch. D. 934, 942, C. A.

his liability, and are contributories accordingly (*h*). A deceased member, or his estate, remains a member for the purpose of the articles of association so long as his name remains on the register without notice to the company of his death (*i*). If shares are registered in joint names, and one of the shareholders dies before winding up, his estate is not liable (*k*).

SECT. 16.
Winding up
by the
Court.

Personal representatives registered with their consent as holders of shares belonging to a deceased member are personally liable and are placed on the list in their own right, although described as executors in the register (*a*). A notification by a person that he is an executor does not authorise the placing of his name on the register so as to make him personally liable (*b*).

Liability of
executors.

Where the personal representatives are placed on the list of contributories, the heirs or devisees need not be added, but, with certain exceptions, they may be added as and when the court thinks fit (*c*).

If the personal representatives make default in paying any money ordered to be paid by them, proceedings may be taken for administering the personal and real estates of the deceased contributory, or either of them, and of compelling payment thereof of the money due (*d*).

The liability of personal representatives placed on the list in their representative capacity is limited to the assets in their hands properly administered (*e*). If, without availing themselves of the protection afforded by statute (*f*), they pay a legacy without providing

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 126 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 76].

(*i*) *New Zealand Gold Extraction Co. (Newbury-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622, 632, C. A.

(*k*) *Hill's Case* (1875), L. R. 20 Eq. 585, 595.

(*a*) *Duff's Executors' Case* (1886), 32 Ch. D. 301, C. A.

(*b*) *Buchan's Case* (1879), 4 App. Cas. 589.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 126 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 99]. As to the exceptions, see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), ss. 1, 2, which make real estate, with some exceptions, assets in the hands of personal representatives for the payment of debts; and title EXECUTORS AND ADMINISTRATORS. The Act of 1897 is to be construed (see s. 26) with the Land Transfer Act, 1875 (38 & 39 Vict. c. 87). As regards the real estate which is excepted, it would seem that the heir or devisee should not be placed on the list. As to s. 99 of the Companies Act, 1862 (25 & 26 Vict. c. 89), see *Hamer's Devisees' Case* (1852), 2 De G. M. & G. 366.

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 126 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 105]; *Price v. Mayo* (1874), 43 L. J. (CH.) 402. As to the effect of a balance order obtained against the representatives of a deceased contributory, see *Re Hubback, International Marine Hydropathic Co. v. Hawes* (1885), 29 Ch. D. 934, C. A. In the administration of the estate of a deceased insolvent contributory, the estimated value of his liability to future calls, as well as the amount of calls already made, may be proved for (*Re McMahon, Fuller v. McMahon*, [1900] 1 Ch. 173; *Re Muggeridge, Muggeridge v. Sharp, Ex parte Bank of London and National Provincial Insurance Association* (1870), L. R. 10 Eq. 443). The real estate of the deceased is liable for calls (Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104); *Turquand v. Kirby* (1867), L. R. 4 Eq. 123).

(*e*) *Baird's Case* (1870), 5 Ch. App. 725; *Ex parte Blakeley's Executors* (1852), 3 Mac. & G. 726; *Ex parte Gouthwaite* (1851), 3 Mac. & G. 187; *Keene's Executors' Case* (1853), 3 De G. M. & G. 272, C. A.; *Heward v. Wheatley* (1853), 3 De G. M. & G. 628, C. A.; see also *Re Herefordshire Banking Co., Bulmer's Case* (1864), 33 Beav. 435; *Fearnside and Dean's Case, Dobson's Case* (1865), 1 Ch. App. 231; *Buchan's Case, supra*.

(*f*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 29.

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for the contingent liability on shares, they are personally liable in respect of the shares to an amount not exceeding the legacy (*g*). As against the legatee, however, they may claim repayment of the legacy, even if at the time of payment they had notice of the contingent liability (*h*), but not if it had then become an ascertained liability (*i*). When the personal representatives are protected by statute, the liquidator can compel the legatee to refund the legacy (*k*).

Trustees

835. Persons whose names are entered on the register as holders of shares as trustees are contributories in their own right, and their liability is not limited to the amount of the trust estate (*l*).

(*b*) *Liability of Contributories in General.*

Liability in
case of
limited
company.

836. In the case of a company limited by shares no contribution is to be required from any member exceeding the amount, if any, unpaid on the shares, in respect of which he is liable as a present or past member (*m*). His liability, if any (*n*), continues so long as anything remains unpaid upon his shares, and payment in full can alone put an end to it (*o*). Thus, persons to whom shares have been issued at a discount may be called upon in a winding up to pay in cash for their shares, not only to meet the claims of outside creditors, but also to adjust the rights of the contributories *inter se* (*p*).

In the case of a company limited by guarantee, no contribution

(*g*) *Taylor v. Taylor* (1870), L. R. 10 Eq. 477. As to the distribution of an estate comprising partly-paid shares, see *Re King, Mellor v. South Australian Land Mortgage and Agency Co.* [1907] 1 Ch. 72.

(*h*) *Jervis v. Wolferstan* (1874), L. R. 18 Eq. 19.

(*i*) *Whittaker v. Kershaw* (1890), 45 Ch. D. 320, C. A.

(*k*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 29.

(*l*) *Muir v. City of Glasgow Bank* (1879), 4 App. Cas. 337; *Bell's Case* (1879), 4 App. Cas. 547, 550; *Cuninghame v. City of Glasgow Bank* (1879), 4 App. Cas. 607; *Gillespie v. City of Glasgow Bank* (1879), 4 App. Cas. 632; *Cree v. Somervail* (1879), 4 App. Cas. 648; *Ker's Case* (1879), 4 App. Cas. 547, 549, 598.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (iv).

(*n*) As to the extent of the liability, see p. 160, *ante*. As to the liability of a past member, see p. 162, *ante*. As to the liability when the business of the company is carried on with less than the proper number of members, see p. 160, *ante*. As to the liability in case of forfeiture for non-payment of calls, see p. 200, *ante*. Nothing in the Act of 1908 is to invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or where the funds of the company are alone made liable in respect of the policy or contract (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (vi). [*Companies Act, 1862* (25 & 26 Vict. c. 89), s. 38 (6)]; *Re Great Britain Mutual Life Assurance Society* (1880), 16 Ch. D. 246, C. A.). Where a company has issued such policies or made such contracts, there are two sets of creditors, those who can be paid only out of the restricted fund, and those who, being ordinary creditors, can be paid out of all the assets of the company. As to how the assets of the company should be distributed in such cases, see *Lethbridge v. Adams, Ex parte International Life Assurance Society (Liquidator)* (1872), L. R. 13 Eq. 547; *Re Agriculturist Cattle Insurance Co., Ex parte Official Manager* (1874), 10 Ch. App. 1; *Re International Life Assurance Society* (1876), 2 Ch. D. 476, C. A.; *Re Accidental Death Insurance Co.* (1878), 7 Ch. D. 568; and see *Weston's Case* (1868), L. R. 6 Eq. 17.

(*o*) *Oregonum Gold Mining Co. of India v. Roper*, [1892] A. C. 125, 145.

(*p*) *Welton v. Saffery*, [1897] A. C. 299; see also *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66, C. A.

can be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up (*q*). But if the guarantee company has a share capital a member is liable, in addition to the amount so undertaken, to contribute to the extent of any sums unpaid on any shares held by him (*r*).

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Court.

The members can, by agreement *inter se*, undertake a liability more extensive than the statutory liability (*s*). If the company is formed under the Act of 1908 it is doubtful whether the court has jurisdiction to enforce any such liability in the winding up (*t*), but it can be enforced in an action (*u*).

Contractual
liability.

837. In the case of a limited company, any director or manager, whether past or present, whose liability is, in pursuance of the Act of 1908, unlimited (*w*) is, in addition to his liability (if any) to contribute as an ordinary member, liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company. A past director or manager is not, however, liable to make such further contribution if he has ceased to hold office for a year or upwards before the winding up commenced; or if it is in respect of any debt or liability of the company contracted after he ceased to hold office. Subject to the articles of association, the further contribution is not required unless the court deems it necessary in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding up (*a*).

Unlimited
liability of
directors.

838. The liability of a contributory creates a debt of the nature of a specialty accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability (*b*).

Nature of
liability.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (*v*); and see p. 75, *ante*.

(*r*) *Ibid.*, s. 123 (3).

(*s*) *McKewan's Case* (1877), 6 Ch. D. 447, C. A.; *Maxwell's Case* (1874), L. R. 20 Eq. 585, 588 (cases under the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), in which the extended liability imposed by the articles was enforced in the winding up); compare *Lion Insurance Association v. Tucker* (1883), 12 Q. B. D. 176, C. A.

(*t*) See *Baird's Case*, [1899] 2 Ch. 593, 598; *Re Marlborough Club Co.* (1868), L. R. 5 Eq. 365.

(*u*) *Lion Insurance Association v. Tucker*, *supra*; *Peninsular Co. v. Fleming* (1872), 27 L. T. 93; compare *South African Territories v. Wallington*, [1898] A. C. 309.

(*w*) See p. 235, *ante*.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (2) [Companies Act, 1867 (30 & 31 Vict. c. 131), s. 5]. Where the court orders a director with unlimited liability to pay money due from him to the company other than under a call, the court may allow him by way of set-off any money due to him from the company on any independent contract with the company, but not any money due in respect of any dividend or profit (*ibid.*, s. 165 (2)).

(*b*) *Ibid.*, s. 125 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 75, 90, 134]; see *Re Vaughan, Ex parte Canwell* (1864), 4 De G. J. & Sm. 539; *Williams v. Harding* (1866), L. R. 1 H. L. 9, 29; *Re Pickering, Ex parte Pickering* (1868), 4 Ch. App. 58, 61; *Re West of England Bank, Ex parte Hatcher* (1879), 12 Ch. D. 284, 287; compare *Re Taunton, Delmard, Lane & Co., Christie v. Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175, 185; *Grissell's Case* (1886), 1 Ch. App. 528, 535. Before liquidation, the liability of shareholders to future calls does not become a debt until a call is made (*Whittaker v. Kershaw* (1890), 45 Ch. D. 320,

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Court.

Sums due to
a member
as such.

839. Although a sum due to any member in that character (c) by way of dividends, profits, or otherwise (d), is not deemed to be a debt of the company, payable to him in a case of competition between himself and any other creditor not a member, it may be taken into account, for the purpose of the final adjustment of the rights of the contributories among themselves (e). Sums due to a director under the articles, in respect of his remuneration, are not sums due to him in his character of a member (f).

(c) *Settlement of List of Contributories.*

Liquidator's
power to
settle list.

840. As soon as may be after making a winding-up order, the court is to settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of the Act of 1908 (g). In settling the list the court is to distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others (h).

In pursuance of the statutory power (i), rules have been made enabling the powers of the court with respect to settling the list of contributories and rectifying the register of members to be exercised, when required by the liquidator as an officer of the court, subject to its control (k); but there is a statutory prohibition against rectification by the liquidator of the register of members without the special leave of the court (l).

The official receiver, while acting as provisional liquidator after the winding-up order, has the powers of an ordinary liquidator as to settling the list of contributories (m).

Provisional
list.

841. The liquidator must with all convenient speed after his appointment settle a provisional list of contributories of the company, and appoint a time and place for that purpose. The provisional list must contain a statement of the address of each

326, C. A.) As to companies not registered but wound up under the Act of 1908, see *Re Muggeridge, Muggeridge v. Sharp, Ex parte Bank of London and National Provincial Insurance Association* (1870), L. R. 10 Eq. 443. As to the heir's liability, see *Buck v. Robson* (1870), L. R. 10 Eq. 629. As to the right of set-off, see p. 515, *post*.

(c) A person claiming damages for an irregular forfeiture of his shares does not claim in the character of a member (*Re New Chile Gold Mining Co.* (1890), 45 Ch. D. 598).

(d) As to what claims are included in the words "or otherwise," see *Re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191, 198, C. A.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (vii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38 (7)]; and see p. 529, *post*.

(f) *Re Dale and Plant* (1889), 43 Ch. D. 255; *Re New British Iron Co., Ex parte Beckwith*, [1898] 1 Ch. 324; *Re A1 Biscuit Co.*, [1899] W. N. 115; compare *Re Leicester Club and County Racecourse Co., Ex parte Cannon* (1885), 30 Ch. D. 629; *Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65, C. A.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 163 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 98].

(h) *Ibid.*, s. 163 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 99].

(i) *Ibid.*, s. 173 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 13].

(k) Companies (Winding-up) Rules, r. 75 (1).

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 173 [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 13].

(m) *Re English Bank of the River Plate*, [1892] 1 Ch. 391,

contributory, and the number of shares or extent of interest to be attributed to him, and distinguish the several classes of contributories. As regards representative contributories, the liquidator must, so far as practicable, observe the statutory requirement that in settling the list a distinction must be made between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others (*n*). If the liquidator has already commenced an action for calls this does not preclude him from discontinuing, and settling the defendant on the list, but the costs of action will be deducted from the amount recovered (*o*).

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Court.

In many cases there is not only a list of present members, called the "A" list, but also a list of past members, called the "B" list. The liquidator can settle the "A" list without application to the court. Before settling the "B" list he must, however, apply to the court for directions, and the court, before directing the settlement of the "B" list, must be satisfied that the present members will probably be unable to meet their obligations (*p*). When a duly executed transfer has been lodged before the winding up began, then, unless the company made default in registering the transfer before the winding up, the transferor's name must be put on the "A" list (*a*).

842. The liquidator must give notice in writing of the time and place appointed for the settlement of the list to every person whom he proposes to include in it, and must state in the notice to each person in what character and for what number of shares or interest he proposes to include him in the list (*b*).

Notice of
appointment
to settle list.

843. On the day appointed for settlement the liquidator must hear any person who objects to being settled as a contributory, and after such hearing must finally settle the list, which, when so

Final settle-
ment.

(*n*) Companies (Winding-up) Rules, r. 77. For the form of provisional list of contributories, see *ibid.*, Form 42. The persons whose names are placed on the list in a representative capacity are the personal representatives, or trustees in bankruptcy, of persons who, when the winding up commenced, were registered as members, but who, either before or after the commencement, have died or become bankrupt. In the absence of any provision in articles of association as to the liability of joint holders of shares, the survivor at the commencement of the winding up is alone liable as a contributory, and the personal representatives of a deceased joint holder cannot be placed on the list (*Hill's Case* (1875), L. R. 20 Eq. 585, 595; *Re Kharaskhoma Exploring and Prospecting Syndicate* (1897), 66 L. J. (CH.) 675, 681, C. A.). As to a company being estopped from placing a personal representative on the list, see *Meux's Executors' Case* (1852), 2 De G. M. & G. 522.

(*o*) *Re United Service Association*, [1901] 1 Ch. 97.

(*p*) *Wright's Case* (1868), L. R. 12 Eq. 345, n., C. A.; *Needham's Case* (1867), L. R. 4 Eq. 135; *Andrew's Case* (1867), 3 Ch. App. 161; compare *Re Barnard's Bank*, *Helbert v. Banner* (1871), L. R. 5 H. L. 28. As to the liabilities of past members, see p. 488, *ante*.

(*a*) *Re North of England Banking Co.*, *Chartres' Case* (1849), 1 De G. & Sm. 581; as to rectifying the register in such a case, see p. 496, *post*.

(*b*) Companies (Winding-up) Rules, r. 78. For the form of notice of appointment, see *ibid.*, Form 43; and for form of affidavit of postage of such notices, *ibid.*, Form 44. The notice may be served out of the jurisdiction (*Re Newman (Nathan) & Co.* (1887), 35 Ch. D. 1, C. A.); compare *Re Liebig's (Baron) Cocoa Chocolate Works, Ltd.*, [1888] W. N. 120.

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settled, will be the list of contributories of the company (c). He makes a certificate of the result of the settlement of the list, so far as it is settled up to the date of the certificate, the particulars required as to the persons settled on or excluded from it, the number of shares and otherwise being stated in schedules annexed to the certificate (d).

Notice of
final settle-
ment.

844. Having finally settled the list of contributories, the liquidator must forthwith give notice to every person whom he has finally placed thereon, stating in what character and for what number of shares or interest he has been placed on the list, and informing him that any application for the removal of his name from the list, or for a variation of it, must be made to the court by summons within twenty-one days from the date of the service on him of the notice (e).

Varying the
list.

845. The liquidator may from time to time vary or add to the list of contributories, but any such variation or addition must be made in the same manner in all respects as the settlement of the original list (f).

(d) *Rectification of Register or List of Contributories.*

Court's power
to rectify
list.

846. In a compulsory winding up the court has power, on the settlement of the list of contributories, to rectify the register of members (g) in all cases where rectification is required in pursuance of the Act of 1908 (h). This may be done either before or after the list of contributories has been settled, and the court may make any consequential alterations in the list (i).

Liquidator's
power.

847. The liquidator cannot make any rectification of the register without the special leave of the court (k). If he places on the list

(c) Companies (Winding-up) Rules, r. 79. The register of members and the books and papers of the company and the liquidator are *prima facie* evidence against the contributories (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 33, 220).

(d) Companies (Winding-up) Rules, Form 45.

(e) *Ibid.*, r. 80. For the form of notice, see *ibid.*, Form 46; and for form of affidavit of service of notice, *ibid.*, Form 48. As to the effect of a scheme of arrangement, see *Re Ligoniel Spinning Co., Ex parte Connor*, [1900] 1 I. R. 250. Subject to the power of the court to extend the time or to allow an application to be made notwithstanding the expiration of the time limited for that purpose, no application to the court by any person who objects to the list of contributories as finally settled by the liquidator is entertained after the expiration of twenty-one days from the date of the service on such person of notice of the settlement of the list (Companies (Winding-up) Rules, r. 81 (1); and see *Re Liverpool Household Stores Association, Ex parte Weld-Blundell* (1890), 63 L. T. 383). For the form of order on application to vary, see Companies (Winding-up) Rules, Form 49. The official receiver is not in any case personally liable to pay any costs of or in relation to an application to set aside or vary his act or decision settling the name of a person on the list of contributories (*ibid.*,

(f) *Ibid.*, r. 82. For the form of supplemental list of contributories, see *ibid.*, Form 47. The supplemental list cannot be used to obtain balance orders against contributories for sums not due by them as such (*Re Marlborough Club Co.* (1868), L. R. 5 Eq. 365).

(g) As to the effect of entries in the register, see p. 151, *ante*.

(h) Companies (Consolidation), Act 1908 (8 Edw. 7, c. 69), ss. 32, 163 (1).

(i) *Ibid.*

(k) *Ibid.*, s. 173.

the name of a person who is not on the register of members, the liquidator has to satisfy the court, on an application by such person to vary the list by removing his name therefrom, that the circumstances are such that the applicant's name ought to have been upon the register, and was improperly omitted therefrom (*l*). Where a sale and transfer of shares are made after the winding-up order, the court will only direct the registration of the transferee for the benefit of the company or of those interested in its assets (*m*).

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Court.

The principles upon which the court exercises the power of rectifying the register after the commencement of a winding up are similar to those upon which it exercises the power of rectifying the register while the company is a going concern (*n*). Where, however, a person whose name is duly entered on the register as a member at the date of the commencement of the winding up seeks to have his name removed on the ground that, although he agreed to become a member, the agreement is voidable at his option—as where the contract was induced by fraud—it is necessary that he should, before the winding up commenced, have definitely and effectively repudiated the agreement (*o*) and followed up his repudiation by active measures to have his name removed from the register (*p*), except where there is some agreement which exonerates the member from the necessity of taking such steps (*q*). The same principles apply whether the winding up is compulsory or is a voluntary winding up, either under supervision or not (*r*).

Principles
guiding the
court.

848. The court will, on the application of the liquidator in the name of the company (*s*), if satisfied that the justice of the case requires it (*t*), rectify its register of members and, if necessary, the list of contributories, where a person's name is, without sufficient cause (*a*), entered in or omitted from the register or list, or if default has been made or unnecessary delay has taken place in entering on the

Where
rectification
ordered.

(*l*) *Re Macdonald, Sons & Co.*, [1894] 1 Ch. 89, C. A.

(*m*) *Re Onward Building Society*, [1891] 2 Q. B. 463, C. A.

(*n*) See p. 153, *ante*.

(*o*) *Re Overend, Gurney & Co., Oakes v. Turquand and Harding* (1867), L. R. 2 H. L. 325; *Reese River Silver Mining Co. v. Smith* (1869), L. R. 4 H. L. 64, 81; *Re Dunlop-Truffault Cycle and Tube Manufacturing Co., Shearman's Case* (1896), 75 L. T. 385; *Re Sussex Bride Co.*, [1901] 1 Ch. 698; *Ward's Case* (1866), L. R. 2 Eq. 226. After winding up commenced the shareholder who has been induced to take shares by fraud, and has not in the meantime repudiated and taken active steps, has no claim against the liquidator of the company or its assets for damages in respect of the fraud (*Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317; *Burgess's Case* (1880), 15 Ch. D. 507).

(*p*) *Hare's Case* (1869), 4 Ch. App. 503; *Kent v. Freehold Land and Brick-making Co.* (1868), 3 Ch. App. 493; *Re Central Klondyke Gold Mining and Trading Co.*, *Thomson's Case* (1898), 5 Mans. 282; *Re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, C. A.; compare *Hart's Case* (1868), L. R. 6 Eq. 512.

(*q*) *Pawle's Case* (1869), 4 Ch. App. 497; compare *Whiteley's Case*, [1900] 1 Ch. 365, C. A.

(*r*) *Stone v. City and County Bank* (1877), 3 O. P. D. 282, C. A.

(*s*) *Re Bank of Hindustan, China and Japan, Ex parte Kintrea* (1869), 5 Ch. App. 95.

(*t*) *Trevor v. Whitworth* (1887), 12 App. Cas. 409, 440; *Re Onward Building Society, supra*; *Re Hannan's King (Browning) Gold Mining Co.* (1898), 14 T. L. R. 314, C. A.

(*a*) For instance, where a person's name is registered without his authority

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Cases of
rectification.

register the fact of any person having ceased to be a member (*b*). Where a transfer has not been registered before winding up, owing to the default of the company, the court will not, at the liquidator's instance, rectify the register (*c*); but it will do so on the application of other persons by substituting the name of the transferee for that of the transferor (*d*). It will not, however, do so where there has been no default or unnecessary delay on the company's part (*e*). If a person's name is improperly entered or omitted, it must be considered to be entered or omitted without sufficient cause, as, for instance, where a transfer is fraudulently made to escape liability and contains incorrect statements (*f*); but an out-and-out transfer to escape liability is good (*g*), even although there has been a misdescription of the transferee (*h*). Where a person, with intent to deceive a company, takes shares in the name of a fictitious person, or of some other person without his authority, the liquidator can place his name on the list of contributories, and the court will rectify the list of members and, if necessary, the list of contributories (*i*). Rectification by substituting the name of a beneficiary for that of his registered trustee cannot be obtained (*j*), unless when the winding up commenced the trustee is an infant (*k*). The liquidator can substitute a transferor for the transferee where the latter was an infant when the winding up commenced (*l*), unless the company has been guilty of *laches* (*m*). After a company has

(*Alabaster's Case* (1868), L. R. 7 Eq. 273; *Somerville's Case* (1871), 6 Ch. App. 266), and the circumstances do not show assent (*Crawley's Case* (1869), 4 Ch. App. 322; *Challis's Case* (1871), 6 Ch. App. 266).

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 32, 163 (1).

(*c*) *Sichell's Case* (1867), 3 Ch. App. 119.

(*d*) *Nation's Case* (1866), L. R. 3 Eq. 77; *Fyfe's Case* (1869), 4 Ch. App. 768; *Hill's Case* (1867), 4 Ch. App. 769, n.; *Lowe's Case* (1870), L. R. 9 Eq. 589; *Re Manchester and Oldham Bank*, [1885] W. N. 169.

(*e*) *Shepherd's Case* (1866), 2 Ch. App. 16; *Re Anglo-Indian and Colonial, Industrial and Commercial Institution, Ltd., Montagu's (Lord R.) Case, Grey's Case*, [1888] W. N. 137. On a sale and transfer made after a compulsory order the power to rectify the register will only be exercised on strong grounds (*Re Onward Building Society*, [1891] 2 Q. B. 463, C. A.).

(*f*) *Re Bank of Hindustan, China and Japan, Ex parte Kintrea* (1869), 5 Ch. App. 96.

(*g*) *Re Smith, Knight & Co., Hakim's Case* (1869), 7 Ch. App. 296, n.; compare *Re Mexican and South American Co., Costello's Case* (1860), 2 De G. F. & J. 302, C. A.; *Re Electric Telegraph Co. of Ireland, Budd's Case* (1861), 3 De G. F. & J. 297, C. A.; *Re Discoverers' Finance Corporation*, [1908] 1 Ch. 141, compromised on appeal; and overruled in *Re Discoverers' Finance Corporation, Lindlar's Case*, [1910] 1 Ch. 312, C. A.

(*h*) *Re Financial Insurance Co., Bishop's Case* (1869), 7 Ch. App. 296, n.; *Masters' Case* (1872), 7 Ch. App. 292; *Williams' Case* (1875), 1 Ch. D. 576.

(*i*) *Pugh and Sharman's Case* (1872), L. R. 13 Eq. 566; *Richardson's Case* (1875), L. R. 19 Eq. 588; *Re Yeoland's Consols, Manley's Case* (1890), 2 Meg. 74; *Re Central Klondyke Gold Mining and Trading Co., Savigny's Case* (1898), 5 Mans. 336; *King's Case* (1871), 6 Ch. App. 196.

(*j*) *King's Case*, *supra*.

(*k*) *Weston's Case* (1870), 5 Ch. App. 614; compare *Re National Bank of Wales, Ltd., Massey and Giffin's Case*, [1907] 1 Ch. 583.

(*l*) *Curtis's Case* (1868), L. R. 6 Eq. 455; *Castello's Case* (1869), L. R. 8 Eq. 504; *Capper's Case* (1867), 3 Ch. App. 458; *Re Joint Stock Discount Co., Mann's Case* (1867), 3 Ch. App. 459, n.; *Symons' Case* (1870), 5 Ch. App. 298; *Richardson's Case* (1875), L. R. 19 Eq. 588.

(*m*) *Parsons' Case* (1869), L. R. 8 Eq. 656.

once obtained an adult member, a prior transfer to an infant cannot be avoided, and the transferor to the infant cannot be placed on the B. list (n). The liquidator cannot substitute the name of a husband for that of a wife, although she has no separate estate and the shares were given to her by him (o).

SMOT. 16.
Winding up
by the
Court.

Where a person makes a binding agreement with a company to take shares, but his name is not entered on the register as the holder, the register may be rectified and his name entered on the list of contributories (p). An agreement by a person to "place" shares is not an agreement to accept an allotment, and his name cannot be entered on the register or list (q). Where fully-paid shares have been given to a director as a bribe, he cannot be placed on the list in respect of such shares as if they were unpaid (r); but he may be placed on the list in respect of shares which he agreed to take, but which he purported to pay for with money obtained from the vendor to the company (s). Where registration of a transfer has been procured by misrepresentation of the transferor contained in the transfer itself, and directors have the power of refusing to register a transfer, the court will, if the transfer was made when the company was insolvent, rectify the register and list by substituting the name of the transferor for that of the transferee (t). This will not be done after a lapse of years where the misrepresentation was made by the purchaser who took the transfer in the name of a nominee misdescribed in the transfer (u). A shareholder's name will be taken off the register after winding up commenced where there is no contract by him to take the shares (a). Where shareholders' names have been improperly removed from

Agreements
to take
shares etc.

(n) *Gooch's Case* (1872), 8 Ch. App. 266.

(o) *Re London, Bombay and Mediterranean Bank* (1881), 18 Ch. D. 581.

(p) *Re Oola Mining Co. Palmer's Case* (1868), 1. R. 2 Eq. 573; *Re East India Cotton Agency, Sands' Case* (1875), 32 L. T. 299.

(q) *Gorriessen's Case* (1873), 8 Ch. App. 507.

(r) *Dent's Case, Forbes' Case* (1873), 8 Ch. App. 768; *Carling, Hespeler and Walsh's Cases* (1875), 1 Ch. D. 115, C. A.; *De Ruigne's Case* (1877), 5 Ch. D. 306, C. A.; *Re Innes & Co., Ltd.*, [1903] 2 Ch. 254 C. A.; compare *Ex parte Daniell* (1857), 1 De G. & J., 372, commented on in *Carling, Hespeler and Walsh's Cases, supra*.

(s) *Hay's Case* (1875), 10 Ch. App. 593.

(t) *Payne's Case* (1869), L. R. 9 Eq. 223; *Williams' Case* (1869), L. R. 9 Eq. 225, n.

(u) *Williams' Case* (1875), 1 Ch. D. 576.

(a) For instance, because he has not applied for or agreed to take shares (*Hutchinson's Case*, [1895] 1 Ch. 228; *Ormerod's Case*, [1894] 2 Ch. 474; *Baillie's Case*, [1898] 1 Ch. 110); or his application for shares was withdrawn before notice of allotment was given (*Truman's Case*, [1894] 3 Ch. 272; *Ritso's Case* (1877), 4 Ch. D. 774, C. A.; *Hebb's Case* (1867), L. R. 4 Eq. 9); or although application for shares was made, notice of allotment was not given (*Crawley's Case, Robinson's Case* (1869), 4 Ch. App. 322; *Gurn's Case* (1867), 3 Ch. App. 40); or, the application for shares being conditional, the condition was not fulfilled (*Re London and Southern Counties Freehold Land Co.* (1885), 31 Ch. D. 223); or the application for shares was not accepted (*Beck's Case* (1874), 9 Ch. App. 392). As to a shareholder acting as a member, or otherwise by word or deed precluding himself from objecting that there was not a contract binding him to take the shares, see *Crawley's Case, Robinson's Case, supra*; *Challis's Case* (1871), 6 Ch. App. 266; *Re Railway Time Tables Publishing Co., Ex parte Sandys* (1889), 42 Ch. D. 98, C. A.; *Re Barned's Banking Co., Ex parte Contract Corporation* (1867), 3 Ch. App. 105.

SECT. 16.
Winding up
by the
Court.

When calls
may be
made.

Liquidator's
power to
make calls.

Sanction of
committee.

the register before a winding up commenced, the court will, on the liquidator's application, rectify the register by replacing their names (b).

(e) *Calls.*

849. The court may, at any time after making a winding-up order, and either before or after it has ascertained the insufficiency of the assets of the company, make calls on all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of any money which it considers necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding up, and for the adjustment of the rights of the contributories among themselves. In making a call the court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call (c).

The call may be made before or after ascertaining what claims against the company will be established as debts (d); but the list of contributories must first have been settled (e). Shareholders are liable to pay calls made in the winding up, although by the contract under which they took their shares the calls were only payable by instalments, and the date for payment has not arrived (f).

850. The court's powers in relation to making calls are exercisable by the liquidator, in a winding up by the court, as an officer of the court, but only with the court's leave or the committee's sanction, and subject to the following rules (g):—

A liquidator desiring to make a call may, if there is a committee of inspection, summon a meeting of the committee, to obtain its sanction to the intended call, by a notice in the prescribed form (h) sent to each member in sufficient time to reach him not less than seven days before the day appointed for holding the meeting, and containing a statement of the proposed amount of the call and the purpose for which it is intended (i). Notice of the intended call and the intended meeting of the committee must also be advertised once at least in a London newspaper, or, where the winding up is not in

(b) *Duff's Executors' Case* (1886), 32 Ch. D. 301, C. A.; *Re Bank of Hindustan, China and Japan, Ex parte Kintrea* (1869), 5 Ch. App. 95; *Re Companies Guardian Society, Wallscourt's (Lord) Case*, [1899] W. N. 258.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7. c. 69), s. 166 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 102]. As to the effect of a mortgage of calls after a winding-up order has been made, see *Gwelo (Matabeleland) Exploration and Development Co.*, [1901] 1 I. R. 38.

(d) *Re Contract Corporation* (1866), 2 Ch. App. 95; *Re Burned's Banking Co.* (1867), 36 L. J. (CH.) 215, C. A.

(e) *Needham's Case* (1867), L. R. 4 Eq. 135, 138; *Re English Bank of the River Plate*, [1892] 1 Ch. 391, 394.

(f) *Re Cordova Union Gold Co.*, [1891] 2 Ch. 580; *Re Pyle Works* (1890), 44 Ch. D. 534, C. A., per LINDLEY, L.J., at p. 583; *London Provident Building Society v. Morgan*, [1893] 2 Q. B. 266, 272.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7. c. 69), s. 173; Companies (Winding-up) Rules, r. 83. Calls in respect of uncalled capital charged by debentures can only be made in the liquidator's names; see *Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724; *Re Westminster Syndicate, Ltd.*, [1908] W. N. 236.

(h) See Companies (Winding-up) Rules, Form 50.

(i) *Ibid.*, r. 83.

the High Court, in a newspaper circulating in the district of the court in which the proceedings are pending, by an advertisement in the prescribed form (j), stating the time and place of the intended meeting of the committee, and that each contributory may either attend the meeting and be heard, or make any communication to the liquidator or members of the committee, to be laid before the meeting, in reference to the intended call (k).

SECT. 16.
Winding up
by the
Court.

At the meeting any statements or representations made either to the meeting personally, or addressed in writing to the liquidator or members of the committee, by any contributory, must be considered before the intended call is sanctioned. The committee's sanction is given by resolution, which must be passed by a majority of the members present (l).

Where there is no committee of inspection, the liquidator cannot make a call without obtaining the leave of the court (m). The application to the court for leave is made by summons stating the proposed amount of the call. The summons must be served four clear days at the least before the day appointed for making the call on every contributory proposed to be included in the call; or, if the court so directs, notice of such intended call may be given by advertisement, without a separate notice to each contributory (n).

Leave of
court.

851. When the liquidator is authorised by resolution or order to make a call on the contributories, he must file with the registrar a document in the prescribed form, with such variations as circumstances may require, making the call (o).

Document
making a
call.

When a call has been made by the liquidator, a copy of the resolution of the committee of inspection or order of the court (if any), as the case may be, must, as soon as the call has been made, be served upon each of the contributories included in the call, together with a notice from the liquidator specifying the amount or balance due from such contributory in respect of the call, but such resolution or order need not be advertised unless for any special reason the court so directs (p). If the notice of call states that if it is not paid at the time appointed interest will be charged from that time, the interest must be paid (q).

(j) See Companies (Winding up) Rules, Form 51.

(k) *Ibid.*, r. 83.

(l) *Ibid.* For the form of resolution, see *ibid.*, Form 52.

(m) *Ibid.*, r. 83.

(n) *Ibid.*, r. 84. For the form of summons, see *ibid.*, Form 54; for the form of affidavit, *ibid.*, Form 55; for the form of advertisement, *ibid.*, Form 56; and for the form of order, see *ibid.*, Form 57.

(o) *Ibid.*, r. 85. For the form of document, see *ibid.*, Form 58.

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7. c. 69), s. 173; Companies (Winding-up) Rules, r. 86. For the form of notice of a call sanctioned by the committee, see *ibid.*, Form 53, and for the form of notice to be served with the order, see *ibid.*, Form 59.

(q) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28; *Re Overend, Gurney & Co., Ex parte Lintott* (1867), L. R. 4 Eq. 184; *Barrow's Case* (1868). 3 Ch. App. 784. Provisions in articles of association as to payment of interest on calls, joint and several liability for calls, or as to the time of payment and amount, do not apply to calls made by a liquidator (*Re Welsh Flannel and Tweed Co.* (1875), L. R. 20 Eq. 360; *Re Kharaskhoma Exploring and Prospecting Syndicate* (1897), 66 L. J. (CH.) 675, 681, C. A.; *Re Cordova Union Gold Co.*, [1891] 2 Ch.

SECT. 16.
Winding up
by the
Court.
"Balance
order."

852. The payment of the amount due from each contributory on a call may be enforced by order of the court, to be made in chambers on summons by the liquidator (r). This order is generally called a "balance order" (s), and the summons by which it is applied for must be supported by an affidavit by the liquidator (t).

When twenty years have elapsed since a contributory was discharged from further liability by compromise with the liquidator every presumption is made in favour of the discharge (u).

(f) *Rights of Contributories in regard to Debts due from and to the Company.*

Shareholder's
claim as
creditor.

853. When a shareholder has paid all calls which have become due, he is entitled to a dividend on the amount of any debt owing to him from the company *pari passu* with the other creditors (a). If he has bought up a debt of the company for less than its amount, he may prove for the full amount (b); but if after the winding up commenced he assigns a debt due to him from the company, his assignee cannot receive any dividend upon it unless and until the shareholder has paid all calls due (c). A shareholder who claims as assignee of a debt due by the company can prove for his debt in competition with creditors (d). A shareholder whose shares have been improperly forfeited and sold may prove for damages in competition with creditors (e).

A contributory, who petitions for and obtains a winding-up order, is entitled to the costs of his petition before payment of any calls due from him to the company (f).

Set off by
contributory.

854. A shareholder cannot in a winding up set off a debt owing to him by the company against a call (g), whether made before or after the winding up (h), although in the former case there has been an

(r) Companies (Winding-up) Rules, r. 87.

(s) See p. 504, *post*.

(t) For form of affidavit, see Companies (Winding-up) Rules, Form 60. For the form of a balance order, see *ibid.*, Form 61; and for the form of affidavit of the service of the order, see *ibid.* Form 62; and see p. 504, *post*. As to a trustee's right to indemnity against calls, see *Hardoon v. Belilios*, [1901] A. C. 118, P. C.

(u) *Watt v. Assets Co.*, [1905] A. C. 317.

(a) *Re West of England Bank, Ex parte Brown* (1879), 12 Ch. D. 823; *Grissell's Case* (1866), 1 Ch. App. 528.

(b) *Re Humber Iron Works Co.* (1869), L. R. 8 Eq. 122.

(c) *Re China Steamship Co., Ex parte Mackenzie* (1869), L. R. 7 Eq. 240.

(d) *Re Railway Time Tables Publishing Co., Ex parte Welton*, [1899] 1 Ch. 108, C. A.

(e) *Re New Chile Gold Mining Co.* (1890), 45 Ch. D. 598.

(f) *Re General Exchange Bank* (1867), L. R. 4 Eq. 138.

(g) *Grissell's Case* (1866), 1 Ch. App. 528; *Gill's Case* (1879), 12 Ch. D. 755; *Calisher's Case* (1868), L. R. 5 Eq. 214; *Re West of England Bank, Ex parte Brown* (1879), 12 Ch. D. 823; compare *Re London and Colonial Co., Ex parte Clark* (1869), L. R. 7 Eq. 550; *Re United Service Association*, [1901] 1 Ch. 97, 101. The rule is the same in a voluntary winding up (*Black & Co.'s Case* (1872), 8 Ch. App. 254; *Re Whitehouse & Co.* (1878), 9 Ch. D. 595, disapproving *Brighton Arcade Co. v. Dowling* (1868), L. R. 3 C. P. 175); and see *Hoby & Co. v. Birch* (1890), 59 L. J. (q. b.) 247.

(h) *Barnett's Case* (1875), L. R. 19 Eq. 449; *Government Security Investment Co. v. Dempsey* (1880), 50 L. J. (q. b.) 199. A debt cannot be set off in answer to a bankruptcy notice by the liquidator (*Re G.E.B.*, [1903] 2 K. B. 340). Where an action for calls has been commenced before winding up, and set-off has been

agreement to do so (i) ; but his trustee in bankruptcy may do so (k) even although the debt was assigned before the bankruptcy but after the winding up commenced (l). Where, however, a company in liquidation is both a creditor and a shareholder of another company in liquidation it cannot, even when insolvent, set off against calls made by the liquidator of the latter company a debt owing to it by that company (m) or take any dividend on the debt until it has paid up all calls in full (n). A member who holds shares in trust for the company cannot set off against a call a claim to indemnity (o).

SECT. 16.
Winding up
by the
Court.

The assignee of a debt assigned after the winding up commenced is in the same position as the contributory (p). Where the assignment is made before the winding up commenced he is entitled to any dividends on the debt that may be declared, notwithstanding the non-payment by his assignor of calls on shares due from him to the company (q).

Assignees

The right of a liquidator to require payment of money due from a contributory, before he is allowed to participate in a dividend, only applies where both amounts are due at the commencement of the winding up (r).

855. In the case of an unlimited company, where a contributory is ordered to pay moneys due from him or the estate of the person whom he represents, not being moneys payable by virtue of a call in the winding up (s), the court may allow to him, by way of set-off, any money due to him or the estate which he represents from the company on any independent dealing or contract with it, but not moneys due to him as a member in respect of any dividend or profit. In the case of a limited company the court may make the like allowance to any director or manager whose estate is unlimited, or to his estate (t). Whether the company is limited or unlimited, when all the creditors have been paid in full, any money due on

Set-off where
company or
liability
unlimited.

pleaded but there has been no judgment, after winding up no set-off can be allowed against the calls (*Re Hiram Maxim Lamp Co.*, [1903] 1 Ch. 70).

(i) *Re Branksea Island Co.*, *Ex parte Bentinck* (No. 1) (1888), 1 Meg. 12, C. A.

(k) *Re Duckworth* (1867), 2 Ch. App. 578 ; *Re Anglo-Greek Navigation and Trading Co.*, *Carralli and Haggard's Claim* (1869), 4 Ch. App. 174.

(l) *Re Universal Banking Corporation*, *Ex parte Strang* (1870), 5 Ch. App. 492. The rule is the same whether the claim is in bankruptcy or in the winding up (*ibid.*).

(m) *Re Auriferous Properties, Ltd.*, [1898] 1 Ch. 691.

(n) *Re Auriferous Properties, Ltd.* (No. 2), [1898] 2 Ch. 428 ; *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1904] 2 Ch. 45.

(o) *Re Munster Bank, Ltd.* (*Dillon's Claim*) (1886), 17 L. R. Ir. 341, C. A.

(p) *Re China Steamship Co.*, *Ex parte Mackenzie* (1869), L. R. 7 Eq. 240.

(q) *Re Taunton, Delmard, Lane & Co.*, *Christie v. Taunton, Delmard, Lane & Co.*, [1893] 2 Ch. 175.

(r) *Grissell's Case* (1886), 1 Ch. App. 528.

(s) The right of set-off does not exist as against calls made in the winding up (*Re West of England and South Wales District Bank*, *Ex parte Branwhite* (1879), 48 L. J. (CH.) 463, not following *Gibbs and West's Case* (1870), L. R. 10 Eq. 312).

(t) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 165 (1) (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 101 ; Companies Act, 1867 (30 & 31 Vict. c. 131), s. 6].

SECT. 16.
Winding up
by the
Court.

Balance
orders.

Order for
payment.

Conclusive
evidence of
order.

any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call (a).

(g) *Orders against Contributories.*

856. Money payable on shares upon the terms of allotment or payable in respect of calls made before the winding-up order may be due when the winding up commences. At any time after making a winding-up order the court may order any contributory for the time being settled on the list of contributories to pay, in the manner directed by the order, any money due from him or from the estate of the person whom he represents to the company, exclusive of any money payable by him or the estate by virtue of any call made by the liquidator in the winding up (b). The order, which is usually called a "balance order," is not a judgment, and it cannot be enforced by action; but the right of action in respect of the amount due is not merged in or destroyed by the order, and the amount may be sued for (c). A bankruptcy notice cannot be issued in respect of a balance order (d).

Contributories may be required, on notice by the liquidator, to pay or transfer to him money or property of the company, or may be ordered to pay money due to the company into the Bank of England (e).

857. An order made by the court on a contributory is (subject to any right of appeal) conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due. All other pertinent matter stated in the order is to be taken to be truly stated as against all persons, and in all proceedings, except proceedings against the real estate of a deceased contributory, in which case the order is only *prima facie* evidence for the purpose of

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 165 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 101].

(b) *Ibid.*, s. 165 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 101]. As to enforcing an order made in one part of the United Kingdom in another part thereof, see *Re Hollyford Copper Mining Co.* (1867), 5 Ch. App. 93; *Re City of Glasgow Bank* (1880), 14 Ch. D. 628. The rules as to making calls in the winding up apparently do not apply in respect of allotment moneys, or calls made before the winding up; but under s. 167 (1) of the Act of 1908 the court may order any person from whom money is due to the company to pay the same into the Bank of England, or any branch thereof, to the account of the liquidator, and under *ibid.*, s. 173, rules may be made to enable the powers of the court as to requiring delivery of property to the liquidator to be exercised by him; see *ibid.*, s. 164, and Companies (Winding-up) Rules, r. 76.

(c) *Chalk, Webb & Co. v. Tennent* (1887), 57 L. T. 498; *Westmoreland Green and Blue Slate Co. v. Feilden*, [1891] 3 Ch. 15, C. A.; see *Re Hubback, International Marine Hydromatic Co. v. Hawes* (1885), 29 Ch. D. 934, C. A.; and compare Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 177 [Companies Act, 1862 (25 & 26 Vict. c. 89, s. 119)], which provides that any powers conferred on the court by the Act are in addition to and not in restriction of any existing powers of instituting proceedings against any contributory or debtor of the company, or the estate of any contributory or debtor, for the recovery of any call or other sums. In an action for the amount due the order is conclusive evidence that the money is due (*ibid.*, s. 168 (1)).

(d) *Re Shirley, Ex parte Mackay* (1887), 58 L. T. 237; *Re Sanders, Ex parte Whinney* (1884), 13 Q. B. D. 476; *Re Tennent, Ex parte Grimwade* (1886), 17 Q. B. D. 357, C. A.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 167.

charging his real estate, unless his heirs or devisees were on the list of contributories at the time when the order was made (*f*).

SECT. 16.
Winding up
by the
Court.

As between the contributories of the company, all books and papers of the company and of the liquidators are *primâ facie* evidence of the truth of all matters purporting to be therein recorded (*g*).

858. The court, at any time, either before or after making a winding-up order, on proof of probable cause for believing that a contributory is about to quit the United Kingdom, or otherwise to abscond, or to remove or conceal any of his property, for the purpose of evading payment of calls, or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and movable personal property to be seized, and him and them to be safely kept until such time as the court may order (*h*). The court may order the seizure of a contributory's goods without ordering the arrest of his person (*i*).

Arrest of
contributory
and seizure of
his books.

(vi.) *Realisation of Property.*

859. The liquidator in a winding up by the court has power to sell the company's real and personal property and choses in action by public auction or private contract, as a whole or in parcels, and to do all acts and to execute, in its name and on its behalf, all deeds, receipts, and other documents, for which purpose he may use its seal, when necessary (*k*). The power may be exercised without the sanction of the court or of the committee of inspection. The exercise of the power is, however, subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of the power (*l*). The liquidator himself may apply to the court for directions as to the sale (*m*). A claim for misfeasance against directors or promoters may be sold (*n*). The property may be sold for a consideration other than cash (*o*).

Liquidator's
power of
sale.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 168 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 106]. As to balance order for payment of calls, see p. 504, *ante*.

(*i*) *Re Imperial Mercantile Credit Co.* (1867), L. R. 5 Eq. 264.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (2) (a), (b) [Companies Act, 1862 (25 & 26 Vict. c. 89), 95, as amended by Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (2)].

(*l*) *Ibid.*, s. 151 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (3)]; and see *ibid.*, s. 158 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 24].

(*m*) *Ibid.*, s. 158 (3). When a sale is sanctioned by the court, the Court of Appeal will not readily interfere (*Re Oriental Bank Corporation* (1887), 56 L. T. 868, C. A.). As to the effect of s. 70 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), relating to the conclusiveness of orders of court, see *Jones v. Barnett*, [1900] 1 Ch. 370, C. A. As to inquiries as to incumbrances, see *Re Hamilton's Windsor Ironworks Co., Ex parte General Credit Discount Co.* (No. 2) (1879), 27 W. R. 827, C. A.

(*n*) *Re Park Gate Waggon Works Co.* (1881), 17 Ch. D. 234; *Wood v. Woodhouse and Rawson United*, [1896] W. N. 4; compare *New Westminster Brewery v. Hannah*, [1876] W. N. 215, where it was held that the claim did not in fact pass on the sale.

(*o*) *Re Agra and Masterman's Bank* (1866), cited L. R. 12 Eq. 509, n. (deferred

SECT. 16.
Winding up
by the
Court.

Restrictions
on purchase.

860. Neither the liquidator nor any member of the committee of inspection of a company while so acting may, except by leave of the court, either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the company's assets. Any such prohibited purchase may be set aside by the court on the application of the Board of Trade or of any creditor or contributory, and the court may make such order as to costs as it thinks fit (*p*).

Proceeds of
sale.

861. Where assets are sold through an auctioneer or other agent, the gross proceeds of the sale must be paid over by him, and the charges and expenses connected with the sale must afterwards be paid to him, on the production of the necessary certificate of the taxing officer. Every liquidator by whom such auctioneer or agent is employed is, unless the court otherwise orders, accountable for the proceeds of every such sale (*q*).

Conveyances
on sale.

862. As the property is not, in the absence of a special order, vested in the liquidator, he is not a necessary party to conveyances made by the company in liquidation. He is, however, often made a party in order to obtain the covenant implied by law from his conveying as trustee, and to show that he concurred (*r*).

(vii.) *Carrying on the Company's Business.*

Necessary
permission.

863. So far as may be necessary for the beneficial winding up of the company, the liquidator may carry on its business (*s*) with the sanction either of the court or of the committee of inspection (*t*). He cannot, however, carry on the business with the view of making a profit for the company (*a*), or of facilitating reconstruction (*b*). Contracts may be made for the purposes of the beneficial winding up of the company (*c*), and the onus of proving that a contract is not beneficial lies upon the party objecting to it (*d*).

A liquidator carrying on the business must not, without

payments secured by promissory notes); *Re Bank of South Australia* (2), [1895] 1 Ch. 578, C. A.; *Re Cambrian Mining Co.* (1882), 48 L. T. 114.

(*p*) Companies (Winding-up) Rules, r. 156; and see title **BANKRUPTCY AND INSOLVENCY**, Vol. II., pp. 116, 118. On a sale being set aside interest is not charged on the profits (*Silkstone and Haigh Moor Coal Co. v. Edey*, [1900] 1 Ch. 167).

(*q*) Companies (Winding-up) Rules, r. 176. As to the taxation of the charges, see p. 565, *post*.

(*r*) See Encyclopædia of Forms, Vol. IV., p. 810; Vol. XII., pp. 766, 769.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 151 (1) (*b*); *British Waggon Co. v. Lea* (1880), 5 Q. B. D. 149. As to contracts made where it is unnecessary to carry on the business, see *Bateman & Co. v. Ball* (1887), 56 L. J. (Q. B.) 291. As to payment of the costs of carrying on the business, see *Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411.

(*t*) The sanction of the committee of inspection need not be in writing, but must be specific, and not retrospective; compare *Re Vauxsaur*, [1900] 2 Q. B. 309; *Re White, Ex parte Nichols*, [1902] W. N. 114 (both bankruptcy cases).

(*a*) Compare *Re Batey, Ex parte Emmanuel* (1881), 17 Ch. D. 35, C. A.

(*b*) *Re Wreck Recovery and Salvage Co.* (1890), 15 Ch. D. 353, C. A.; *Re Regent's Canal Ironworks Co., Ex parte Grissell*, *supra*.

(*c*) *Ibid*.

(*d*) *Hire Purchase Furnishing Co. v. Richens* (1887), 20 Q. B. D. 387, C. A.; *Bateman & Co. v. Ball* (1887), 56 L. J. (Q. B.) 291.

the express sanction of the court (*e*), purchase goods for carrying it on from any person whose connection with him is of such a nature as would result in the liquidator obtaining any portion of the profit (if any) arising out of the transaction (*f*). No member of a committee of inspection may, except under and with the sanction of the court (*e*), directly or indirectly, by himself or by any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the winding up, or to receive out of the assets any payment for any goods supplied by him to the liquidator for or on account of the company. If it appears to the Board of Trade that any such profit or payment has been made, it may disallow such payment or recover such profit, as the case may be, on the audit of the liquidator's account (*g*).

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by the
Court.

Making
profit.

864. The liquidator must keep a distinct account of the trading, incorporating in the cash book the total weekly amount of the receipts and payments (*h*). The trading account must from time to time, and not less than once in every month, be verified by affidavit, and submitted to the committee of inspection (if any), or such member as may be appointed by the committee for that purpose, to be examined and certified (*i*).

Liquidator's
trading
account.

865. The liquidator is not liable for loss occasioned by the felonious acts of servants, if properly selected and employed (*k*).

Felonious act
of servants.

SUB-SECT. 10.—*Proof of Debts.*

(i.) *In General.*

866. In a winding up by the court every creditor must prove his debt, unless the judge in any particular winding up gives directions that any creditors or class of creditors shall be admitted without proof (*l*). A creditor must bear the cost of proving his debt, unless the court otherwise orders (*m*).

When debts
must be
proved.

867. The court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved (*n*). This power has been delegated to the liquidator (*o*). Subject to the Act of 1908, and unless otherwise ordered by the court, the liquidator in any winding up may from time to time fix a

Limitation
of time.

(*e*) The cost of obtaining the sanction must be borne by the person in whose interest it is obtained, and is not payable out of the company's assets (Companies (Winding-up) Rules, r. 159).

(*f*) *Ibid.*, r. 157.

(*g*) *Ibid.*, r. 158. As to the similar rule which applies to dealings by a liquidator with moneys in his hands, see *Re Anon.* (1866), 15 L. T. 170.

(*h*) Companies (Winding-up) Rules, r. 171 (1).

(*i*) *Ibid.*, r. 171 (2).

(*k*) *Johnson v. Palmer*, [1893] 1 Ch. 71.

(*l*) Companies (Winding-up) Rules, r. 88.

(*m*) *Ibid.*, r. 94.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 169 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 107].

(*o*) *Ibid.*, s. 173 (*e*) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 13].

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Court.

certain day (not being less than fourteen days from the date of the notice) on or before which the company's creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved. He must give notice in writing of the day so fixed by advertisement in such newspaper as he considers convenient. The notice must also be given, in a winding up by the court, to every person mentioned in the statement of affairs as a creditor who has not proved his debt, and, in any other winding up, to the last known address or place of abode of each person who, to the knowledge of the liquidator, claims to be a creditor of the company and whose claim has not been admitted (*p*).

Proof after
expiration of
time limit.

Whenever there are funds in court or otherwise available, a creditor, although the time appointed for his bringing in his claim has long elapsed, is invariably allowed to prove, subject to terms as to costs and as regards dividends already paid (*q*).

(ii.) *Debts Provable.*

What debts
are provable.

868. In every winding up all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, are admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value (*r*).

A creditor may prove for a debt not payable at the date of the winding-up order or resolution as if it were payable presently, and may receive dividends equally with the other creditors; but a rebate of interest must be deducted at the rate of £5 per cent. per annum, computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted (*s*).

Claims under contracts made on behalf of a company before its registration, or before it is entitled to commence business,

(*p*) Companies (Winding-up) Rules, r. 102; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147.

(*q*) *Harrison v. Kirk*, [1904] A. C. 1; *Re McMurdo, Penfield v. McMurdo*, [1902] 2 Ch. 684, C. A.; *Re General Rolling Stock Co., Joint Stock Discount Co.'s Claim* (1872), 7 Ch. App. 646; *Re Kit Hill Tunnel, Ex parte Williams* (1881), 16 Ch. D. 590. As to secured creditors, see *Re Lee, Ex parte Good* (1880), 14 Ch. D. 82, C. A.; *Re Metcalfe, Hicks v. May* (1879), 13 Ch. D. 236, C. A.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 206 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 158]. This is subject in the case of insolvent companies to the application, in accordance with the provisions of the Act, of the law of bankruptcy (*ibid.*). As to the application of bankruptcy rules, see p. 512, *post*. The rule in bankruptcy, that there cannot be a double proof so as to entitle a creditor to receive two dividends from one estate in respect of the same debt, was applied in the winding up of companies long before the bankruptcy rules were made applicable in the case of insolvent companies (*Re Oriental Commercial Bank, Ex parte European Bank* (1871), 7 Ch. App. 99).

(*s*) Companies (Winding-up) Rules, r. 98. This rule applies where the company is insolvent (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 21); and see *Re Broune and Wingrove, Ex parte Ador*, [1891] 2 Q. B. 574, C. A.

cannot be proved for unless the contracts have been adopted by the company (t).

Proof may be made for damages for breach of contract such as, for instance, for breach of a contract to buy goods (u); to purchase a business (a); to repair a ship (b); to give fully-paid shares in satisfaction of a debt (c), or to employ a person as a servant of the company (d); and the claim may include the damage sustained under a continuing breach of contract after the winding up commenced (e), or for breach of contracts.

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Court.

869. The making of a winding-up order (f), or the appointment of a receiver in a debenture-holder's action (g), operates as a wrongful dismissal of the servants of the company; and damages are allowed for breach of the contract of service (h). Where by the contract a liquidated sum is to be paid to a servant in case the contract is determined before the expiration of the term of service, proof is allowed for the agreed sum (i). Where there is no such agreement, proof is allowed for the present value of the salary for the remainder of the term, less a deduction in respect of the servant being at liberty to obtain other employment (j). Where an agent is to be paid partly by salary and partly by a commission on business done, he is not entitled to prove for loss of commission (k). When, however, payment is entirely by commission, proof is allowed in respect of commission which might have been earned during the remainder of the period of service fixed by the agreement (l).

Dismissal of
servants.

870. The Statutes of Limitation cease to run against a creditor on a winding-up order being made, and he is allowed to prove at any time before the company is dissolved, but so as not to interfere

Statutes of
limitation.

(t) *Re National Motor Mail-Coach Co., Ltd., Clinton's Claim*, [1908] 2 Ch. 515, C. A.; *New Druce-Portland Co. v. Blakiston* (1908), 24 T. L. R. 583.

(u) *Re Central Corporation, Claim of Ebbw Vale Co.* (1869), L. R. 8 Eq. 14.

(a) *Lafitte & Co. v. Lafitte* (1873), 42 L. J. (CH.) 716, H. L.

(b) *Ibid.*

(c) *Re Railway Time Tables Publishing Co., Ex parte Welton*, [1899] 1 Ch. 108.

(d) See *infra*.

(e) *Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co.* (1868), 4 Ch. App. 112.

(f) The decisions whether a voluntary winding up operates as a dismissal of servants are conflicting; but the better opinion is that it does not; see *Shirreff's Case* (1872), L. R. 14 Eq. 417; *Midland Counties District Bank, Ltd. v. Attwood*, [1905] 1 Ch. 357.

(g) *Reid v. Explosives Co.* (1887), 19 Q. B. D. 264, C. A.; *Brace v. Calder*, [1895] 2 Q. B. 253, C. A.

(h) *Chapman's Case* (1866), L. R. 1 Eq. 346; *Macdowall's Case* (1886), 32 Ch. D. 366; and see, *Re English Joint Stock Bank, Ex parte Harding* (1867), L. R. 3 Eq. 341.

(i) *Re English and Scottish Bank, Ex parte Logan* (1870), L. R. 9 Eq. 149; *Shirreff's Case*, *supra*. As to the effect of an agreement for payment of a share of "net profits," see *Framms v. Bultfontein Mining Co.*, [1891] 1 Ch. 140.

(j) *Yelland's Case* (1867), L. R. 4 Eq. 350; *Re London and Colonial Co., Ex parte Clark* (1869), L. R. 7 Eq. 550; *Hartland v. General Exchange Bank, Ltd.* (1866), 14 L. T. 863; see, generally, title MASTER AND SERVANT.

(k) *Re English and Scottish Marine Insurance Co., Ex parte McClure* (1870), 5 Ch. App. 737; *Rhodes v. Forwood* (1876), 1 App. Cas. 256; compare *Ogdens, Ltd. v. Nelson*, [1905] A. C. 109.

(l) *Re Patent Floor Cloth Co. Ltd., Dean and Gilbert's Claim* (1872), 26 L. T. 467.

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by the
Court.

Proof of
particular
claims.

with dividends already paid (*m*); but a proof in respect of claims statute-barred before the order is not allowed (*n*).

871. A person holding shares in another company on which there is a liability as trustee for a company in liquidation can prove in its winding up for an indemnity against such liability (*o*).

A person holding acceptances of the company may prove in its winding up, but only for the amount actually due to him; if he has received anything from other parties, he can only prove in the winding up for the balance (*p*), although the part payment was made after the winding up commenced (*q*).

Where money lent on security of debentures is repayable on a certain date, and winding up supervenes before that date arrives, the debenture-holders are entitled to realise their security for the full amount of principal, interest, and costs, as though the time for repayment had arrived (*r*).

Money deposited by one party to a gaming and wagering contract with the other party thereto, as cover for differences, may be proved for, if there is a surplus after paying creditors in full, interest including, from the date of winding up till the date of the final dividend (*s*).

A creditor proving his debt must deduct therefrom all trade discounts, but is not compelled to deduct any discount not exceeding 5 per cent. on the net amount of his claim, which he may have agreed to allow for payment in cash (*t*).

When any rent or other payment falls due at stated periods, and the order or resolution to wind up is made at any time other than one of those periods, the persons entitled to the rent or payment may prove for a proportionate part thereof up to the date of the winding-up order or resolution as if the rent or payment accrued due from day to day (*a*).

(*m*) *Re General Rolling Stock Co., Joint Stock Discount Co.'s Claim* (1872), 7 Ch. App. 646.

(*n*) *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822.

(*o*) *Re National Financial Co., Ex parte Oriental Commercial Bank* (1868), 3 Ch. App. 791.

(*p*) *Re Oriental Commercial Bank, Ex parte Mazoudoff* (1868), 11 R. 6 Eq. 582. As to securities for payment of such acceptances, the rule in *Ex parte Waring, Inglis, Clarke* (1815), 19 Ves. 344, obtains in England (*Hickie & Co.'s Case* (1867), L. R. 4 Eq. 226; *Re Barned's Banking Co., Leech's Claim* (1871), 6 Ch. App. 388; *Re Barned's Banking Co., Ex parte Joint Stock Discount Co.* (1875), 10 Ch. App. 198; but not in Scotland (*Royal Bank of Scotland v. Commercial Bank of Scotland* (1882), 7 App. Cas. 366). For the rule in *Ex parte Waring, Inglis, Clarke*, *supra*, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 171.

(*q*) *Re Oriental Commercial Bank, Ex parte Mazoudoff*, *supra*.

(*r*) *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547, 555, O. A.; *Hodson v. Tea Co.* (1880), 14 Ch. D. 859; compare *Re Panama, New Zealand and Australian Royal Mail Co.* (1870), 5 Ch. App. 318.

(*s*) *Universal Stock Exchange v. Strachan*, [1896] A. C. 166; *Re Duncan (W. W.) & Co.*, [1905] 1 Ch. 307.

(*t*) Companies (Winding-up) Rules, r. 95.

(*a*) *Ibid.*, r. 96. But where the liquidator remains in occupation of premises demised to a company which is being wound up, nothing in the rule is to prejudice or affect the right of the landlord to claim payment by the company, or the liquidator, of rent during the period of the company's or the liquidator's occupation (*ibid.*); see *Re South Kensington Co-operative Stores* (1881), 17 Ch. D. 161. As to proof for rent payable in advance, see *Shackell & Co. v. Chorlton & Sons*, [1895] 1 Ch. 378.

872. On any debt or sum certain, payable at a certain time or otherwise, on which interest is not reserved or agreed for, and which is overdue at the date of the winding-up order or resolution, the creditor may prove for interest at a rate not exceeding 4 per cent. per annum to that date from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made, giving notice that interest will be claimed from the date of the demand until the time of payment (b). A demand may be made after the date of the winding-up order (c).

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Winding up
by the
Court.

Proof for
interest.

Interest in a winding up cannot be paid in respect of debts which do not carry interest (d).

Judgment debts carry interest at 4 per cent., even where the sum for which judgment was given carried a higher rate, unless the judgment was given as collateral security for the debt (e).

In the case of an insolvent company, creditors whose debts carry interest are entitled to dividends only on what is due for principal and interest when the winding up commences (f). This rule does not prevent a secured creditor from receiving dividend for the full amount of the principal, and also paying himself the interest out of the security (g). Nor does it prevent a creditor who has a right of proof against two insolvent companies from receiving dividends from both until he has been paid in full the amount of his proof and of the interest accruing due after the winding up commenced (h). A secured creditor who has realised his security cannot, however, apply the proceeds first in payment of interest since the winding up, and then of principal, and prove for the balance; his proof must be for the sum due at the winding up, less the amount realised from the security, though he may set off

Amount
receivable.

(b) Companies (Winding-up) Rules, 1909, r. 97.

(c) *Re East of England Banking Co.* (1868), 4 Ch. App. 14.

(d) *Re Herefordshire Banking Co.* (1867), L. R. 4 Eq. 250; *Re East of England Banking Co.*, *supra*; compare *Re Hatfield Cask Co.* (1863), 11 W. R. 971; *Re State Fire Insurance Co.* (1864), 11 L. T. 489. As to interest on express or implied contracts, see *Caledonian Rail. Co. v. Carmichael* (1870), L. R. 2 Sc. & Div. 56, 66; and title MONEY AND MONEY-LENDING. As to interest on debentures to cover an overdraft, see *Re Vint & Sons, Ltd.*, [1905] 1 I. R. 112. As to interest on bills of exchange and promissory notes, see title BILLS OF EXCHANGE ETC., Vol. II., pp. 524, 525. As to interest on debts or sums certain payable under an instrument in writing at a time certain, or in other cases after demand, see Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 28; *London, Chatham and Dover Rail. Co. v. South Eastern Rail. Co.*, [1893] A. C. 429; and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 232.

(e) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 17; R. S. C., Ord. 42, r. 16, Ord. 58, r. 19; *Re European Central Rail. Co., Ex parte Oriental Financial Corporation* (1876), 4 Ch. D. 33, C. A.; *Re Agriculturist Cattle Insurance Co., Ex parte Hughes* (1872), 4 Ch. D. 34, n., C. A.; compare *Popple v. Sylvester* (1862), 22 Ch. D. 98.

(f) *Warrant Finance Co.'s Case* (1869), 4 Ch. App. 643; *Re Whitaker, Whitaker v. Palmer (Thomas), Ltd.*, [1904] 1 Ch. 299; *Re Salt & Co.*, [1908] W. N. 63; see *Re International Contract Co., Hughes' Claim* (1872), L. R. 13 Eq. 623.

(g) *Warrant Finance Co.'s Case* (No. 2) (1869), 5 Ch. App. 88; *Economic Assurance Society v. Osborne*, [1902] A. C. 147.

(h) *Warrant Finance Co.'s Case* (No. 2), *supra*

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Winding up
by the
Court.

against interest profits arising from the security during the winding up (i). The mere fact that a creditor, on being paid the whole amount of his proof, gives a receipt for it "in full discharge" of his claim, or that the amount of the proof was adjudicated on, does not prevent his claiming interest after the date of the winding-up order, if the assets prove sufficient (k).

In the case of a solvent company, each dividend is treated as an ordinary payment on account, and applicable first in payment of interest then due, and then in reduction of principal (l).

(iii.) *Application of Bankruptcy Rules.*

Bankruptcy
rules
applicable.

873. In the winding up of an insolvent company, the respective rights of secured and unsecured creditors, the debts provable, and the valuation of annuities and future and contingent liabilities are regulated by the same rules as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this provision (m).

This provision is applicable to any company in liquidation until it is shown that its assets are sufficient for payment of its debts in full (n) and the expenses of the winding up (o); and it makes applicable in the winding up of an insolvent company the bankruptcy rules (1) as to proofs by secured creditors (p); (2) as to mutual credits and set-off (q), except that no set-off is allowed against calls unless the contributory is bankrupt (a); (3) as to debts and liabilities provable (b); and (4) as to interest on

(i) *Quartermaine's Case*, [1892] 1 Ch. 639; compare *Re Savin* (1872), 7 Ch. App. 760 (a bankruptcy case).

(k) *Re Duncan (W. W.) & Co.*, [1905] 1 Ch. 307; as to interest on moneys deposited to cover differences on a gambling transaction, see p. 510, *ante*.

(l) *Warrant Finance Co.'s Case* (1869), 4 Ch. App. 643; *Ebbw Vale Co.'s Case* (1869), 5 Ch. App. 112.

(m) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 207 [Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10]. As to the object of s. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), see *Re Withernsea Brickworks* (1880), 16 Ch. D. 337, 342, 343, C. A.; *Re Hopkins, Williams v. Hopkins* (1881), 18 Ch. D. 370, 377, C. A.; *Re D'Epineuil (Count), Tadman v. D'Epineuil* (1882), 20 Ch. D. 217; *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch. D. 587, 591, C. A.; *Gorringe v. Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, C. A.

(n) *Re Milan Tramways Co., Ex parte Theys*, *supra*.

(o) See *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652, C. A.

(p) *Quartermaine's Case*, [1892] 1 Ch. 639; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 226 *et seq.*

(q) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (1884), 26 Ch. D. 624; *Gill's Case* (1879), 12 Ch. D. 755; *Re Auriferous Properties, Ltd.*, [1898] 1 Ch. 691; see further pp. 514, 515, *post*; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 211—215.

(a) See p. 515, *post*.

(b) *Re Northern Counties of England Fire Insurance Co., MacFarlane's Claim* (1881), 17 Ch. D. 337; *Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, A. As to debts provable or not provable in bankruptcy, see title BANKRUPTCY

debts (c). Hence, all liabilities of a company are provable in winding up, except demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, and except liabilities which in the opinion of the court cannot be fairly estimated (d).

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by the
Court.

The following bankruptcy rules are not applicable in winding up, namely, those relating to (1) the restriction on the rights of an execution creditor (e); or (2) reputed ownership (f); or (3) the landlord's right to distrain for rent accrued due before the winding up (g); or (4) the right to disclaim leases and onerous contracts (h); or (5) the abolition of the priority of the Crown against the property of the debtor (i); or (6) the avoidance of unregistered bills of sale, as against the trustee in bankruptcy (k); or (7) a secured creditor not being a good petitioning creditor unless by his petition he offers to surrender his security or estimates its value at an amount less than his debt (l). Many of the above matters do not arise in the winding-up of companies (m).

Rules not
applicable.

874. There are frequently creditors in a winding up whose claims are in respect of contingent debts. The liquidator must estimate the value of their claims subject to the right to appeal to the court, which, unless it thinks that the debt or liability is incapable of being fairly estimated, will assess its value, and thereupon the amount of the value becomes provable (n). Claims contingent when the

Proofs for
contingent
debts.

AND INSOLVENCY, Vol. II., pp. 197—235. As to double proof, see *Re Oriental Commercial Bank, Ex parte European Bank* (1871), 7 Ch. App. 99.

(c) *Re Salt (Thomas) & Co., Ltd.* (1908), 98 L. T. 558; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 232, 233.

(d) As to proofs for unliquidated damages for torts or otherwise, and for damages ascertained by verdict or otherwise, see *Watson v. Holliday* (1882), 20 Ch. D. 780; *Re Lennox, Ex parte Lennox* (1885), 16 Q. B. D. 315, C. A.; *Re Tollemache, Ex parte Revell* (No. 1) (1884), 13 Q. B. D. 720, C. A.; *Re Blythe, Ex parte Banner* (1881), 17 Ch. D. 480, C. A.; *Re Onslow, Ex parte Kibble* (1875), 10 Ch. App. 373; *Jack v. Kipping* (1882), 9 Q. B. D. 113; compare title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 198.

(e) *Re Taylor, Ex parte Railway Steel and Plant Co.* (1878), 8 Ch. D. 183; *Re Richards & Co.* (1879), 11 Ch. D. 676; *Re Withernsea Brickworks* (1880), 16 Ch. D. 337, C. A., overruling *Re Printing and Numerical Registering Co.* (1878), 8 Ch. D. 535; *Pratt v. Inman* (1889), 43 Ch. D. 175; *Re National United Investment Corporation*, [1901] 1 Ch. 950.

(f) *Re Crumlin Viaduct Works Co.* (1879), 11 Ch. D. 755; *Gorringe v. Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, C. A.

(g) *Re Coal Consumers Association* (1876), 4 Ch. D. 625; *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181; *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250, C. A.

(h) *Re Westbourne Grove Drapery Co.* (1877), 5 Ch. D. 248.

(i) *Re Oriental Bank Corporation, Ex parte The Crown* (1884), 28 Ch. D. 643. The bankruptcy rule as to the priority of rates did not apply (*Re Albion Steel and Wire Co.* (1878), 7 Ch. D. 547). As to the priority of rates now, see p. 516, *post*.

(k) *Re D'Epineuil (Count), Tadman v. D'Epineuil* (1882), 20 Ch. D. 217; *Re Whitaker, Whitaker v. Palmer*, [1901] 1 Ch. 9, C. A.

(l) *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681.

(m) As to the valuation of and proof for annuities, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 203; *Re British Nation Life Assurance Association, Ex parte Young and Garrett* (1879), 27 W. R. 443, C. A.

(n) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 37; see title BANK- AND INSOLVENCY, Vol. II., pp. 198, 199.

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Winding up
by the
Court.

Proof by
 lessors.

winding up commenced, but ascertained during the winding up, may be admitted to proof for the ascertained amount, but not so as to disturb previous dividends (o).

875. When the company is lessee of leasehold premises, then, if the lessor is willing that the lease should be determined, he may prove for the loss thereby sustained by him (a). If he is not willing to accept a surrender of the lease, he can only prove for rent accrued and breaches of covenant committed prior to the date of the proof (b). He may, however, in the latter case enter a claim for the whole of the future rent (c), and, though he cannot have a sum equal to a dividend (at the rate paid to other creditors) on the amount of this claim impounded for his benefit (d), distribution of the assets amongst contributories will not be allowed until the claim has been provided for (e).

Mutual
 credits.

876. The mutual credit clause in bankruptcy (f) does not apply as between a contributory and the company so as to enable him to set off a debt due to him against calls made in a winding up, unless he is a bankrupt; but it applies to every creditor of an insolvent company other than a contributory (g). For the purposes of set-off the commencement of the winding up fixes the rights of the parties (h). Mutual credits are not allowed when the result would be to make a fraudulent preference (i). The mutual credit clause is only applicable where the claims on each side are such as result in pecuniary liabilities. Thus, a claim for money cannot be set off against one for return of goods (k). A surety for a company's debt,

(o) *Re Northern Counties of England Fire Insurance Co., MacFarlane's Claim* (1880), 17 Ch. D. 337; compare *Re Bridges, Hill v. Bridges* (1881), 17 Ch. D. 342; *Holdich's Case* (1872), L. R. 14 Eq. 72, 80.

(a) *Re Panther Lead Co.*, [1896] 1 Ch. 978.

(b) *Re New Oriental Bank Corporation* (No. 2), [1895] 1 Ch. 753; see, however, *Craig's Claim*, [1895] 1 Ch. 267, 276, C. A.; *Re Panther Lead Co.*, *supra*, where it was said that the earlier cases would have to be reconsidered, having regard to *Hardy v. Fothergill* (1888), 13 App. Cas. 351 (a bankruptcy case).

(c) *Re Haytor Granite Co.* (1865), 1 Ch. App. 77; *Re New Oriental Bank Corporation* (No. 2), *supra*.

(d) *Re London and Colonial Co., Horsey's Claim* (1868), L. R. 5 Eq. 561; compare *Re Westbourne Grove Drapery Co.* (1877), 5 Ch. D. 248.

(e) *Oppenheimer v. British and Foreign Exchange and Investment Bank* (1877), 6 Ch. D. 744; *Gooch v. London Banking Association* (1886), 32 Ch. D. 41, C. A.; *Elphinstone (Lord) v. Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332; *Craig's Claim*, *supra*; compare *Re Telegraph Construction Co.* (1870), L. R. 10 Eq. 384 (a case of reduction of capital). The existence of continuing contractual obligations may prevent the dissolution of a company (*Tolhurst v. Associated Portland Cement Manufacturers* (1900), [1902] 2 K. B. 660, C. A., *per COZENS-HARDY, L.J.*, at pp. 678, 679; affirmed, [1903] A. C. 414).

(f) Bankruptcy Act, 1863 (46 & 47 Vict. c. 52), s. 38; see title **BANKRUPTCY AND INSOLVENCY**, Vol. II., pp. 211—215.

(g) *Campbell's Case* (1876), 4 Ch. D. 470, 475; *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434. As to contributories, see p. 503, *ante*.

(h) *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch. D. 587, 591, C. A.; *Sankey Brook Coal Co. v. Marsh* (1871), L. R. 6 Exch. 185; *Re United Ports and General Insurance Co., Ex parte Etna Insurance Co.* (1877), 46 L. J. (CH.) 403.

(i) *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95, C. A.

(k) *Eberle's Hotels and Restaurant Co. v. Jonas* (1887), 18 Q. B. D. 459, C. A.

who pays the debt after the winding up commenced, may set off the amount paid against a debt due from him to the company when the winding up commenced (*l*).

SECT. 16.
Winding up
by the
Court.

(iv.) *Set-off.*

877. The right of set-off may be exercised in respect of claims arising before the winding up commenced, although not ascertained until afterwards (*m*); and unliquidated damages for breach of contract can be set off against a liquidated sum (*n*). The liquidator may disallow a proof, in whole or in part, if the company, as a matter of account, has a set-off (*o*). Against
creditors.

A surety may prove in the winding up of an insolvent company, although he has not paid the debt for which he is liable (*p*).

As between the company and those of its creditors who are not contributories, if the company is solvent the ordinary law as to set-off is applicable (*q*); but if the company is insolvent the bankruptcy rules as to set-off apply (*r*).

A debt to a company contracted after the commencement of a winding up cannot be set off against a debt owing by the company before the commencement of the winding up (*s*). Where a director, who is ordered to pay money under a misfeasance summons, is a debenture-holder, and after the commencement of the winding up, but before the issue of the summons, has transferred his debentures, the transferee is entitled to payment of the moneys due on the debentures, and the company cannot set off the moneys due under the misfeasance order (*t*).

Moneys handed to a creditor for a specific purpose cannot be retained by him by way of set-off against a debt owing to him; such moneys, if not applied for the specified purpose, must be returned (*u*).

Claims resulting in pecuniary liabilities may be set off (*a*).

(*l*) *Re Moseley Green Coal and Coke Co., Ltd., Barrett's Case* (No. 2) (1865), 4 De G. J. & Sm. 756.

(*m*) *Re Progress Assurance Co., Ex parte Bates* (1870), 39 L. J. (CH.) 496.

(*n*) *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; *Eberle's Hotels and Restaurant Co. v. Jones* (1887), 18 Q. B. D. 459, C. A.; compare *Re South Blackpool Hotel Co., Ex parte James* (1869), L. R. 8 Eq. 225.

(*o*) *Re National Wholemeal Bread and Biscuit Co.*, [1892] 2 Ch. 457. Applications by way of appeal from his decision should be made in chambers (*ibid.*). An applicant, if successful, will be allowed his costs of appeal out of the assets, but not his costs of proof (*ibid.*).

(*p*) *Re Herepath and Delmar, Ex parte Delmar* (1890), 38 W. R. 752.

(*q*) *Anderson's Case* (1866), L. R. 3 Eq. 337. As to set-off in relation to contributories, see p. 502, *ante*. As to set-off generally, see title SET-OFF AND COUNTERCLAIM.

(*r*) *Sankey Brook Coal Co. v. Marsh* (1871), L. R. 6 Exch. 185; *Ince Hall Rolling Mills Co. v. Douglas Forge Co.* (1882), 8 Q. B. D. 179; see p. 514, *ante*.

(*s*) See cases cited in note (*n*), *supra*.

(*t*) *Re Goy & Co., Ltd., Farmer v. Joy & Co., Ltd.*, [1900] 2 Ch. 149; *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch. D. 587, C. A.; and see *Re Brown and Gregory, Ltd., Shephard v. Brown and Gregory, Ltd., Andrews v. Brown and Gregory, Ltd.*, [1904] 2 Ch. 448; *Re Rhodesia Goldfields, Ltd., Partridge v. Rhodesia Goldfields, Ltd.*, [1910] W. N. 7.

(*u*) *Re Mid-Kent Fruit Factory*, [1896] 1 Ch. 567.

(*a*) *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q. B. 573, C. A.; *Biggerstaff v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93, C. A.

SECT. 16.

(v.) *Priority of Debts.***Winding up
by the
Court.**What are
assetsPriority of
Crown debts.

878. The assets available for distribution in the winding up are those which remain after satisfying the claims of secured creditors (b) so far as their rights have not been affected by statute (c).

879. Subject to the express provisions of the Act of 1908 with regard to assessed taxes, land tax, and property or income tax (d), debts owing by the company to the Crown have priority over all other unsecured debts (e), a surety who has paid a Crown debt being entitled to the same priority (f). Where there is competition between the Crown and a subject as regards proceedings by distress, the Crown has priority though the subject's distress was put in first (g).

Preferential
debts.Rates and
taxes.

880. The security of some secured creditors is postponed, and the Crown's priority among unsecured creditors is affected, by the special preference given to the following debts, which have priority over other debts and rank equally *inter se*, namely:—
(1) All parochial or other local rates (h) which were due from the company at the date of the winding-up order when there is no previous voluntary winding up (i), and which became due and payable within the preceding twelve months, and all assessed taxes, land tax, property or income tax assessed on the company up to the preceding April 5th, not exceeding in the whole one year's assessment (j); (2) all wages or salary of any clerk or

(b) See p. 519, *post*

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209; see *infra*.

(d) Reversion duty has no priority (Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 15 (1)).

(e) *Re Oriental Bank Corporation, Ex parte The Crown* (1884), 28 Ch. D. 643; *New South Wales Taxation Commissioners v. Palmer*, [1907] A. C. 179, P. C.; *Re Henley & Co.* (1878), 9 Ch. D. 469, C. A.; *Re West London Commercial Bank* (1888), 38 Ch. D. 364. As to what are Crown debts, see *Fox v. Newfoundland Government*, [1898] A. C. 667, P. C.; and see *Exchange Bank of Canada v. R.* (1886), 11 App. Cas. 157, P. C.

(f) *Re Churchill (Lord), Manisty v. Churchill* (1888), 39 Ch. D. 174.

(g) *A.-G. v. Leonard* (1888), 38 Ch. D. 622.

(h) As to the manner in which rates are to be paid and the apportioning of water rate, see *Re Mannesmann Tube Co., Ltd., Von Siemens v. Mannesmann Tube Co., Ltd.*, [1901] 2 Ch. 93.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (5) (a). In any other case the date is that of the commencement of the voluntary winding up (*ibid.*, s. 209 (5) (b)), namely, the date of the extraordinary resolution, or of the confirmatory resolution in the case of a special resolution, and this is so whether the winding up has or has not been continued under supervision; see p. 577, *post*.

(j) The Board of Trade and the Inland Revenue authorities have authorised regulations with reference to the King's taxes, to the following effect:—

(1) Where a winding-up order is made on or after December 1st in the year of assessment, or the official receiver or liquidator remains in possession of the premises in respect of which King's taxes are assessed under a winding-up order made prior to that date until the following January 1st, the collector is entitled to prove for such taxes, namely, the income tax (Sched. A), inhabited house duty and land tax, assessed on the company up to April 5th next following the date of the winding-up order, as if such taxes had become due and payable at the date of the winding-up order, and such proof is to rank for dividend.

(2) Where a winding-up order is made prior to December 1st in the year of

servant (*k*), in respect of services rendered to the company during four months before the date, not exceeding £50; (3) all wages of any workman or labourer, not exceeding £25, whether payable for time or for piece work, in respect of services rendered to the company during two months before the date of the winding-up order (any labourer in husbandry who has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, having priority in respect of the whole or part of such sum as the court decides to be due under the contract, proportionate to the time of service up to the date of the order); and (4) (unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company), all amounts, not exceeding in any individual case £100, due in respect of compensation under the Workmen's Compensation

SECT. 16.
Winding up
by the
Court.
Wages.

assessment, the Inland Revenue authorities make no claim on the official receiver or liquidator for income tax (Sched. A), inhabited house duty, and land tax for the year ending April 5th next following the date of the winding-up order, unless the official receiver or liquidator remains in possession of the premises in respect of which the taxes are assessed until the following January 1st.

(3) Where the official receiver or liquidator disposes of a business as a going concern, he is to allow to the purchaser the proportion of the income tax (Sched. A) and land tax for the current year to the date of the completion of the purchase, and the purchaser becomes liable to the Inland Revenue authorities for the taxes in question for the whole year.

(4) Nothing in these regulations is to be deemed to interfere with the right of the Crown to enforce payment of income tax (Sched. A) and land tax, actually due and payable, by distress levied on the property of the company. These taxes for the year ending April 5th next following the date of the winding-up order must, therefore, be dealt with on the footing of secured debts, and be paid by the official receiver or liquidator on demand without any proof on the part of the collector, if on or after January 1st in the year of assessment there are on the premises sufficient goods belonging to the company on which the collector might levy, and notice of any such claim must be given to the official receiver or liquidator by the collector forthwith upon the making of the winding-up order. If at such time there are no goods upon which distress can be levied, proof of the debt may be made by the collector as directed in paragraph (1), and such proof will, if found correct, be admitted to rank for dividend.

In like manner, any income tax (Sched. A) and land tax, assessed on the company up to April 5th next before the date of the winding-up order, must be dealt with as secured debts, if there are at the time of the collector's demand sufficient goods on the premises on which he might levy. If there are no such goods, proof of the debt may be made by the collector, and such proof must, if found correct, be admitted as a preferential claim in so far as it relates to taxes payable in full under s. 209 (1) (a) of the Act of 1908, and as ranking for dividend for any part not so payable in full.

(5) Where income tax is outstanding under Schedules B, D, or E, the Inland Revenue authorities will, on receipt of an affidavit by the secretary or other officer of the company, with a certificate by the official receiver or liquidator, setting out that no income taxable under such schedule has been made, forego all claim to payment of the tax, whether the same is payable in full under s. 209 (1) (a) of the Act of 1908 or otherwise, but the waiver of claim under this regulation does not embrace rents, royalties, interest of money, or annuities, or fees, or salaries, from which deductions have been made on account of income tax.

(6) Where an affidavit by the secretary or other officer of the company cannot be obtained, the certificate of the official receiver or liquidator may be accepted as sufficient evidence.

(*k*) See *Re Smith, Ex parte Fox* (1886), 17 Q. B. D. 4.

Winding up
by the
Court.

Act, 1906 (l), the liability for which accrued before the date of the order (m).

A managing director is not a clerk or servant (n). A secretary to a company may be a clerk or servant. Where, however, the secretary does not give his whole time to the company's service, but discharges the duties of his office by a clerk appointed and paid by himself, or where he is also managing clerk to a firm of solicitors (o), he is not a clerk or servant (p). Artists employed to sing by an opera company are clerks or servants (q).

The above-mentioned preferential debts must be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions. Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, they must be discharged forthwith so far as the assets are sufficient to meet them (r).

Secured and
preferential
debts.

881. The above-mentioned debts have no preference or priority over the claims of secured creditors (s), except that (1) in the case of a registered company, so far as the assets of the company available for payment of general creditors are insufficient to meet them, they have priority over the claims of holders of debentures or debenture stock under any floating charge created by the company, and are to be paid accordingly out of any property comprised in

(l) 6 Edw. 7, c. 58; see title MASTER AND SERVANT. Where the compensation is a weekly payment, the amount due is to be taken to be the lump sum for which the weekly payments could, if redeemable, be redeemed if the employer made an application for that purpose under *ibid.*, Sched. I. (*ibid.*, s. 5 (3)). This Act is amended by s. 209 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 30], for in it the date fixed was in all cases "the date of the commencement of the winding-up." There is no priority or preference under the Act of 1906 where the company in winding up has entered into a contract with any insurers in respect of any liability under that Act to any workman, but in that case the rights of the employers against the insurers are transferred to and vested in the workman, and the insurers have the same rights and remedies, and are subject to the same liabilities, as if they were the employers, but are not under any greater liability to the workman than they would have been to the employer (Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5 (1)).

(m) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (1) [Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (1), (2); Companies Act, 1907 (7 Edw. 7, c. 50), s. 30; Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5].

(n) *Re Newspaper Proprietary Syndicate, Ltd.*, *Hopkinson v. Newspaper Proprietary Syndicate, Ltd.*, [1900] 2 Ch. 349.

(o) *Cairney v. Back*, [1906] 2 K. B. 746.

(p) *Re Callender's Paper Manufacturing Co.* (unreported), SWINFEN EADY, J., in chambers, June 30th, 1908.

(q) *Re Winter German Opera, Ltd.* (1907), 23 T. L. R. 662; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 217, 218. Wages varying in amount and paid by way of commission on the tonnage of ships constructed are wages within the Act (*Re Earle's Shipbuilding and Engineering Co.*, *Barclay & Co. v. Earle's Shipbuilding and Engineering Co.*, [1901] W. N. 78); compare *Re Klein, Ex parte Goodwin*, [1906] W. N. 148, where a commission was held to be "salary."

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (2), (3) [Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (2), (3)].

(s) *Richards v. Kidderminster Overseers*, [1896] 2 Ch. 212.

or subject to that charge (a); (2) in the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding-up order (b), they are to be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof, although in respect of any money paid under any such charge the landlord or other person who has distrained has the same rights of priority as the person to whom the payment is made (c).

SECT. 16.
Winding up
by the
Court.

Effect of
distress for
rent.

(vi.) *Secured Creditors.*

882. A secured creditor (d) need not prove at all, but may rely on his security. He may bring an action to realise it without leave in a voluntary winding up, and with the leave of

Position of
secured
creditors.

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (2) (b) [Preferential Payments in Bankruptcy Amendment Act, 1897 (60 Vict. c. 19), s. 2]. The Act of 1897 was not confined to registered companies, but applied in the winding up of any company under the Acts then in force; and see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 107.

(b) This provision, apparently, does not apply in the case of a voluntary winding up, although the provision for which it was substituted was of general application.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (4) [Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1 (4)].

(d) The definition of a "secured creditor" in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 168 (see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 44—46, 67, 224—230), applies in the winding up of insolvent companies. (*Re Lough Neagh Ship Co.*, [1896] 1 I. R. 29; *Re Whitaker*, *Whitaker v. Palmer* [1901] 1 Ch. 9, C. A.; *Re Leinster Contract Corporation*, [1903] 1 I. R. 517). The following are secured creditors in a winding-up:—Persons holding security under an execution put in, or under a garnishee order *nisi* which has been duly served (*Re Stanhope Silkstone Collieries Co.* (1879), 11 Ch. D. 160, C. A.; *Re National United Investment Corporation*, [1901] 1 Ch. 950), or under a charging order which has been duly served (*Italy v. Barry* (1868), 3 Ch. App. 452); persons holding security by agreement (*Re Printing and Numerical Registering Co.* (1878), 8 Ch. D. 535). An execution creditor who has seized land under an *elegit* is a secured creditor (*Re Gourlay*, *Ex parte Abbott* (1880), 15 Ch. D. 447, C. A.; *Re Hobson* (1886), 33 Ch. D. 493); but a creditor who obtains the appointment of a receiver, or issues a writ of sequestration, is not a secured creditor except as regards property actually in the possession of the receiver or the sequestrator (*Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154; *Re Potts*, *Ex parte Taylor*, [1893] 1 Q. B. 648, C. A.; *Re Shephard*, *Atkins v. Shephard* (1889), 43 Ch. D. 131, C. A.). A landlord having power to distrain is not in England a secured creditor (*Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322, C. A.); but in Scotland a landlord is a secured creditor (*Re Wanzer, Ltd.*, [1891] 1 Ch. 305), and so is a creditor who has arrested in Scotland, *jurisdictionis fundandæ causâ*, property of a company which is subsequently ordered to be wound up (*Re West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713; *Re Queensland Mercantile and Agency Co.*, *Ex parte Australasian Investment Co.*, *Ex parte Union Bank of Australia*, [1892] 1 Ch. 219, C. A.). In order to be a secured creditor of a company in liquidation the creditor must hold a security on property of the company at the commencement of the liquidation; a security on the property of a third person does not constitute the creditor a secured creditor of the company; see *Re Hallett & Co.*, *Ex parte Cocks*, *Biddulph & Co.*, [1894] 2 Q. B. 256, C. A. When security is taken without notice of an irregularity known to the directors, and is paid off by one of the directors, the security is valid (*Owen and Ashworth's Claim*, *Whitworth's Claim*, [1901] 1 Ch. 115, C. A.).

SECT. 16.
Winding up
by the
Court.

Proof of
 amount due.

the court in a compulsory winding up or in a winding up under supervision (e),

883. Where a secured creditor of an insolvent company proves for his debt, the rules in bankruptcy applicable to proofs by secured creditors apply (f). If he realises his security, the amount for which he may prove (g) is the balance arrived at by deducting from the amount due, when the winding up commenced, for principal and interest, the net amount realised; but he may set off profits arising from the security after the commencement of the winding up interest accrued during the same period (h). He may prove for his whole debt if he surrenders his security (i). If he proves for his whole debt, or votes in respect of it, he thereby elects to surrender his security; but the court may allow him to amend his proof in case of inadvertence (k). Where the company is solvent, he may prove for the whole amount of his debt without giving credit for the value of his security (l), if he has not realised his security and his debt is ascertained (m). Where he holds debentures as collateral security for a debt less than the nominal amount of the debentures, he cannot prove for an amount greater than his debt (n).

Valuation and
 redemption.

884. For the purposes of voting, a secured creditor must, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and he is entitled to vote only in respect of the balance (if any) due to him after deducting the value of the security (o). The official receiver or liquidator may, within twenty-eight days after a proof estimating the value of a security has been used in voting at a meeting, require the creditor to give up the security for the benefit of the creditors generally on payment of the estimated value with an addition of 20 per cent. The creditor may, at any time before being required to give up his security,

(e) *Re Longdendale Cotton Spinning Co.* (1878), 8 Ch. D. 150.

(f) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., rr. 9—17; and title **BANKRUPTCY AND INSOLVENCY**, Vol. II., pp. 44—46, 67, 224—230.

(g) Companies (Winding-up) Rules, r. 9.

(h) *Quartermaine's Case*, [1892] 1 Ch. 639. As to proof in regard to interest, see *Re Savin* (1872), 7 Ch. App. 760; and p. 511, *ante*. Proof is allowed for the balance after dividends have been paid, but not so as to disturb such distribution (*Re K&H Hill Tunnel, Ex parte Williams* (1881), 16 Ch. D. 590).

(i) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 10.

(k) *Re Lister (Henry) & Co., Ltd., Ex parte Huddersfield Banking Co.*, [1892] 2 Ch. 417; Companies (Winding-up) Rules, r. 135. As to what is inadvertence, see *Re Safety Explosives, Ltd.*, [1904] 1 Ch. 226, C. A.; *Re Rowe, Ex parte West Coast Gold Fields, Ltd.*, [1904] 2 K. B. 489; *Re Burr, Ex parte Clarke* (1892), 67 L. T. 232.

(l) *Kellock's Case, Re Xeres Wine Shipping Co., Ex parte Alliance Bank* (1869), 3 Ch. App. 769.

(m) *Re Barned's Banking Co., Coupland's Claim* (1869), L. R. 8 Eq. 472.

(n) *Re Blakely Ordnance Co., Metropolitan and Provincial Bank's Claim* (1869), L. R. 8 Eq. 244; compare *Warrant Finance Co.'s Case* (No. 2) (1869), 5 Ch. App. 88. As to the rights of the creditors as regards the holders of *pari passu* debentures, see *Re Regent's Canal Ironworks Co.* (1876), 3 Ch. D. 43.

(o) Companies (Winding-up) Rules, r. 135. As to the effect of voting for the whole debt, see *s*

correct the valuation by a new proof and deduct the new value from his debt; but in that case the 20 per cent. addition is not to be made if the security is required to be given up (*p*).

SECT. 16.
Winding up
by the
Court.

(vii.) *Mode of Proof; Admission and Rejection of Proof.*

885. A debt may be proved in any winding up by delivering or sending through the post an affidavit verifying the debt (*q*). The affidavit may be made by the creditor himself or by some person authorised by him or on his behalf; if made by a person so authorised it must state his authority and means of knowledge (*r*). It must contain or refer to a statement of account showing the particulars of the debt, and must specify the vouchers, if any, by which the same can be substantiated (*s*). It must also state whether the creditor is or is not a secured creditor (*t*).

Affidavit.

The affidavit may, in a winding up by the court, be sworn before an official receiver or assistant official receiver, or any officer of the Board of Trade or any clerk of an official receiver duly authorised in writing by the court or the Board in that behalf (*a*). For the purpose of any of his duties in relation to proofs, the liquidator, in a winding up by the court, may administer oaths and take affidavits (*b*).

Swearing
proofs.

In a winding up by the court the affidavit proving a debt must be sent to the official receiver or, if a liquidator has been appointed, to the liquidator (*c*); in any other winding up it may be sent to the liquidator (*d*).

Lodging
proof.

886. Where a creditor seeks to prove in respect of a negotiable instrument or security on which the company is liable, the instrument or security must, subject to any special order of the court to the contrary, be produced to the official receiver, chairman of a meeting, or liquidator, as the case may be, and be marked by him before the proof can be admitted either for voting or for any purpose (*e*).

Bills and
notes.

(*p*) Companies (Winding-up) Rules, r. 136; see *Re London, Bombay and Mediterranean Bank, Ex parte Cama* (1874), 9 Ch. App. 686.

(*q*) Companies (Winding-up) Rules, r. 89. But where a creditor has to take proceedings to establish the debt or claim, the cost of such proceedings, if successful, can be proved for also (*Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, C. A.). As to costs of adjournment of a claim into court, see *Re General Estates Co., Ex parte Wright and Gamble* (1869), L. R. 8 Eq. 123; *Holden's (Henry) Case* (1869), L. R. 8 Eq. 444.

(*r*) Companies (Winding-up) Rules, r. 90.

(*s*) *Ibid.*, r. 91; and for the general form of proof of debt, see *ibid.*, Form 63. According to the form the amount is ascertained as at the date of the winding-up order, but in the case of contingent claims subsequent facts may be taken into consideration to show what the real value at that time was (*Holdich's Case* (1872), L. R. 14 Eq. 72, 80). The official receiver or liquidator to whom the proof is sent may at any time call for the production of the vouchers (Companies (Winding-up) Rules, r. 91).

(*t*) *Ibid.*, r. 92. As to secured creditors, see *ibid.*, r. 135.

(*a*) *Ibid.*, r. 93.

(*b*) *Ibid.*, r. 107.

(*c*) Proofs received by the official receiver must be handed over to the liquidator, who must give a receipt for the same on the list of proofs (*ibid.*, r. 101).

(*d*) *Ibid.*, r. 89.

(*e*) *Ibid.*, r. 100.

SECT. 16.
Winding up
by the
Court.
Wages.

887. Where there are numerous claims for wages by workmen and others employed by the company, it is sufficient if one proof for all the claims is made either by a foreman or by some other person on behalf of all. To the proof must be annexed a schedule setting forth the names of the workmen and others, and the amounts severally due to them. Any such proof is to have the same effect as if separate proofs had been made by each of the workmen and others (*f*).

Admission
and rejection.

888. The liquidator(*g*) must examine every proof of debt lodged with him and the grounds of the debt. Within twenty-eight days after receiving it, subject to the power of the court to extend the time(*h*), he must in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects it, he must state in writing to the creditor the grounds of the rejection(*i*). In examining a proof he may also examine a set-off, if it is a matter of account, to determine the amount to be admitted(*k*).

Filing.

889. In a winding up by the court the official receiver, where no other liquidator is appointed, must, before payment of a dividend, file all proofs tendered in the winding up, with a list of them, distinguishing the proofs which were wholly or partly admitted and the proofs which were wholly or partly rejected(*l*).

Every liquidator in a winding up by the court (other than the official receiver) must on the first day of every month file with the registrar of the court a certified list of all proofs, if any, received by him during the preceding month, distinguishing the proofs admitted, those rejected, and such as stand over for further consideration. In the case of proofs admitted or rejected, he must cause the proofs to be filed with the registrar(*m*).

Appeal.

890. If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the court may, on the application of the creditor or contributory, reverse or vary the decision(*n*).

(*f*) Companies (Winding-up) Rules, r. 99.

(*g*) As to the powers of the official receiver as liquidator, see pp. 424 *et seq.*, *ante*.

(*h*) Companies (Winding-up) Rules, r. 113. Where the liquidator has given notice of his intention to declare a dividend (see *ibid.*, Form 67), he must, within fourteen days after the date mentioned in the notice as the latest date up to which proofs must be lodged, examine, and in writing admit or reject, or require further evidence in support of, every proof which has not been already dealt with, and must give notice of his decision, rejecting a proof wholly or in part, to the creditors affected thereby. Where a creditor's proof has been admitted, the notice of dividend (see *ibid.*, Form 71) is a sufficient notification of the admission (*ibid.*, r. 113). Subject to the power of the court to extend the time in a winding up by the court, the official receiver, as liquidator, must not later than fourteen days from the latest date specified in the notice of his intention to declare a dividend (see *ibid.*, Form 67) as the time within which such proofs must be lodged, in writing either admit or reject wholly, or in part, every proof lodged with him, or require further evidence in support of it (*ibid.*, r. 112).

(*i*) *Ibid.*, r. 103; and for the form of notice of rejection of proof, see *ibid.*, Form 65.

(*k*) *Re National Wholemeal Bread and Biscuit Co.*, [1892] 2 Ch. 457.

(*l*) Companies (Winding-up) Rules, r. 109.

(*m*) *Ibid.*, r. 110; and for the form of list of proofs to be filed, see *ibid.*, Form 66.

(*n*) *Ibid.*, r. 104. A contributory creditor, unless he is the one whose proof is rejected, can only be interested where the proof is admitted; for the admission

Subject to the court's power to extend the time, no such application can be entertained unless notice of the application is given before the expiration of twenty-one days from the date of service of the notice of rejection (o).

SECT. 16.
Winding up
by the
Court.

The liquidator (including the official receiver when he is liquidator) must, within three days after receiving notice from a creditor of his intention to appeal against a decision rejecting a proof, file the proof with the registrar, with a memorandum of his disallowance (p).

891. If the liquidator thinks that a proof has been improperly admitted, the court may on his application, after notice to the creditor who made the proof, expunge the proof or reduce its amount (q). The court may also expunge or reduce a proof upon the application of a creditor or contributory if the liquidator declines to interfere in the matter (r).

Expunging
by court.

SUB-SECT. 11.—*Distribution of Assets.*

(i.) *In General.*

892. Although in a compulsory winding up there is no statutory provision, as in the case of a voluntary winding up (s), that all costs, charges, and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall be payable out of the assets in priority to all other claims, the same principle is practically applied (t). After the costs, charges, and expenses have been paid, the assets are to be applied in payment of the company's debts and liabilities to creditors (a). When the creditors have been paid in full, any surplus is to be distributed amongst the contributories according to their rights *inter se* as adjusted by the court (b).

How assets
to be applied.

(ii.) *Payment of Costs, Charges, and Expenses.*

893. Whether the winding up is compulsory or voluntary, all claims of creditors in respect of costs ought *prima facie* to be dealt with in the winding up in accordance with the rules applicable to the distribution of the assets (c).

Rules
applicable.

Costs which a company has previously to the winding up been

results in a diminution of the assets (*Re Canadian Pacific Colonization Corporation* (1891), 40 W. R. 40). The right of appeal is not confined to creditors whose proofs have been dealt with. An appeal is by application to chambers even where it is from the official receiver (*Companies (Winding-up) Rules*, r. 5).

A successful appellant is allowed his costs of appeal (*Re National Wholemeal Bread and Biscuit Co.*, [1892] 2 Ch. 457). The official receiver is in no case liable personally for the costs of an appeal; see *Companies (Winding-up) Rules*, r. 114.

(o) *Companies (Winding-up) Rules*, r. 104.

(p) *Ibid.*, r. 111.

(q) *Ibid.*, r. 105.

(r) *Ibid.*, r. 106; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 234, 235.

(s) *Companies (Consolidation) Act*, 1908 (8 Edw. 7, c. 69), s. 196.

(t) *Webb v. Whiffin* (1872), L. R. 5 H. L. 711, 735.

(a) *Companies (Consolidation) Act*, 1908 (8 Edw. 7, c. 69), ss. 123, 158, 163 (1), 166, 169.

(b) *Ibid.*, s. 170; see *Re Bridgewater Navigation Co., Ltd.*, *Birch v. Cropper* (1889), 14 App. Cas. 525.

(c) *Re Wenborn & Co.*, [1905] 1 Ch. 413. That is to say, the creditor must prove if his action was commenced before winding up, although judgment is

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Winding up
by the
Court.

Actions com-
menced
before wind-
ing up.

ordered to pay are provable in the winding up if the sum recovered in the proceedings in which they were ordered to be paid is provable, and the order to pay them is made before the company goes into liquidation (d).

If an action is pending to which the company is a party, and the company by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant, and must in case of failure pay the costs in full (e). Thus, where an action by the company, commenced before winding up, is continued afterwards by leave, the defendant, if he obtains judgment for costs, is entitled to be paid in full as from the commencement of the action (f). Where an action has been brought against a company before winding up, and the plaintiff subsequently recovers judgment for damages and costs, the costs are ordered to be paid in full out of the assets (g). But the costs of a representative action brought before winding up, although commenced by shareholders against promoters for the company's benefit, cannot, if the action is continued after the winding up without leave, and afterwards dismissed by consent, be paid out of the assets (h).

Actions
brought after
winding up.

Where, while the winding up is pending, an action or other proceeding is brought in the name of the company or by its liquidator, and an order for costs is made against it or him, the costs are payable in full out of the assets in priority to the costs of winding up (i). Similarly, where leave is given to bring an action against the company and to the liquidator to defend it, the successful plaintiff is entitled to have his costs in full out of the assets, including his costs of obtaining leave (k).

Realisation
of assets
subject to
security.

894. Where property subject to a specific charge is realised by the liquidator in the winding up, the proceeds are applicable (1) to the costs of realisation; (2) in payment of the costs of preservation, strictly so described, so far as the other assets of the company are not sufficient; and (3) in payment of the principal, interest, and mortgagees' costs, all of which have priority over the general costs

obtained afterwards (*Re Thurso New Gas Co.* (1889), 42 Ch. D. 486; *Re Snyder Dynamite Projectile Co.*, *Peck v. Snyder Dynamite Projectile Co.*, [1893] W. N. 37).

(d) *Re Duffield, Ex parte Peacock* (1873), 8 Ch. App. 682; *Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, C. A.; *Vint v. Hudspeth* (1885), 30 Ch. D. 24, C. A. As to taxation of a solicitor's bill of costs delivered before winding up, see *Re James, Ex parte Quiller* (1850), 4 De G. & Sm. 183; *Re Marseilles Extension Railway and Land Co., Ex parte Evans* (1870), L. R. 11 Eq. 151.

(e) *Re Wenborn & Co.*, [1905] 1 Ch. 413.

(f) *Re London Drapery Stores*, [1898] 2 Ch. 684.

(g) *Re Wenborn & Co.*, *supra*.

(h) *Re Hull Central Drapery Co.* (1880), 15 Ch. D. 326, C. A. As to the costs where an action by the company before winding up is afterwards discontinued, see *Re United Service Association*, [1901] 1 Ch. 97.

(i) *Re Wenborn & Co.*, *supra*; *Re Home Investment Society* (1880), 14 Ch. D. 167; *Madrid Bank v. Pelly* (1869), L. R. 7 Eq. 442; *Re Bank of Hindustan, China, and Japan, Ex parte Levick* (1867), L. R. 5 Eq. 69; *Re Bank of Hindustan, China, and Japan, Ex parte Smith* (1867), 3 Ch. App. 125; *Ferraro's Case*, (1874), 9 Ch. App. 355. As to the lien of the successful party's solicitor, see *Re Bank of Hindustan, China, and Japan, Ex parte Smith*, *supra*.

(k) *Bailey and Leatham's Case* (1869), L. R. 8 Eq. 94; *Re Wenborn & Co.*, *supra*.

of the liquidation and the costs of carrying on the business of the company (*l*). When money recovered in misfeasance proceedings by the liquidator is subject to a debenture charge, the liquidator's costs of the proceedings, but not the costs of the petition for winding up, are payable out of it in priority to the debentures (*m*).

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Court.

Where property is recovered by the company by action, the liquidator's solicitor may be entitled to claim a lien on that property for his costs (*n*). His bill of costs is part of the costs of winding up (*o*).

Solicitor's
lien.

A solicitor's lien in respect of costs incurred before winding up may be enforced by a charging order after the winding up has commenced (*p*). His lien on documents may be enforced in respect of documents which came to his hands before, and not in the course of, the winding up (*q*); but this does not apply to books or documents on which the directors had no power to create a lien, such as the share register or minute book (*r*), or other books or documents which are required to be kept at the company's office (*s*), or to the file of proceedings in the winding up, and the documents relating thereto (*t*), nor can any lien on the company's books or documents be acquired in respect of costs incurred before the incorporation of the company (*a*).

895. The assets out of which costs, whether payable to an outside litigant or as winding-up costs, are payable are those which are left after satisfying the claims of secured creditors (*b*).

Assets out of
which costs
payable.

896. The successful litigant whose costs are ordered to be paid by the liquidators or the company out of its assets is *prima facie* entitled to have his costs paid immediately, and the order of priority mentioned below does not affect the matter (*c*). The date of the order gives no priority, but payment will not be indefinitely postponed until all claims have come in (*d*). The onus is on the

Immediate
payment of
costs.

(*l*) *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601; *Re Oriental Hotels Co., Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *Re Regent's Canal Ironworks Co., Ex parte Grissell* (1875), 3 Ch. D. 411, C. A.; *Re Ormerod, Grierson & Co.*, [1890] W. N. 217; *Re Northern Milling Co.*, [1908] 1 I. R. 473; compare *Lathom v. Greenwich Ferry Co.*, [1895] W. N. 77.

(*m*) *Re Anglo-Austrian Printing and Publishing Union, Brabourne v. Same*, [1895] 2 Ch. 891; compare *Re Bonelli's Electric Telegraph Co., Cook's Claim* (No. 2) (1874), L. R. 18 Eq. 656, where a fund was paid into court to answer a particular claim.

(*n*) *Re Massey, Re Freehold Land and Brickmaking Co.* (1870), L. R. 9 Eq. 267, 368.

(*o*) *Ibid.*, at p. 369.

(*p*) *Re Born, Curnock v. Born*, [1900] 2 Ch. 433.

Re Rapid Road Transit Co., [1909] 1 Ch. 96; *Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, C. A.

(*r*) *Re Capital Fire Insurance Association, supra*.

(*s*) *Re Anglo-Maltese Hydraulic Dock Co.*, [1885] W. N. 84.

(*t*) *Re Union Cement and Brick Co., Ex parte Pulbrook* (1869), 4 Ch. App. 627.

(*a*) *Re Galland*, [1885] W. N. 224, C. A.; compare *Re English and Colonial Produce Co., Ltd.*, [1906] 2 Ch. 435, 439, C. A.; *Re National Motor Mail-Coach Co., Ltd., Clinton's Claim*, [1908] 2 Ch. 515.

(*b*) See p. 519, *ante*.

(*c*) See *Re London Metallurgical Co.*, [1895] 1 Ch. 758; Companies (Winding up) Rules, r. 187 (3).

(*d*) *Re London Metallurgical Co., supra*.

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Winding up
by the
Court.

Actions com-
 menced
 before wind-
 ing up.

Actions
 brought after
 winding up.

Realisation
 of assets
 subject to
 security.

ordered to pay are provable in the winding up if the sum recovered in the proceedings in which they were ordered to be paid is provable, and the order to pay them is made before the company goes into liquidation (*d*).

If an action is pending to which the company is a party, and the company by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant, and must in case of failure pay the costs in full (*e*). Thus, where an action by the company, commenced before winding up, is continued afterwards by leave, the defendant, if he obtains judgment for costs, is entitled to be paid in full as from the commencement of the action (*f*). Where an action has been brought against a company before winding up, and the plaintiff subsequently recovers judgment for damages and costs, the costs are ordered to be paid in full out of the assets (*g*). But the costs of a representative action brought before winding up, although commenced by shareholders against promoters for the company's benefit, cannot, if the action is continued after the winding up without leave, and afterwards dismissed by consent, be paid out of the assets (*h*).

Where, while the winding up is pending, an action or other proceeding is brought in the name of the company or by its liquidator, and an order for costs is made against it or him, the costs are payable in full out of the assets in priority to the costs of winding up (*i*). Similarly, where leave is given to bring an action against the company and to the liquidator to defend it, the successful plaintiff is entitled to have his costs in full out of the assets, including his costs of obtaining leave (*k*).

894. Where property subject to a specific charge is realised by the liquidator in the winding up, the proceeds are applicable (1) to the costs of realisation; (2) in payment of the costs of preservation, strictly so described, so far as the other assets of the company are not sufficient; and (3) in payment of the principal, interest, and mortgagees' costs, all of which have priority over the general costs

obtained afterwards (*Re Thurso New Gas Co.* (1889), 42 Ch. D. 486; *Re Snyder Dynamite Projectile Co.*, *Peck v. Snyder Dynamite Projectile Co.*, [1893] W. N. 37).

(*d*) *Re Duffield, Ex parte Peacock* (1873), 8 Ch. App. 682; *Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, C. A.; *Vint v. Hudspeth* (1885), 30 Ch. D. 24, C. A. As to taxation of a solicitor's bill of costs delivered before winding up, see *Re James, Ex parte Quiller* (1850), 4 De G. & Sm. 183; *Re Marseilles Extension Railway and Land Co., Ex parte Evans* (1870), L. R. 11 Eq. 151.

(*e*) *Re Wenborn & Co.*, [1905] 1 Ch. 413.

(*f*) *Re London Drapery Stores*, [1898] 2 Ch. 684.

(*g*) *Re Wenborn & Co.*, *supra*.

(*h*) *Re Hull Central Drapery Co.* (1880), 15 Ch. D. 326, C. A. As to the costs where an action by the company before winding up is afterwards discontinued, see *Re United Service Association*, [1901] 1 Ch. 97.

(*i*) *Re Wenborn & Co.*, *supra*; *Re Home Investment Society* (1880), 14 Ch. D. 167; *Madrid Bank v. Pelly* (1869), L. R. 7 Eq. 442; *Re Bank of Hindustan, China, and Japan, Ex parte Levick* (1867), L. R. 5 Eq. 69; *Re Bank of Hindustan, China, and Japan, Ex parte Smith* (1867), 3 Ch. App. 125; *Ferrao's Case*, (1874), 9 Ch. App. 355. As to the lien of the successful party's solicitor, see *Re Bank of Hindustan, China, and Japan, Ex parte Smith*, *supra*.

(*k*) *Bailey and Leatham's Case* (1869), L. R. 8 Eq. 94; *Re Wenborn & Co.*, *supra*.

of the liquidation and the costs of carrying on the business of the company (*l*). When money recovered in misfeasance proceedings by the liquidator is subject to a debenture charge, the liquidator's costs of the proceedings, but not the costs of the petition for winding up, are payable out of it in priority to the debentures (*m*).

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Court.

Where property is recovered by the company by action, the liquidator's solicitor may be entitled to claim a lien on that property for his costs (*n*). His bill of costs is part of the costs of winding up (*o*).

Solicitor's
lien.

A solicitor's lien in respect of costs incurred before winding up may be enforced by a charging order after the winding up has commenced (*p*). His lien on documents may be enforced in respect of documents which came to his hands before, and not in the course of, the winding up (*q*); but this does not apply to books or documents on which the directors had no power to create a lien, such as the share register or minute book (*r*), or other books or documents which are required to be kept at the company's office (*s*), or to the file of proceedings in the winding up, and the documents relating thereto (*t*), nor can any lien on the company's books or documents be acquired in respect of costs incurred before the incorporation of the company (*a*).

895. The assets out of which costs, whether payable to an outside litigant or as winding-up costs, are payable are those which are left after satisfying the claims of secured creditors (*b*).

Assets out of
which costs
payable.

896. The successful litigant whose costs are ordered to be paid by the liquidators or the company out of its assets is *prima facie* entitled to have his costs paid immediately, and the order of priority mentioned below does not affect the matter (*c*). The date of the order gives no priority, but payment will not be indefinitely postponed until all claims have come in (*d*). The onus is on the

Immediate
payment of
costs.

(*l*) *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601; *Re Oriental Hotels Co., Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *Re Regent's Canal Iron-works Co., Ex parte Grissell* (1875), 3 Ch. D. 411, C. A.; *Re Ormerod, Grierson & Co.*, [1890] W. N. 217; *Re Northern Milling Co.*, [1908] 1 I. R. 473; compare *Lathom v. Greenwich Ferry Co.*, [1895] W. N. 77.

(*m*) *Re Anglo-Austrian Printing and Publishing Union, Brabourne v. Same*, [1895] 2 Ch. 891; compare *Re Bonelli's Electric Telegraph Co., Cook's Claim* (No. 2) (1874), L. R. 18 Eq. 656, where a fund was paid into court to answer a particular claim.

(*n*) *Re Massey, Re Freehold Land and Brickmaking Co.* (1870), L. R. 9 Eq. 267, 368.

(*o*) *Ibid.*, at p. 369.

(*p*) *Re Born, Curnock v. Born*, [1900] 2 Ch. 433.

(*q*) *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96; *Re Capital Fire Insurance Association* (1883), 24 Ch. D. 408, C. A.

(*r*) *Re Capital Fire Insurance Association, supra*.

(*s*) *Re Anglo-Maltese Hydraulic Dock Co.*, [1885] W. N. 84.

(*t*) *Re Union Cement and Brick Co., Ex parte Fulbrook* (1869), 4 Ch. App. 627.

(*a*) *Re Galland*, [1885] W. N. 224, C. A.; compare *Re English and Colonial Produce Co., Ltd.*, [1906] 2 Ch. 435, 439, C. A.; *Re National Motor Mail-Coach Co., Ltd., Clinton's Claim*, [1908] 2 Ch. 515.

(*b*) See p. 519, *ante*.

(*c*) See *Re London Metallurgical Co.*, [1895] 1 Ch. 758; Companies (Winding up) Rules, r. 187 (3).

(*d*) *Re London Metallurgical Co., supra*.

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by the
Court.

liquidator to show that payment of the costs should be postponed until provision has been made for any prior claims (e). Where the costs are to be paid by the liquidator personally, and he is to be at liberty to retain them out of the assets of the company, such costs rank even before the costs of realisation (f).

Priority of
payments.

897. The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges, and expenses incurred in the winding up in such order of priority as the court thinks just (g).

Subject to any order of the court, whether the assets are or are not insufficient to satisfy the liabilities (h), the assets of a company (a) in a winding up by the court, remaining after payment of the fees and actual expenses incurred in realising or getting in the assets, are liable to the following payments, which are to be paid in the following order of priority, namely: (1) the taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the court (b); (2) the remuneration of the special manager (if any); (3) the costs and expenses of any person who makes or concurs in making the company's statement of affairs; (4) the taxed charges of any shorthand writer appointed to take an examination (provided that where the shorthand writer is appointed at the instance of the official receiver, the cost of the shorthand notes is deemed to be an expense incurred by the official receiver in getting in and realising the company's assets); (5) the liquidator's necessary disbursements, other than actual expenses of realisation; (6) the costs of any person properly employed by the liquidator; (7) the remuneration of the liquidator (c); (8) the actual out-of-pocket expenses necessarily

(e) *Re London Metallurgical Co.*, [1895] 1 Ch. 758.

(f) *Re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33, C. A., disapproving *Re Dronfield Silkstone Coal Co.* (No. 2) (1883), 23 Ch. D. 511.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 171 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 110].

(h) See *Re London Metallurgical Co.*, *supra*. Nothing contained in the Companies (Winding-up) Rules, r. 187, is to apply to or affect costs which, in the course of legal proceedings by or against a company which is being wound up by the court, are ordered by the court in which such proceedings are pending or a judge thereof to be paid by the company or the liquidator, or the rights of the person to whom such costs are payable (*ibid.*, r. 187 (3)).

(a) As to the winding up of a company to which the Stannaries Act, 1887 (50 & 51 Vict. c. 43), as modified by the Act of 1908, applies, see p. 672, *post*.

(b) *Re Audley Hall Cotton Spinning Co.* (1868), L. R. 6 Eq. 245. The petitioner's costs include the costs of establishing his debt (*Re Universal Non-Tariff Fire Insurance Co.*, [1875] W. N. 54), and costs on appeal (*Re Bright, Ex parte Wingfield and Blew*, [1903] 1 K. B. 735). They are a first charge on the assets and must be paid in full in priority to the costs of the liquidator (*Re Audley Hall Cotton Spinning Co.*, *supra*; and see *Re Sanitary Burial Association*, [1900] 2 Ch. 289, C. A.); and no set-off is allowed against them even where the petitioner is a contributory against whom calls have been made (*Re General Exchange Bank* (1867), L. R. 4 Eq. 138). As to costs of instructions for brief, see *Re Consolidated Exploration and Finance Co.*, [1899] 2 Ch. 599.

(c) The liquidator's remuneration has a more favourable position than it formerly had, for under the practice prior to 1891 he was not entitled to any remuneration until all the costs of winding-up (including the costs of the solicitor employed by him) had been paid in full (*Re Massey, Re Freehold Land*

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incurred by the committee of inspection, subject to the approval of the Board of Trade (d).

The court will not vary the above order of priority except for sufficient reason (e).

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by the
Court.

898. Actual expenses of realisation mean strictly the costs of a sale of any of the assets, and do not extend to the liquidator's solicitor's bill of costs (f). The fees, costs, and charges payable by the liquidator to the official receiver on taking possession of the assets, in respect of which the official receiver has a lien, are, if not realisation expenses, sums in respect of which the liquidator, standing in the shoes of the official receiver, is a secured creditor (g).

Actual
expenses of
realisation
etc.

The expenses of the special manager are probably actual expenses of realisation, but his costs of giving security are to be borne by himself personally (h). The liquidator's necessary disbursements do not include his costs of giving security, as he is to bear them personally (i). If the liquidator changes his solicitor and the costs cannot be paid in full, they will, as a rule, be paid rateably (k).

(iii.) Distribution amongst Creditors.

899. Not more than two months before declaring a dividend the liquidator must give notice of his intention to do so to the Board of Trade in order that the same may be gazetted, and at the same time to such of the creditors mentioned in the statement of affairs as have not proved their debts. The notice must specify the latest

Notice of
intention to
declare
dividend.

and *Brickmaking Co.* (1870), L. R. 9 Eq. 367). The costs of a liquidator incurred in a voluntary winding up before a supervision order is made are payable in priority to those of the petitioner who obtains the order; see *Re New York Exchange Co.*, [1893] 1 Ch. 371. As to priorities between the voluntary liquidator's remuneration and his solicitor's costs incurred during the same period, see *Re Sanitary Burial Association*, [1900] 2 Ch. 289, C. A.

(d) Companies (Winding-up) Rules, r. 187 (1). As to the priority of the liquidator's costs, expenses, and remuneration before 1890, see *Re Regent's Canal Ironworks Co.*, *Ex parte Grissell* (1875), 3 Ch. D. 411, C. A.; *Re Oriental Hotels Co.*, *Perry v. Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *Re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33, C. A. As to the remuneration of liquidators in force before the Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), see 3 Ch. App. p. lxiv.; *Re Mysore Reefs Gold Mining Co.* (1886), 34 Ch. D. 14, C. A. Joint liquidators, in the absence of any special agreement, are entitled to share equally in the remuneration granted to them (*Re Langham Hotel Co.*, *Ex parte Liquidator* (1869), 20 L. T. 163).

(e) *Re London Metallurgical Co.*, [1895] 1 Ch. 758; *Re Bright, Ex parte Wingfield and Blew*, [1903] 1 K. B. 735 (a bankruptcy case).

(f) *Re Bright, Ex parte Wingfield and Blew*, *supra*. In the Chancery Division in a debenture-holder's action the costs of realisation, including the costs of an abortive sale, come first in order of priority (*Batten v. Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317); and see *Re Dronfield Silkstone Coal Co.* (No. 2) (1883), 23 Ch. D. 511. Costs of realisation have been held in the Chancery Division to be confined to costs of actual sale and not to include costs of preservation (*Lathom v. Greenwich Ferry Co.*, [1895] W. N. 77), but the correctness of the decision is open to doubt; see *Re Wrexham, Mold, and Connah's Quay Rail Co.*, [1900] 1 Ch. 261; *Re Boynton (A.), Ltd.*, *Hoffman v. Boynton (A.), Ltd.*, [1910] 1 Ch. 519.

(g) See Companies (Winding-up) Rules, r. 161.

(h) *Ibid.*, r. 57.

(i) *Ibid.*

(k) *Re Audley Hall Cotton Spinning Co.* (1868), L. R. 6 Eq. 245.

SECT. 16.
Winding up
by the
Court.

Declaration
of dividend.

Transmission
of list to
Board of
Trade.

Payment of
dividends.

date up to which proofs must be lodged, which must not be less than fourteen days from the date of the notice (l).

Where no notice of appeal against the rejection of any proof has been given within the time specified (m), the liquidator must exclude all proofs which have been rejected from participation in the dividend (n).

Immediately after the expiration of the time fixed for appealing against his decision (o) he must proceed to declare a dividend, giving notice to the Board of Trade (in order that the same may be gazetted), and also sending a notice of dividend to each creditor whose proof has been admitted (p).

900. Upon the declaration of a dividend the liquidator must forthwith transmit to the Board of Trade a list of the proofs already filed with the registrar (q), in the form which is applicable, as the case may be (a). If the winding up is in a court other than the High Court the list must, on payment of the prescribed fee, be examined by the registrar with the proofs tendered for filing, and if found correct certified by him. If the winding up is in the High Court, the liquidator must, if so required by the Board of Trade, transmit to the Board office copies of all lists of proofs filed by him up to the date of the declaration of the dividend (b).

The creditors in the lists must be numbered consecutively, so that for the purpose of identification corresponding numbers may be affixed to the cheques and money orders. The Board requires great care to be exercised in the preparation of these lists; in all cases of payment to executors, trustees, representative officials etc., the name or names should be inserted in the list (c).

901. The payment of dividends is in every instance, except where a special bank account has been authorised, made by cheques

(l) Companies (Winding-up) Rules, r. 150 (1), and for the form of notice to creditors, see *ibid.*, Form 67.

(m) Where any creditor, after the date mentioned in the notice of intention to declare a dividend as the latest date up to which proofs may be lodged, appeals against the decision of the liquidator rejecting a proof, notice of appeal must, subject to the power of the court to extend the time in special cases, be given within seven days from the date of the notice of the decision against which the appeal is made, and the liquidator may in such case make provision for the dividend upon such proof, and the probable costs of such appeal in the event of the proof being admitted (*ibid.*, r. 150 (2)).

(n) *Ibid.*, r. 150 (2).

(o) See p. 522, *ante*.

(p) Companies (Winding-up) Rules, r. 150 (3); and for the form of notice to creditor, see *ibid.*, Form 71. If it becomes necessary, in the opinion of the liquidator and the committee of inspection, to postpone the declaration of the dividend beyond the limit of two months, the liquidator has to give a fresh notice of his intention to declare a dividend to the Board of Trade in order that the same may be gazetted; but it is not necessary for him to give a fresh notice to creditors mentioned in the statement of affairs who have not proved their debts. In all other respects the same procedure follows the fresh notice as would have followed the original notice (*ibid.*, r. 150 (4)). Dividends are payable on the full amount without regard to payments made by third persons (*Re Ligoniel Spinning Co.*, [1900] 1 I. R. 324).

(q) See Companies (Winding-up) Rules, r. 110; and p. 522, *ante*.

(a) See *ibid.*, Forms 68, 69. Form 68 includes a request for orders for payment. Form 69 is used where there is a special bank account.

(b) *Ibid.*, r. 150 (5).

Board of Trade Regulations, 1909, r. 11.

on the Bank of England, or money orders, which are prepared by the Board of Trade on the application of the liquidator in the prescribed form (d), and are transmitted to him for distribution amongst the creditors. The Board requires ten days' notice to enable it to prepare the cheques or money orders for dividends (e). The total amount of the dividend payable must be charged in the cash book in one sum. If the dividend has been paid by cheques on the Companies Liquidation Account, the liquidator, on the expiration of six months from the date of issue, or on application for his release, if that event occurs earlier, must return any cheques remaining in hand to the Accountant-General to the Board (f).

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Court.

If the dividend is paid through a special bank, the liquidator must, on the declaration of the dividend, forward to the Comptroller of the Companies Department, Board of Trade, the above-mentioned list of proofs filed in the prescribed form (g), together with the office copy list of proofs filed if the case is in the High Court, and at the expiry of six months from the date of the declaration of the dividend must forward to the comptroller, for audit, vouchers for the dividends paid and a list of those remaining unclaimed. The liquidator is then furnished with a receivable order for payment into the Bank of England of the amount of the dividends unclaimed. In no circumstances must unclaimed dividends be credited to the estate without the previous sanction of the comptroller (h).

Payment
through
special bank.

Dividends may, at the request and risk of the person to whom they are payable, be transmitted to him by post (i). If he desires them to be paid to some other person he may lodge with the liquidator a document in the prescribed form, which is a sufficient authority for payment of the dividend to the person therein named (j).

An unclaimed share of assets paid into the Companies Liquidation Account cannot be attached by a creditor of the shareholder entitled to it by means of a garnishee order (k).

(iv.) *Distribution amongst Contributories.*

902. The court is to adjust the right of the contributories among themselves and distribute any surplus among the persons entitled (l) in accordance with their rights and interests in the company (m).

Adjusting
rights.

(d) See Companies (Winding-up) Rules, Form 68; and *supra*.

(e) Board of Trade Regulations, 1909, r. 11.

(f) *Ibid.*

(g) Companies (Winding-up) Rules, Form 69.

(h) Board of Trade Regulations, r. 11.

(i) Companies (Winding-up) Rules, r. 150 (6).

(j) *Ibid.*, r. 150 (7); and for the form of authority, see *ibid.*, Form 72. Compare *Wragge's Case* (1868), L. R. 5 Eq. 284.

(k) *Spence v. Coleman*, [1901] 2 K. B. 199, C.A.

(l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 170 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 109].

(m) *Griffith v. Paget* (1877), 5 Ch. D. 894; 6 Ch. D. 511; *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.; *Re North West Argentine Railway*, [1900] 2 Ch. 882. As to the rights of a B contributory to return of money, see *Re Barnard's Bank, Helbert v. Banner* (1871), L. R. 5 H. L. 28.

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Court.

In a winding up past and present members are liable to contribute to the assets of the company to an extent sufficient (amongst other purposes) for the adjustment of the rights of the contributories amongst themselves (*n*). The contributories get nothing until the costs, charges and expenses properly incurred in the winding up have been paid and the debts and liabilities of the company discharged in full, and, in some cases, until provision has been made for future contingent claims (*o*). A sum due to a person in his character of a member, by way of profits, dividends, or otherwise, may be taken into account for the purposes of the final adjustment of contributories' rights (*p*). Only the rights of contributories *quâ* contributories can be adjusted under this provision; hence it does not enable directors who are contributories to enforce against persons who also are contributories rights which have nothing to do with their position as contributories (*q*).

Distribution
 according to
 nominal
 capital.

903. If the memorandum and articles of association contain no provision as to how surplus assets (*r*) are to be divided, then, subject to the terms on which any capital has been issued, the surplus assets are divided and losses are borne in proportion to the nominal amounts of the shares and not to the sums paid up. Where, however, some shareholders have paid up more than others, the court adjusts the amounts until all have paid up in the same proportion, and the surplus thus arrived at is then distributed in proportion to the nominal amounts (*s*).

The rights may be adjusted by making larger returns to those

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1); and see p. 500, *ante*.

(*o*) See pp. 516 *et seq.*, *ante*.

(*p*) See *Re New Transvaal Co.*, [1896] 2 Ch. 750; *Re Peabody Gold Mining Corporation*, [1897] W. N. 170; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (vii.).

(*q*) *Re Alexandra Palace Co.* (1883), 23 Ch. D. 297, 300 (rights between a tortfeasor and creditors and contributories); *Addison's Case* (1875), L. R. 20 Eq. 620 (contracts by some contributories to indemnify the rest); compare *Baird's Case*, [1899] 2 Ch. 593.

(*r*) The term "surplus assets" as used in the company's regulations may mean either what remains after paying the costs, charges, and expenses of the winding up and debts, or after making those payments and returning the paid-up capital to the shareholders (*Re Anglo-Continental Corporation of Western Australia*, [1898] 1 Ch. 327; *Re Mutoscope and Biograph Syndicate*, [1898] 1 Ch. 896; *Re Crichton's Oil Co.*, [1902] 2 Ch. 86, 93, O. A.; *Re Welsh Whisky Distillery Co., Ltd.*, [1900] W. N. 59).

(*s*) *Re Hodges' Distillery Co., Ex parte Maude* (1870), 6 Ch. App. 51; *Re Bridgewater Navigation Co., Ltd.*, *Birch v. Cropper* (1889), 14 App. Cas. 525, 543; *Re Driffield Gas Light Co.*, [1898] 1 Ch. 451; *Re Eclipse Gold Mining Co.* (1874), L. R. 17 Eq. 490 (new capital); *Re Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165; *Oakbank Oil Co. v. Crum* (1882), 8 App. Cas. 65. In the absence of agreement, by all the shareholders or through the machinery of modification clauses, the distribution must be in accordance with the legal rights of the shareholders (*Re North West Argentine Rail. Co.*, [1900] 2 Ch. 882, where WRIGHT, J., distinguished his former decision in *Re Beeston Pneumatic Tyre Co.*, [1898] W. N. 34, which cannot be supported). *Somes v. Currie* (1855), 1 K. & J. 605, and *Sheppard v. Scinde, Punjab and Delhi Rail. Co.* (1887), 36 W. B. 1, O. A., were decided on special circumstances; see *Re Driffield Gas Light Co.*, *supra*; *Re Land and Cattle Co.*, [1909] 2 Ch. 187.

who have paid larger amounts (t), or by making calls (a). The articles may, however, be so framed as to prevent calls being made on the holders of partly-paid shares to equalise the amounts paid up (b).

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Court.

A provision in the articles as to how dividends are to be distributed while the company is a going concern does not, *per se*, govern or affect the distribution of surplus assets in a winding up (c).

Subject as above stated, the rights of the contributories as regards surplus assets are regulated by the memorandum and articles of association, due regard being had to the rights of preference shares as thereby declared (d). There is no general rule that shareholders with a preference as to repayment of capital can have no further share in surplus assets. The question depends on the construction of the memorandum and articles, and if these are silent, the surplus must be divided among all the shareholders, ordinary and preference, in proportion to the nominal amounts of the shares (e).

Preference
shareholders.

904. Any discount on shares unlawfully issued at a discount is treated as capital unpaid, which may be so regarded in adjusting accounts, or may be called up to adjust the rights of the contributories (f).

Shares issued
at a discount.

905. Where a company has proved in the bankruptcy of a shareholder for the uncalled amount of the shares and received a dividend

Bankrupt
shareholder.

(t) *Re Hodges' Distillery Co., Ex parte Maude* (1870), 6 Ch. App. 51; *Re Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165; *Re Bridgewater Navigation Co., Ltd., Birch v. Cropper* (1889), 14 App. Cas. 525; *Re Driffield Gas Light Co.*, [1898] 1 Ch. 451; *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66, C. A.; *Re West Coast Gold Fields, Ltd., Rowe's Trustee's Claim*, [1906] 1 Ch. 1, C. A., where shares on which a dividend had been paid in the bankruptcy of the holder were held to be not fully paid.

(a) *Re Anglo-Continental Corporation of Western Australia*, [1898] 1 Ch. 327; *Welton v. Saffery*, [1897] A. C. 299; *Re Anglesea Colliery Co.* (1866), 1 Ch. App. 555; and see *Re Provision Merchants' Co.* (1872), 26 L. T. 862; *Re Sheppard's Corn Malting Co., Ex parte Lowensfeld* (1893), 70 L. T. 3, C. A.; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123.

(b) *Re Holyford Mining Co.* (1869), 3 I. R. Eq. 208, C. A.; *Re New Transvaal Co.*, [1896] 2 Ch. 750; *Re Peabody Gold Mining Corporation*, [1897] W. N. 170; see *Re Eclipse Gold Mining Co.* (1874), L. R. 17 Eq. 490; *Re Coed Madog Slate Co.*, [1877] W. N. 190; compare *Re Provision Merchants' Co.* (1872), 26 L. T. 862.

(c) *Re Driffield Gas Light Co.*, *supra*; *Re London India Rubber Co.* (1868), L. R. 5 Eq. 519; compare *Simpson v. Palace Theatre, Ltd.*, [1893] W. N. 91, where a scheme for voluntary liquidation and reconstruction was held to be invalid because it did not provide for a *pro rata* division among all the shareholders.

(d) *Re Bangor and Portmadoc Slate and Slab Co.* (1875), L. R. 20 Eq. 59; *Sime v. Coats*, [1908] S. C. 751. ss. 170, 186 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), do not supply a rule for the mode of adjusting loss of capital or of distributing surplus assets, but only supply the necessary powers for giving effect to the rights and interests of the parties (*Re Driffield Gas Light Co.*, *supra*). As to a company being estopped from denying the validity of an issue of preference shares, see *Re London and Northern Bank* (1902), 18 T. L. R. 320.

(e) *Re Espuela Land and Cattle Co.*, [1909] 2 Ch. 187; *Simpson v. Palace Theatre, Ltd.*, *supra*.

(f) *Welton v. Saffery*, *supra*; *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66, C. A.

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by the
Court.

Money
received in
advance of
calls.

Surplus after
refunding
paid-up
capital.

Statute of
Limitations.

of less than 20s. in the pound, the shares are not treated as fully paid for the purposes of the trustee receiving a share of the surplus assets in the subsequent winding up of the company until the other shareholders have received dividends sufficient to equalise the amount paid up (g).

906. Where inequality in the amounts paid up arises from the shareholder having made payments in advance of calls, each shareholder, for the purpose of equalising, is entitled to be repaid the amount advanced, with interest at the agreed rate up to the date of repayment, before any payment is made, in respect of the other shares ranking *pari passu* with his shares, in repayment of capital (h). The same principle applies where the company issues both fully-paid and partly-paid shares (i).

907. Where, after repayment to the shareholders of all paid-up capital, there is still a surplus remaining for distribution, then, subject to the articles and the terms of issue (j), the surplus, so far as it represents capital, is divisible in proportion to the nominal amount of the shares, whether they are preference or ordinary shares, and whether at the winding up they were partly or fully paid up (k). The surplus, so far as it represents undivided profits, is in some cases divisible amongst the shareholders as if it were profit available for dividend (l), but in other cases it must be treated as capital (m). Unless the articles so provide, the holders of shares issued at a premium are not in a winding up entitled to have the premium repaid (n). Because shares are entitled to a preferential dividend it does not follow that they are entitled to preference in repayment of capital (o). The regulations of most companies authorise the distribution of surplus assets in specie.

908. The holder of shares, the certificate of which is under the seal of the company and refers (as is usual) to the memorandum and articles of the company, is not barred by the Statute of Limitations, in respect of dividends declared on the shares, until the expiration of twenty years from the date of declaration (p).

(g) *Re West Coast Gold Fields, Ltd., Rowe's Trustee's Claim*, [1906] 1 Ch. 1, C. A.

(h) *Re Exchange Drapery Co* (1888), 38 Ch. D. 171; *Re Wakefield Rolling Stock Co.*, [1892] 3 Ch. 165.

(i) *Re Hodges' Distillery Co., Ex parte Maude* (1870), 6 Ch. App. 51.

(j) *Re Mutoscope and Biograph Syndicate*, [1899] 1 Ch. 896.

(k) *Re Bridgewater Navigation Co., Ltd., Birch v. Cropper* (1889), 14 App. Cas. 525.

(l) *Re Bridgewater Navigation Co.*, [1891] 2 Ch. 317, C. A.; *Bishop v. Smyrna and Cassaba Rail. Co.*, [1895] 2 Ch. 265; compare *Re Odessa Waterworks Co.* (1897), reported [1901] 2 Ch. 190, n.; *Re Hall (W. J.) & Co., Ltd.*, [1909] 1 Ch. 521.

(m) See *Bishop v. Smyrna and Cassaba Rail. Co.* (No. 2), *supra*; *Re Crichton's Oil Co.*, [1902] 2 Ch. 86, C. A., where the subject is fully discussed; *Re Accrington Corporation Steam Tramways Co.*, [1909] 2 Ch. 40.

(n) *Re Driffield Gas Light Co.*, [1898] 1 Ch. 451.

(o) *Re London India Rubber Co.* (1868), L. R. 5 Eq. 519; *Re North West Argentine Rail. Co.*, [1900] 2 Ch. 882.

(p) *Re Artisans' Land and Mortgage Corporation*, [1904] 1 Ch. 796; *Re Drogheda Steam Packet Co., Ltd.*, [1903] 1 I. R. 512; and see *Severn and Wye and Severn Bridge Rail. Co.*, [1896] 1 Ch. 559; *Re Cornwall Minerals Rail. Co.*, [1897] 2 Ch. 74, where the company was incorporated by a special Act.

909. Every order by which the liquidator is authorised to make a return to contributories of the company must, unless the court otherwise directs, contain or have appended thereto a schedule or list setting out in a tabular form the full names and addresses of the persons to whom the return is to be paid, and the amount of money payable to each person, and particulars of the transfers of shares (if any) which have been made, or the variations in the list of contributories which have arisen, since the date of the settlement of the list of contributories. The schedule or list which the liquidator must prepare must be in the prescribed form, with such variations as circumstances shall require (q).

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by the
Court.

Return
schedule.

910. Applications for cheques for returns to contributories must be made on the prescribed form (r), which must give the name of each contributory, together with the amount for which he has been settled on the list, and, in cases where the amount payable is under £2, the place at which the money order should be made payable. The total amount of each return to contributories must be entered in the cash book in one sum, as in the case of dividends (s).

Application
for return
cheques.

SUB-SECT. 12.—*Stay and Transfer of Proceedings, and Special Case.*

(i.) *Proceedings by or against the Company.*

911. The court has power, at any time after the presentation of a winding-up petition and before a winding-up order has been made (t), on the application of the company, or any creditor or contributory, to stay or restrain any proceedings against the company on such terms as it thinks fit (a). Where the action or proceeding is pending in the High Court or Court of Appeal, the application is made to the court in which the action or proceeding is pending for a stay of proceedings. In the case of any other action or proceeding the application is made to the court having jurisdiction to wind up the company to restrain further proceedings (b). Where the company has been registered under Part VII. of the Act of 1908, or is an unregistered company, the power extends, where the application to stay or restrain is by a creditor, to actions and proceedings against any contributory of the company (c).

Power to
stay.

An application to stay any proceedings in the High Court must

(q) Companies (Winding-up) Rules, r. 151. For the form of schedule, see *ibid.*, Form 74; and for the form of notice of return to contributories, *ibid.*, Form 73.

(r) This form is called Form C, No. 6.

(s) Board of Trade Regulations, 1909, r. 12; as to the payment of dividends, see p. 528, *ante*. As to payment when the shares are vested in a Scotch sequestrator, see *Re Tuticorin Cotton Press Co.*, [1894] W. N. 181.

(t) For this purpose a petition for the continuance of a voluntary winding up subject to supervision, and a supervision order made thereon, are deemed a petition and order respectively for compulsory winding up [Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 200, 203].

(a) *Ibid.*, s. 140 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 85; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 (5); Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), s. 27 (5)].

(b) See p. 391, *ante*.

(c) *Ibid.*, ss. 265, 270 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 197, 201]. In the case of an unregistered company the application may also be made by the company (*Rudow v. Great Britain Mutual Life Assurance Society* (1881), 17 Ch. D. 600, C. A.).

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Court.

be made to the division in which the matter is pending (*d*), and may be made *ex parte* (*e*). It is generally made by summons, but sometimes by motion. All actions pending against the company in the King's Bench Division may be stayed by a single order (*f*).

The jurisdiction to stay is discretionary (*g*), and in its exercise regard must be had to the primary object of winding up, namely, the collection and distribution of the assets *pari passu* amongst unsecured creditors after payment of preferential debts (*h*).

Avoidance of
executions.

912. Where any registered company is being wound up by or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up is, unless leave to proceed is given by the court (*i*), avoided altogether (*k*), so that no interest in any goods seized is acquired even as against third persons (*l*). The court will set aside a judgment obtained without leave after the making of the winding-up order (*m*).

The provision applies to distress for rent (*n*), or rates (*o*), to

(*d*) *Walker v. Banagher Distillery Co.* (1875), 1 Q. B. D. 129; *Re People's Garden Co.* (1875), 1 Ch. D. 44; *Re Morrison Patent Fuel and Brick Co.*, [1877] W. N. 20; *Re Artistic Colour Printing Co.* (1880), 14 Ch. D. 502; *Re General Service Co-operative Stores*, [1891] 1 Ch. 496; compare *Garbutt v. Fawcus* (1875), 1 Ch. D. 155, C. A.; *Rose v. Gardden Lodge Coal Co.* (1878), 3 Q. B. D. 235.

(*e*) *Masbach v. Anderson & Co.* (1877), 26 W. R. 100; *Everingham v. Co-operative Pure Family Beer Co.*, [1880] W. N. 99, C. A.

(*f*) *Re People's Garden Co.*, *supra*.

(*g*) *Re Great Ship Co., Ltd., Parry's Case* (1863), 4 De G. J. & Sm. 63, C. A. As to costs, see p. 539, *post*.

(*h*) *Smith, Fleming & Co.'s Case, Gledstones & Co.'s Case* (1866), 1 Ch. App. 538, *Publishing Co.*, [1894] 2 Q. B. 380.

(*i*) *Re Exhall Coal Mining Co., Ltd.* (1864), 4 De G. J. & Sm. 377, C. A.; *Re Lancashire Cotton Spinning Co., Ex parte Carnelley* (1887), 35 Ch. D. 656, C. A.; *Re Higginshaw Mills and Spinning Co.*, [1896] 2 Ch. 544, C. A.; *Re Bank of Hindustan, China and Japan, Ex parte Smith* (1867), 3 Ch. App. 125, 129; *Re Wanzer, Ltd.*, [1891] 1 Ch. 305. Ss. 142 and 211 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) (see p. 538, *post*), are to be construed together (*Re Exhall Coal Mining Co., Ltd.*, *supra*; *Re Lancashire Cotton Spinning Co., Ex parte Carnelley*, *supra*; *Re Wanzer, Ltd.*, *supra*; *Re Higginshaw Mills and Spinning Co.*, *supra*). As to whether s. 211 of the Act applies to an execution on a judgment against the company in an action brought by the liquidator, see *Re Bank of Hindustan, China and Japan, Ex parte Smith*, *supra*.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 211 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 163], which is confined to companies registered in England or Ireland. The operation of s. 163 of the Act of 1862 was not confined to companies registered in England or Ireland. But see s. 273 of the Act of 1908.

(*l*) *Re Artistic Colour Printing Co., Ex parte Fourdrinier* (1882), 21 Ch. D. 510, C. A.; distinguish *Re New City Constitutional Club Co., Ex parte Purcell* (1887), 34 Ch. D. 646, C. A.

(*m*) *Hartford v. Amicable Mutual Life Assurance Co.* (1871), 5 I. B. C. L. 368.

(*n*) *Re Exhall Coal Mining Co., Ltd.*, *supra*; *Re Lancashire Cotton Spinning Co., Ex parte Carnelley*, *supra*, where a mortgagee distrained under an attornment clause; *Re Higginshaw Mills and Spinning Co.*, *supra*, where a mortgagee distrained for interest under an express power in the mortgage. The provision includes sequestration in Scotland (*Re Wanzer, Ltd.*, *supra*).

(*o*) *Re Dry Docks Corporation of London* (1888), 39 Ch. D. 306, C. A.

equitable execution (*p*), to arrest of vessels by the Admiralty Court (*q*), and to an embargo on foreign assets (*r*).

When any execution, distress, or similar process is levied or put in force after the winding up has commenced, a stay will be granted or leave to proceed refused (*s*), except in very special circumstances, as where, after the winding up, the liquidator, without taking any objection, allows the plaintiff to go on and alter his position (*t*), or where the execution would have been put in force before the winding up commenced but for resistance made to the sheriff's officer (*a*).

The Act of 1908 does not import the bankruptcy provisions restricting creditors' rights under execution or attachment into the winding up of a company (*b*).

As the Crown is not bound by the Act, the court cannot prevent the Crown from proceeding against a company in liquidation, or from levying execution upon its property (*c*).

913. If execution or process of the same nature has been duly levied or put in force before the winding up commenced, so as to make the creditor a secured creditor, a stay will be refused or leave to proceed and to sell given (*d*), unless the liquidator pays the

SECT. 16.
Winding up
by the
Court.

When
execution
allowed to
proceed.

Executions
levied before
winding up.

(*p*) *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154.

(*q*) The arrest of a ship to enforce a maritime lien is a sequestration, and the proper mode of enforcing it on a vessel belonging to a company is ordinarily by application in the winding up, and not by proceeding *in rem* in the Admiralty Court (*Re Australian Direct Steam Navigation Co.* (1875), L. R. 20 Eq. 325). But where the vessel has been mortgaged, and the mortgagees are not before the winding-up court, a person having a maritime lien is permitted to proceed *in rem* in the Admiralty Court (*Re Rio Grande Do Sul Steamship Co.* (1877), 5 Ch. D. 282, C. A.). As to arrest in Admiralty generally, see title ADMIRALTY, Vol. I., pp. 81 *et seq.* As to arrestment in Scotland *jurisdictionis fundandæ causâ*, see *Re West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713.

(*r*) *Flack's Case*, [1894] 1 Ch. 366; *Re South-Eastern of Portugal Rail. Co.* (1889), 17 W. R. 982; *Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co.* (1874), 9 Ch. App. 557.

(*s*) *Re London and Devon Biscuit Co.* (1871), L. R. 12 Eq. 190; *Re Dimson's Estate Fire-Clay Co.* (1874), L. R. 19 Eq. 202; *Re Universal Disinfecter Co.* (1875), L. R. 20 Eq. 162; *Re Vron Colliery Co.* (1882), 20 Ch. D. 442, 445, C. A. (doubting *Re Bastow & Co.* (1867), L. R. 4 Eq. 681; *Re Imperial Steam and Household Coal Co.* (1868), 37 L. J. (CH.) 517; *Re Taylor, Ex parte Railway Steel and Plant Co.* (1878), 8 Ch. D. 183; *Re Richards & Co.* (1879), 11 Ch. D. 676; *Re Artistic Colour Printing Co., Ex parte Fourdrinier* (1882), 21 Ch. D. 510; *Croshaw v. Lyndhurst Ship Co.*, *supra*.

(*t*) *Rudow v. Great Britain Mutual Life Assurance Society* (1881), 17 Ch. D. 600, C. A.

(*a*) *Re London Cotton Co.* (1866), L. R. 2 Eq. 53.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 207; *Re Withernsea Brickworks* (1880), 16 Ch. D. 337, 341, C. A.; *Gorringe v. Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, 133, 134, C. A.; compare *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, 437. As to the bankruptcy provisions, see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 271 *et seq.*

(*c*) *Re Henley & Co.* (1878), 9 Ch. D. 469, 481, 482, C. A.; *Re West London Commercial Bank* (1888), 38 Ch. D. 364.

(*d*) *Re Great Ship Co., Ltd., Parry's Case* (1863), 4 De G. J. & Sm. 63, C. A.; *Ex parte Milwood Colliery Co.* (1876), 24 W. R. 898, C. A. (overruling *Re Hill Pottery Co.* (1866), L. R. 1 Eq. 649; and *Re Plas-yn-Mhowys Coal Co.* (1867), L. R. 4 Eq. 689); *Re West Cumberland Iron and Steel Co.*, *supra*; *Re Opera, Ltd.*, [1891] 3 Ch. 260, C. A. As to a mortgagee submitting to have his rights determined in the winding up, see *Re Gaudet Frères Steamship Co.*

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Winding up
by the
Court.

Distress for
rent etc.

debt(e), or there are special circumstances(f). Service of a garnishee order nisi is for this purpose equivalent to execution(g); but an order appointing a receiver by way of equitable execution does not *per se* make the judgment creditor obtaining it a secured creditor(h). If the writ has merely reached the hands of the sheriff, but he has not seized at the date of the commencement of the winding up, the court will not in the absence of special circumstances allow execution to be levied(i). An execution is not put in force until possession is taken under it(k).

914. A landlord is permitted to distrain for rent accrued due before or during the winding up where he is not a creditor and therefore cannot prove for the amount of his rent, as, for instance, where the company is not legally or equitably entitled to the lease(l), or is only equitably entitled to the lease(m), even although it has collaterally secured the rent(n). He is not allowed to distrain for rent accrued due before the winding up commenced in respect of which he is a creditor of the company, but must in that case prove his debt(o). If, however, a distress has been put in

(1879), 12 Ch. D. 882; *Re Dry Docks Corporation of London* (1888), 39 Ch. D. 306, 315, C. A.

(e) *Re Withernsea Brickworks* (1880), 16 Ch. D. 337, C. A.; *Re Dry Docks Corporation of London*, *supra*; *Re Hille India Rubber Co.* (No. 2), [1897] W. N. 20; *Re Roundwood Colliery Co.*, *Lee v. Roundwood Colliery Co.* (1897), 66 L. J. (CH.) 186, C. A.

(f) *Re Perkins Beach Lead Mining Co.* (1877), 7 Ch. D. 371; see *Re Hill Pottery Co.* (1866), L. R. 1 Eq. 649, where a sale by the execution creditors was restrained and a sale by the liquidator ordered, the creditors being declared to be entitled to a first charge on the proceeds for their debt and costs; *Re Plas-yn-Mhowys Coal Co.*, (1867), L. R. 4 Eq. 689; *Re Taylor, Ex parte Railway Steel and Plant Co.* (1878), 8 Ch. D. 183, in which cases a sale by the liquidator was ordered, the sheriff to go out of possession, but the creditors to have the same rights against the proceeds as if the sale had been made by the sheriff.

(g) *Re United English and Scottish Assurance Co., Ex parte Hawkins* (1868), 3 Ch. App. 787; *Re Stanhope Silkstone Collieries Co.* (1879), 11 Ch. D. 160, C. A.

(h) *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154.

(i) *Ibid.*; *Re Dimson's Estate Fire-Clay Co.* (1874), L. R. 19 Eq. 202; *Re London and Devon Biscuit Co.* (1871), L. R. 12 Eq. 190; *Re Vron Colliery Co.* (1882), 20 Ch. D. 442, C. A. As to cases where the court has allowed the sheriff to seize and proceed, see *Re London Cotton Co.* (1866), L. R. 2 Eq. 53; *Re Bastow & Co.* (1867), L. R. 4 Eq. 681; *Re Taylor, Ex parte Railway Steel and Plant Co.*, *supra*; *Re Richards & Co.* (1879), 11 Ch. D. 676; *Re Imperial Steam and Household Coal Co.* (1868), 18 L. T. 390.

(k) *Re London and Devon Biscuit Co.* (1871), L. R. 12 Eq. 190; *Re Waterloo Life etc. Assurance Co.* (No. 2) (1862), 31 Beav. 589. As to the rights of other creditors who have lodged their writs, see *Re Hille India Rubber Co.* (No. 2), *supra*; and title EXECUTION.

(l) *Re Traders' North Staffordshire Carrying Co., Ex parte North Staffordshire Rail. Co.* (1874), L. R. 19 Eq. 60, 67, 68.

(m) *Re Exhall Coal Mining Co. Ltd.* (1864), 4 De G. J. & Sm. 377, C. A.; *Re Regent United Service Stores* (1878), 8 Ch. D. 616, C. A.

(n) *Re Carriage Co-operative Supply Association, Ex parte Clemence* (1883), 23 Ch. D. 154; compare *Re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731; *Re New City Constitutional Club Co., Ex parte Purcell* (1887), 34 Ch. D. 646, C. A.

(o) *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250, 257, C. A.; *Re Brown, Bailey and Dixon, Ex parte Roberts and Wright* (1881), 18 Ch. D. 649; *Re Traders' North Staffordshire Carrying Co., Ex parte North Staffordshire Rail. Co.* (1874), L. R. 19 Eq. 60; *Re Coal Consumers Association* (1876), 4 Ch. D. 625. This is the case even where the company is insolvent (*Re Coal Consumers Association, supra*; *Re Bridgewater Engineering Co.* (1879), 12 Ch. D. 181).

before the winding up commenced, although not completed by sale, the landlord is a secured creditor, and the distress is allowed to proceed unless the liquidator pays the debt (*p*). A distress is allowed in respect of rent accrued due after winding up where the company, with a view to its own benefit in working its property or carrying on its business, is in possession of the property (*q*), but not where it retains possession for the benefit of all persons interested in the property (*r*) or without a view to its own benefit (*s*), unless the liquidator has agreed to pay rent. Where the liquidator refuses to pay the rent, leave is given to the landlord to re-enter (*t*). Where a landlord is entitled to re-enter for non-payment of rent his proper remedy is to sue for recovery of possession (*u*). Where, however, he asks the court in a winding up for possession, and the claim is one against which the liquidator would have no defence, the court orders the liquidator to give up possession, and not to put the applicant to the expense of bringing an action (*a*). The landlord is allowed to distrain where the goods are mortgaged for more than their value, inasmuch as the liquidator has no interest (*b*).

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Winding-up
by the
Court.

Recovery of
possession.

A distress for rates put in before the winding up commenced is allowed to proceed unless the liquidator pays the rates (*c*). If the liquidator has beneficially occupied premises within the meaning of those words in rating cases (*d*), he must pay in full the rates becoming due in respect of such premises after the winding up commenced, or leave will be given to distrain for them (*e*).

Rates.

(*p*) *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373, C. A.; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (4).

(*q*) *Re Lundy Granite Co., Ex parte Heaven* (1871), 6 Ch. App. 462; *Re North Yorkshire Iron Co.* (1878), 7 Ch. D. 661; *Re Silkstone and Dodworth Coal and Iron Co.* (1881), 17 Ch. D. 158; *Re South Kensington Co-operative Stores* (1881), 17 Ch. D. 161; *Re Brown, Bailey and Dixon, Ex parte Roberts and Wright*, (1881), 18 Ch. D. 649.

(*r*) *Re Progress Assurance Co., Ex parte Liverpool Exchange Co.* (1870), L. R. 9 Eq. 370; *Re Bridgewater Engineering Co.*, (1879), 12 Ch. D. 181; *Re Lancashire Cotton Spinning Co., Ex parte Carnelley* (1887), 35 Ch. D. 656, C. A.; *Shackell & Co. v. Chorlton & Sons*, [1895] 1 Ch. 378; *Re Higginshaw Mills and Spinning Co.*, [1896] 2 Ch. 544, C. A.

(*s*) *Re North Yorkshire Iron Co., supra*; *Re South Kensington Co-operative Stores, supra*; *Re Brown, Bailey and Dixon, Ex parte Roberts and Wright, supra*; *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322, C. A.; *Re House and Land Investment Trust, Ex parte Smith* (1894), 42 W. R. 572.

(*t*) *General Share and Trust Co. v. Wetley Brick and Pottery Co.* (1882), 20 Ch. D. 260, C. A., where the landlord applied for leave to distrain, or, in the alternative, to re-enter.

(*u*) *Re Strand Hotel Co.*, [1868] W. N. 2; see further, title LANDLORD AND TENANT.

(*a*) *General Share and Trust Co. v. Wetley Brick and Pottery Co., supra*; *Re New North Staffordshire Coal and Iron Co.*, [1884] W. N. 106.

(*b*) *Re New City Constitutional Club Co., Ex parte Pearsell* (1887), 34 Ch. D. 646, C. A.; *Re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731.

(*c*) *Re Dry Docks Corporation of London* (1888), 39 Ch. D. 306, C. A.

(*d*) See title RATES AND RATING.

(*e*) *Re International Marine Hydropathic Co.* (1884), 28 Ch. D. 470, C. A.; *Re Wearmouth Crown Glass Co.* (1882), 19 Ch. D. 640; *Re National Arms and Ammunition Co.* (1885), 28 Ch. D. 474, C. A.; *Re Blazer Fire Lighter, Ltd.*, [1895] 1 Ch. 402; compare *Re British Fullers' Earth Co., Gibbs v. British Fullers' Earth Co.* (1901), 17 T. L. R. 232; *Re Watson, Kipling & Co.* (1883), 23 Ch. D. 500, where it was held that the occupation of the liquidator was not beneficial, and an application for payment of rates in full was refused.

SECT. 16.
Winding up
by the
Court.

Proceedings
 against com-
 pany after
 winding-up
 order.

The owner of a tithe rentcharge will be allowed to distrain for arrears thereof, as he cannot prove for them (*f*).

A distress levied after the winding up has commenced is void, and will be restrained (*g*).

915. Except by leave of the winding-up court (*h*), and subject to such terms as it may impose (*i*) when a winding-up order has been made, no action or proceeding is to be proceeded with or commenced against the company by a person capable of proving in the winding up (*j*); or, in the case of a company registered under Part VII. of the Act of 1908 (*k*), against either the company or any contributory in respect of any of its debts (*l*); or in the case of an unregistered company against any contributory in respect of any of its debts (*m*). The proceedings which may be restrained, or as to which leave to commence or proceed is to be obtained, must be against the company or against its liquidator in that capacity, including, in the case of a company registered under Part VII. of the Act of 1908, or of an unregistered company, an action against a contributory in that capacity, to enforce a debt of the company (*n*). Applications for rectification of the register (*o*), police court proceedings as to rates or penalties (*p*), and sales, after the winding up has commenced, under executions previously levied (*q*), are included; but not a counterclaim against the company, as being in the nature of a defence (*r*); or an inquiry under the Tramways Act, 1870, as to the solvency of promoters of a tramways company in liquidation (*s*).

(*f*) *Re Trimsaran Coal, Iron, and Steel Co.* (1876), 24 W. R. 900.

(*g*) *Re Traders' North Staffordshire Carrying Co., Ex parte North Staffordshire Rail. Co.* (1874), L. R. 19 Eq. 60; *Re Progress Assurance Co., Ex parte Liverpool Exchange Co.* (1870), L. R. 9 Eq. 370.

(*h*) See p. 540, *post*.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 142 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 87].

(*j*) *Re Trimsaran Coal, Iron, and Steel Co., supra*; *Re Lundy Granite Co., Ex parte Heaven* (1871), 6 Ch. App. 462; *Re Regent United Service Stores* (1878), 8 Ch. D. 616. In the case of a compulsory liquidation the creditor is debarred from proceeding by way of action, unless he can show grounds for granting him leave to do so (*Currie v. Consolidated Kent Collieries Corporation*, [1906] 1 K. B. 134, 138).

(*k*) See p. 39, *ante*.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 266 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 198].

(*m*) *Ibid.*, s. 271 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 202]. See *Re Great Ship Co., Ltd., Parry's Case* (1863), 4 De G. J. & Sm. 63, O. A.; *Gray v. Raper* (1866), L. R. 1 C. P. 694. Nor, apparently, can proceedings be commenced or continued, without leave, against the company; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 273.

(*n*) *Re Onward Building Society*, [1891] 2 Q. B. 463, 483, C. A.; *Re South of France Pottery Works Syndicate* (1877), 36 L. T. 651. Actions against directors are not included (*Re New Zealand Banking Corporation* (1869), 39 L. J. (CH.) 128). Nor are proceedings against the company's co-defendant (*Wells v. Estates Investment Co.* (1867), 15 W. R. 762).

(*o*) *Re Onward Building Society, supra*; see, however, *Hall v. Old Talargoch Lead Mining Co.* (1876), 3 Ch. D. 749.

(*p*) *Re Flint, Coal, and Cannel Co.* (1867), 56 L. J. (CH.) 232; *Re Britain Medical and General Life Assurance Association* (1886), 32 Ch. D. 503.

(*q*) *Re Perkins Beach Lead Mining Co.* (1877), 7 Ch. D. 371.

(*r*) *Mersey Steel and Iron Co. v. Naylor, Benson & Co.* (1882), 9 Q. B. D. 648, O. A.

(*s*) *Re Pontypridd and Rhondda Valleys Tramways Co.* (1889), 58 L. J. (CH.) 536.

Where the court stays proceedings or refuses leave to proceed, it generally requires the liquidator to admit the creditor to prove for the amount of his claim, and his costs of action and of the application to stay (*t*), or the costs until he had notice of the winding up (*u*). If an action is commenced after notice of the winding up, the creditor may be ordered to pay the costs thereafter incurred (*a*); and if the company, before the application to stay is made, offers to allow the creditor to prove for his debt and costs, he is not allowed his costs of appearing upon the application to stay (*b*).

Where, at the time when the winding-up order is made, an appeal by the company is pending in the Court of Appeal, which proves successful, the unsuccessful party can appeal to the House of Lords without obtaining the leave of the winding-up court (*c*).

Proceedings will be allowed to continue where they are to enforce a mortgage or security upon the company's property, unless the liquidator offers to give all that the mortgagee can obtain by his proceedings, or an order in the winding up has already given him that relief (*d*); or where the company is a necessary party to an action against it and other persons (*e*); or where an action is the most convenient method of trying a question (*f*); or where a shareholder has commenced proceedings for rescission and rectification of the register before the winding up (*g*); or where the

SECT. 16.
Winding up
by the
Court.

Costs of
proceedings.

When pro-
allowed to
continue.

(*t*) *Re Poole Firebrick and Blue Clay Co.* (1873), L. R. 17 Eq. 268; *Walker v. Banagher Distillery Co.* (1875), 1 Q. B. D. 129.

(*u*) *Re Life Association of England* (1864), 34 L. J. (CH.) 64; *Re Keynsham Co.* (1863), 33 Beav. 123.

(*a*) *Re East Kent Shipping Co.* (1868), 18 L. T. 748; *Freeman v. General Publishing Co.*, [1894] 2 Q. B. 380.

(*b*) *Rose v. Gardden Lodge Coal Co.* (1878), 3 Q. B. D. 235.

(*c*) *Humber & Co. v. John Griffiths Cycle Co.* (1901), 85 L. T. 141, H. L.

(*d*) *Re Lloyd (David) & Co., Lloyd v. Lloyd (David) & Co.* (1877), 6 Ch. D. 339, C. A.; *Re Longendale Cotton Spinning Co.* (1878), 8 Ch. D. 150, 154; *Re Hamilton's Windsor Ironworks Co., Ex parte General Credit and Discount Co.* (No. 2) (1879), 27 W. R. 827, C. A.; *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681; *Re Pound (Henry), Son, and Hutchins* (1889), 42 Ch. D. 402, C. A. (debenture-holders); *Re Wanzer, Ltd.*, [1891] 1 Ch. 305; *Re West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713; *Re Stubbs (Joshua), Ltd., Barney v. Stubbs (Joshua), Ltd.*, [1891] 1 Ch. 475, C. A. (debenture-holders); *Strong v. Carlyle Press*, [1893] 1 Ch. 268, C. A. (debenture-holders); *Re Blakely Ordnance Co., Blakely v. Dent* (1867), 15 W. R. 663, C. A. (unpaid vendor's lien); compare *Thames Plate Glass Co. v. Land and Sea Telegraph Co.* (1870), L. R. 11 Eq. 248; *Re Compagnie Générale de Bellegarde, Campbell v. Compagnie Générale de Bellegarde* (1876) 2 Ch. D. 181.

(*e*) *Re Rio Grande Do Sul Steamship Co.* (1877), 5 Ch. D. 282; *Re London, Bombay and Mediterranean Bank, McEwen v. London, Bombay and Mediterranean Bank* (1866), 15 W. R. 245; *Re Breechloading Armoury Co., Hagell v. Currie*, [1867] W. N. 75; *Re Marine Investment Co.* (1868), 17 L. T. 535.

(*f*) *Wyley v. Exhall Coal Mining Co.* (1864), 33 Beav. 538 (an action to restrain a trespass); *Re Contract Corporation, Ex parte Bateman* (1866), 15 W. R. 118, 245, C. A.; *Re Peace (Joseph) & Co.*, [1873] W. N. 127 (action for damages for diversion of water).

(*g*) *Henderson v. Lacon* (1867), L. R. 5 Eq. 249; *Hall v. Old Talargoch Lead Mining Co.* (1876), 3 Ch. D. 749; *Marshall v. Glamorgan Iron and Coal Co.* (1868), L. R. 7 Eq. 129, 132; *Cocksedge v. Metropolitan Coal Consumers Association, Ltd.* (1891), 65 L. T. 432, C. A. Where a company in liquidation is plaintiff, the defendant may put in a counterclaim in the nature of a defence without obtaining the leave of the court (*Mersey Steel and Iron Co. v. Naylor, Benson & Co.* (1862), 9 Q. B. D. 648, 656, C. A.; affirmed (1884), 9 App. Cas. 434).

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Winding up
by the
Court.

claim is for specific performance (*h*), or for recovery of possession (*i*). Parties to proceedings which are continued by leave are not relieved from cross-examination in the winding up as to the matters in dispute (*k*).

An application to commence or proceed with actions and proceedings against a company after a winding-up order must be made to the winding-up court (*l*), and must not be made *ex parte* (*m*). The Court of Appeal does not interfere where the winding-up judge has given leave to commence or to proceed with an action (*n*), though leave has been given in the Court of Appeal after being refused below (*o*).

Proceedings
outside the
jurisdiction.

916. The winding-up court will restrain a person within its jurisdiction from taking or continuing actions or proceedings out of the jurisdiction (*p*). It will also restrain a person domiciled in Scotland or Ireland from taking or continuing proceedings there (*q*), unless by means of such proceedings he has, before the winding up commenced, become a secured creditor (*r*). Where, however, a person has obtained a judgment *in rem* in a foreign court against the property of a company in liquidation, the liquidator cannot maintain an action against him to recover the amount received by him under the judgment, even though he be a British subject domiciled in England (*s*).

Transfer to
winding-up
order

917. Where a winding-up order has been made in the High Court, the judge dealing with the winding up has power, without further consent, to order the transfer to him of any action, cause, or

(*h*) *Thames Plate Glass Co. v. Land and Sea Telegraph Co.* (1870), L. R. 11 Eq. 248.

(*i*) *Re Strand Hotel Co.*, [1868] W. N. 2.

(*k*) *Re Contract Corporation, Ex parte Bateman* (1866), 15 W. R. 245, C. A.; *Mussey v. Allen* (1878), 9 Ch. D. 164.

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 142. This section refers to "the court" which by *ibid.*, s. 285, means when used in relation to a company, unless the context otherwise requires, the court having jurisdiction to wind up the company. After the winding-up order has been made, the judge dealing with the winding up may obtain control of actions by transferring them under the power of transfer (see *infra*) given him by Companies (Winding-up) Rules, r. 42 (1), which extends and supersedes R. S. O., Ord. 49, r. 5, compare *Wilson v. Natal Investment Co.* (1867), 36 L. J. (CH.) 312.

(*m*) *Western and Brazilian Telegraph Co. v. Bibby* (1880), 42 L. T. 821.

(*n*) *Thames Plate Glass Co. v. Land and Sea Telegraph Construction Co.* (1871), 6 Ch. App. 643.

(*o*) *Re St. Cuthbert's Lead Smelting Co.*, [1866] W. N. 84, 90, C. A.; *Re London, Bombay, and Mediterranean Bank, McEwen v. London, Bombay and Mediterranean Bank*, [1866] W. N. 363, 407, C. A.; *Re Strand Hotel Co.*, [1868] W. N. 2.

(*p*) *Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co.* (1874), 9 Ch. App. 557; *Re North Carolina Estate Co.* (1889), 5 T. L. R. 328; *Flack's Case*, [1894] 1 Ch. 369 (terms imposed upon the company); *Re Belfast Ship Owners' Co.*, [1894] 1 I. R. 321, C. A.; *Re Jenkins & Co.* (1907), 51 Sol. Jo. 715; compare *Re Maudslay, Sons & Field, Maudslay v. Maudslay, Sons & Field*, [1900] 1 Ch. 602.

(*q*) *Re Middlesbrough Firebrick Co.* (1885), 52 L. T. 98; *Re Hermann Loog, Ltd.* (1887), 36 Ch. D. 502; *Re Queensland Mercantile Agency Co.* (1888), 58 L. T. 878; *Re International Pulp and Paper Co.* (1876), 3 Ch. D. 594; *Re Thurso New Gas Co.* (1889), 42 Ch. D. 486.

(*r*) *Re West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713.

(*s*) *Minna Craig Steamship Co. v. Chartered Mercantile Bank of India, London and China*, [1897] 1 Q. B. 460, C. A.

matter pending in any other court or division brought or continued by or against the company. Any action or proceeding against the company by a mortgagee or debenture-holder for the purpose of realising his security, or by any other person for the purpose of enforcing a claim against its assets or property, which is pending in the High Court, is without further order to be transferred (*t*).

SECT. 16.
Winding-up
by the
Court.

(ii.) *Transfer of Winding-up Proceedings.*

918. The winding up of a company by the court, or any proceedings therein, may at any time and at any stage, and either with or without application from any of the parties thereto, be transferred from one court to another, or may be retained in the court in which the proceedings were commenced, although it is not the court in which they ought to have been commenced (*u*). Thus, the judge of the High Court may at any time order the proceedings in any other court to be transferred to the High Court, or any proceedings in the High Court to be transferred to any other court (*w*); and the judge of any court other than the High Court or a palatine court may at any time order any proceedings which have been commenced or are pending in his court to be transferred to any court which has jurisdiction to order the winding up of a company, not being the High Court or a palatine court (*x*).

Power to
transfer.

Notice of the application for transfer must, before the hearing, be served by the applicant on the official receiver of the court in which the proceedings are pending, and on the official receiver of the court to which they are sought to be transferred (*y*).

Notice of
application.

A transfer may be made where a petition has been presented, although a winding-up order on it has not been made (*a*), and may be ordered even after the petition has been opened (*b*).

(*t*) Companies (Winding-up) Rules, r. 42 (1), which follows to some extent the wording of R. S. C., Ord. 49, r. 5. Where any action brought by or against a company is so transferred to the judge of the High Court, the Registrar in Companies Winding-up may, under the general or special directions of the judge, hear, determine and deal with any application, matter, or proceeding which, if the action had not been transferred, would have been determined in chambers, and these provisions apply to the proceedings in any action in which by the Rules of the Supreme Court or otherwise the chamber proceedings are directed to be dealt with by the registrar (*ibid.*, r. 42 (2), which supersedes R. S. C., Ord. 49, r. 5 A.). In the case of applications in chambers in actions so transferred, where the practice in winding up is different from the practice in the Chancery Division, the practice in winding up prevails (Companies (Winding-up) Rules r. 42 (1)). Every writ of summons in a debenture-holder's action must be entitled in the matter of the company, and where a company is being compulsorily wound up in the High Court, such action is to be assigned to the judge having jurisdiction in the matter of the winding-up (Practice Masters' Rules, r. 3).

(*u*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 133 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 3 (1)].

(*w*) *Ibid.*, s. 133 (2); Companies (Winding-up) Rules, r. 43. As to transfer to the stannaries jurisdiction, see *Re New Terras Tin Mining Co.*, [1894] 2 Ch. 344.

(*x*) Companies (Winding-up) Rules, r. 44.

(*y*) *Ibid.*, r. 45.

Re Laxon & Co., [1892] 3 Ch. 31, C. A.

Re East Dulwich No. 295 Starr-Bowkett Building Society (1890), 39 W. R. 32.

SECT. 16.
Winding up
by the
Court.

To what
courts.

Proceedings
after transfer.

Transfer from
county court.

919. The transfer can only be made to a court which has winding-up jurisdiction (c). In the High Court, on a petition which might have been presented in the county court, a winding-up order will be made and the proceedings at the same time will be transferred to the proper county court (d), unless the proceedings are wilfully taken in the wrong court, when they will be dismissed (e). Any particular proceeding in the winding up, for instance, a misfeasance summons, may be transferred (f).

When an order for transfer of proceedings has been made, the person on whose application the transfer has been made must lodge with the registrar of the court to which the proceedings are transferred a sealed copy of the order of transfer. The records of the proceedings must also be transmitted to the registrar, who, as soon as he has received them, must give notice of the transfer to the official receiver of his court. The official receiver, who becomes the official receiver in the proceedings, has to give notice of the transfer to the Board of Trade, and the transferred proceedings receive a new distinctive number (g).

920. No application for the transfer of a winding up or any proceedings therein from a county court to the High Court is entertained until the list of parties who have given notice of their intention to attend the hearing of the petition has been closed. The applicant for such transfer must give four days' notice by postal letter of his application to the petitioner and the respondent, and to all parties in the list, stating that, unless notice is given to him by any of the above-mentioned parties of intention to oppose, the application will be taken as not objected to by them. No costs are allowed to any parties appearing to support or oppose such a transfer, unless for special reasons the judge otherwise determines (h).

When the Lord Chancellor by order excludes a county court from having winding-up jurisdiction, or attaches the district or any part of the district of a county court to the High Court, or any other county court, or detaches the district, or any part of the district, of any county court, from the district and jurisdiction of the High Court, any winding-up matters pending in the court or district to which the order relates are to become transferred to such court as is mentioned for the purpose in the order. The rules as to transfer of proceedings thereupon apply to the transfer of such pending proceedings in all respects as if the proceedings had been transferred by order of a court having power to transfer proceedings (i).

(c) *Re Real Estates Co.*, [1893] 1 Ch. 398

(d) *Re Milford Haven Shipping Co.*, [1895] W. N. 16; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 43, 48, 312.

(e) *Re Brightmore, Ex parte May* (1884), 14 Q. B. D. 37.

(f) *R. v. East Stonehouse County Court Judge and How* (1891), 63 L. T. 730, C. A. A proceeding in court on a voluntary winding up may be transferred (*ibid.*).

(g) Companies (Winding-up) Rules, r. 46.

(h) Practice Direction, May, 1892.

(i) Companies (Winding-up) Rules, r. 47; as to county courts having jurisdiction, see p. 391, *ante*.

(iii.) *Stay of Winding-up Proceedings.*

SECT. 16.

Winding up
by the
Court.Order by
court.

921. The court may at any time after an order for winding up on the application of any creditor or contributory (*j*), and on proof to its satisfaction that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as it thinks fit (*k*). The order to stay may reserve liberty to any dissentient creditor or the official receiver to apply within a limited time to remove the stay (*l*). The proceedings on a compulsory order made after the commencement of a voluntary winding up may be stayed (if no creditor objects) so as to allow the voluntary winding up to continue (*m*). Frequently a stay is applied for in pursuance of a scheme of arrangement sanctioned by the court (*n*).

In the exercise of its jurisdiction to stay, the court, so far as possible, acts upon the principles applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual (*o*). The court refuses, therefore, to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the stay will be conducive or detrimental to commercial morality and to the interests of the public at large. In particular, the court will have regard to the following facts:—That directors have not complied with their statutory duties as to giving information to the official receiver or furnishing a statement of the affairs; that there has been an undisclosed agreement between the promoter and the vendor to the company as to the participation by the former in fully-paid shares forming the consideration for the purchase of property by the company on its formation; that the promoter has made gifts of fully-paid shares to the directors; that there are any other matters connected with the promotion, formation, or failure of the company, or the conduct of its business or affairs, which appear to the court to require investigation. The same principles are apparently applicable whether the company has or has not invited

Considera-
tions in grant-
ing order.

(*j*) In the case of an application by an alleged contributory, he may be required to admit that he is a contributory before an order is made on his application (*Re Continental Bank Corporation, Re London and Mediterranean Bank*, [1867] W. N. 114, 178, C. A.).

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 144 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 89]. The order may also be made where the winding up is voluntary or under supervision (*Re South Barrule Slate Quarry Co.* (1869), L. R. 8 Eq. 688; *Re Steamship "Titian" Co.* (1888), 58 L. T. 178; *Re Schanschieff Electric Battery Syndicate, Ltd.*, [1888] W. N. 166). An order may be made under the section after the return has been made to the registrar of the conclusion of a voluntary winding up, and the period of three months after the expiration of which dissolution will follow (see p. 592, *post*) may thus in effect be extended (*Re Eastern Investment Co., Ltd.*, [1905] 1 Ch. 352).

(*l*) *Re Baxters, Ltd.*, [1898] W. N. 60.

(*m*) *Re Bristol Victoria Potteries Co.* (1872), 20 W. B. 569.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 120; see *Re Western of Canada Oil, Lands and Works Co.*, [1874] W. N. 148; *Re Lyric Syndicate* (1900), 17 T. L. R. 162.

(*o*) *Re Telescriptor Syndicate*, [1903] 2 Ch. 174; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 90—93.

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by the
Court.

the public to subscribe for its shares—at any rate, if any shares held by those originally connected with a company of the latter description have been transferred to persons not having full knowledge of what has been previously done (*p*).

(iv.) *Special Case from County Court.*

Case stated by
county court
judge.

922. If any question arises in any winding-up proceeding in a county court which all the parties to the proceeding, or which one of them and the judge of that court, desire to have determined in the first instance in the High Court, the county court judge is to state the facts in the form of a special case for the opinion of the High Court. The special case and the proceedings, or such of them as may be required, are thereupon to be transmitted to the High Court for the purposes of the determination (*q*).

SUB-SECT. 13.—*Fraudulent Preference; Assignments for Benefit of Creditors.*

(i.) *Fraudulent Preference.*

Fraudulent
preference.

923. Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference is, if made or done by or against a company, to be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and is invalid accordingly. In this connection the presentation of the petition for winding up in the case of a winding up by or subject to the supervision of the court, and the resolution for winding up in the case of a voluntary winding up not under supervision, is deemed to correspond with the act of bankruptcy in the case of an individual (*r*).

This provision applies to winding up, whether compulsory or under supervision or voluntary, the bankruptcy law for the time being applicable to a bankrupt individual (*s*), but does not import into it the mutual credit clause of the bankruptcy law (*t*).

Meaning of
the term.

924. The preference is deemed fraudulent when the substantial and dominant motive in the mind of the debtor (*u*) was to prefer (*a*) one creditor or particular creditors.

(*p*) *Re Telescriptor Syndicate*, [1903] 2 Ch. 174; and see title **BANKRUPTCY AND INSOLVENCY**, Vol. II., pp. 90—93.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 133 (3) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 3 (3)]. A similar provision is contained in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 97 (3), as to which see title **BANKRUPTCY AND INSOLVENCY**, Vol. II., p. 313. And see *Re Portsea Island Building Society*, [1893] 3 Ch. 205; *Re Ferndale Industrial Co-operative Society*, [1894] 1 Q. B. 828.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 210 (1), (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 164]; *Re Russell Hunting Record Co., Ltd.*, [1910] W. N. 142.

(*s*) *Re Liverpool and London Guarantee and Accident Insurance Co., Mason, Gallagher, and Slater's Case* (1882), 30 W. R. 378; *Re Blackpool Motor Car Co., Ltd., Hamilton v. Blackpool Motor Car Co., Ltd.*, [1901] 1 Ch. 77; *Re Stenotyper, Ltd., Hastings Brothers v. Stenotyper, Ltd.*, [1901] 1 Ch. 250; see **BANKRUPTCY ACT, 1883** (46 & 47 Vict. c. 52), s. 48; and title **BANKRUPTCY AND INSOLVENCY**, Vol. II., pp. 279—287.

(*t*) *Kent's Case* (1888), 39 Ch. D. 259, C. A.; see p. 514, *ante*.

(*u*) That is, the company acting, as a rule, by its directors (*Sharp v. Jackson* [1899] A. C. 419).

(*a*) *Kent's Case*, *supra*.

A preference made to shield the company from the legal consequences of some prior act is not a fraudulent preference (b), though a mere sense of moral obligation is not sufficient to prevent the preference being fraudulent (c). Although *bonâ fide* pressure by independent persons or by the operation of the debtor's mind will prevent the preference being fraudulent in the case of an individual, pressure by the director of a debtor company prior to his resignation of office is not so regarded (d).

SECT. 16.
Winding up
by the
Court.

The preference, to be void, must be in favour of a creditor (e). Any person is a creditor who at the date of the impeached transaction is entitled, if winding up supervenes, to prove and to share in the distribution of the assets. Thus, security given to a surety before he has been called upon to pay may be a fraudulent preference (f). Where, however, a director is personally liable for a debt due by the company to a third person, the giving of a security to the third person is not a fraudulent preference, although this is done with the object of relieving the director (g).

Payments to
creditors.

Where a director pays money on shares in advance of calls, and simultaneously receives payment of his director's fees while the company is in embarrassed circumstances, the payment of fees may be set aside as a fraudulent preference (h). The issue of debentures to outsiders in satisfaction of existing debts is not necessarily a fraudulent preference (i); but where a director takes debentures to secure an amount due to him, or for which he is a surety, and postpones registration until within three months before the winding up, the issue is a fraudulent preference (k).

Payments to
directors.

Where any payment is void as a fraudulent preference of directors or other officers of the company, misfeasance proceedings may be taken to recover the amount paid (l). Where moneys which were

(b) *Sharp v. Jackson*, [1899] A. C. 419; compare *Re Patent File Co., Ex parte Birmingham Banking Co.* (1870), 6 Ch. App. 83. A payment made under an honest but mistaken belief in a legal obligation to make it is not a fraudulent preference (*Re Vautin, Ex parte Saffery*, [1900] 2 Q. B. 325).

(c) *Buckley's Case*, [1899] 2 Ch. 725; compare *Re Lake, Ex parte Dyer*, [1901] 1 K. B. 710, O. A.

(d) *Gaslight Improvement Co. v. Terrell* (1870), L. R. 10 Eq. 168; compare *Sykes' Case* (1872), L. R. 13 Eq. 255; *Habershon's Case* (1868), L. R. 5 Eq. 286; *Adamson's Case* (1874), L. R. 18 Eq. 670.

(e) *Re Gwawr-y-Gweithyr Industrial and Provident Society, Ltd., Dovey v. Morgan*, [1901] 2 K. B. 477.

(f) *Re Blackpool Motor Car Co., Ltd., Hamilton v. Blackpool Motor Car Co., Ltd.*, [1901] 1 Ch. 77. But where a director-surety who held unpaid shares made a payment on account of his shares, although there had been no call, and such payment was accompanied by a corresponding payment to the creditor, the transaction was held unimpeachable (*Poolé, Jackson, and Whyte's Case* (1878), 9 Ch. D. 322, O. A.); and see *Kent's Case* (1888), 39 Ch. D. 259, C. A.

(g) *Re Stenotyper, Ltd., Hastings Brothers v. Stenotyper, Ltd.*, [1901] 1 Ch. 250.

(h) *Re Washington Diamond Mining Co.*, [1893] 3 Ch. 95, O. A.; *Sykes' Case*, *supra*; see *Re Auriferous Properties, Ltd.*, [1898] 1 Ch. 691.

(i) *Re Inns of Court Hotel Co.* (1868), L. R. 6 Eq. 82. Where a company has acquired an insolvent business, and has agreed to indemnify the vendor against his debts, the issue of debentures in satisfaction thereof is not a fraudulent preference, although the company is wound up within three months after its incorporation (*Seligman v. Prince & Co.*, [1895] 2 Ch. 617, O. A.).

(k) *Re Jackson and Bassford, Ltd.*, [1906] 2 Ch. 467.

(l) *Re Washington Diamond Mining Co.*, *supra*.

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by the
Court.

advanced by directors have been repaid to them to discharge pressing claims against the company, proceedings to set aside the transaction as a fraudulent preference cannot be sustained by debenture-holders having only a floating charge (*m*).

(ii.) *Deeds of Assignment.*

For benefit of
creditors.

925. A conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors is void (*n*).

For arrange-
ment with
creditors.

The Deeds of Arrangement Act, 1887 (*o*), does not apply to arrangements made by a company, which may validly enter into an unregistered agreement for payment of its debts by instalments. All the creditors may take advantage of such an agreement although some of them have not assented to it (*p*).

SUB-SECT. 14.—*Enforcement of Orders and Appeal.*

(i.) *Enforcing Orders.*

How enforce-
able.

926. Every order of a court having jurisdiction to wind up a company, made in the exercise of the powers conferred by the Act of 1908 and rules, may be enforced by such court as if it were a judgment or order made in the exercise of its ordinary jurisdiction (*q*).

Every court having winding-up jurisdiction has for the purposes of that jurisdiction all the powers of the High Court (*r*).

Every order of a county court made in exercise of the powers conferred by the Act of 1908 and the rules, and every process issued therein, may be enforced, executed, and dealt with not only by such court, but by any county court, whether it has or has not jurisdiction to wind up a company, as if the order or process were made or issued for the enforcement of a judgment or order made by the last-mentioned court in the exercise of its ordinary jurisdiction (*s*).

(*m*) *Willmott v. London Celluloid Co.* (1886), 34 Ch. D. 147, C. A.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 210 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 164].

(*o*) 50 & 51 Vict. c. 57; see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 329 *et seq.*

(*p*) *Re Rileys, Ltd., Harper v. Rileys*, [1903] 2 Ch. 590.

(*q*) Companies (Winding-up) Rules, 1909, r. 24 (1). As to orders of the High Court, see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 178 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 120]; R. S. O., Ord. 42, r. 24; and title PRACTICE AND PROCEDURE. As to enforcing orders of the Lancaster Palatine Court out of the jurisdiction of that court, see *Dunmore v. Wharam*, [1898] W. N. 15. As to making an order of the House of Lords an order of the Chancery Division, see *British Dynamite Co. v. Krebs* (1879), 11 Ch. D. 448.

The court exercising the stannaries jurisdiction has, in addition to its ordinary powers, the same power of enforcing its orders as the High Court has (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 178 (2); and see p. 672, *post*).

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (6) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 1 (6)].

(*s*) Companies (Winding-up) Rules, r. 24. As to enforcing orders in county courts, see title COUNTY COURTS, Vol. VIII., pp. 550, 578.

927. A balance order (*t*) cannot be enforced by *fiery facias*, unless it directs payment to the liquidator (*u*). A county court, however, cannot issue a writ of *fiery facias* addressed to the sheriff to enforce an order directing payment to the liquidator of moneys received on behalf of the company (*a*). If personal representatives of a contributory make default in paying any money ordered to be paid by them, proceedings may be taken to administer the real and personal estate of the deceased contributory, or either of them, and to compel payment of the money due out of the estate (*b*).

SECT. 16.
Winding u
by the
Court.
Balance
order.

928. Any order made by the court in England for or in the course of winding up a company can be enforced in Scotland and Ireland in the courts that would respectively have jurisdiction in respect of that company if registered in Scotland or Ireland in the same manner in all respects as if the order had been made by them (*c*). An office copy of the order must be produced to the proper officer of the Scotch or Irish court, and its production is sufficient evidence of the order. The Scotch or Irish court must thereupon take the requisite steps in the matter for enforcing the order in the same manner as if it had been made by that court (*d*).

Enforcemen
in Scotland
and Ireland.

(*t*) See p. 502, *ante*.

(*u*) *Re Leeds Banking Co.* (1866), 1 Ch. App. 150.

(*a*) *Re Bassett's Plaster Co.*, [1894] 2 Q. B. 96.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 126 (3).

(*c*) *Ibid.*, s. 180 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 122]. As to the court having jurisdiction to wind up companies registered in Ireland, see *ibid.*, s. 134. As to the courts in Scotland, see *ibid.*, ss. 135, 136. In all winding-up proceedings all courts, judges, and persons judicially acting, and all officers, judicial or ministerial, of any court, or employed in enforcing the process of any court, are to take judicial notice of the signatures of officers of the English, Scotch, and Irish winding-up courts, and the seals of those courts when attached to the documents issued under the Act, or official copies thereof (*ibid.*, s. 225). An order on appeal may be enforced in Scotland or Ireland, and therefore the court will not stay execution pending appeal on the ground that the person to whom money is ordered to be paid is in Scotland or Ireland (*Re Queensland Mercantile and Agency Co., Ex parte Union Bank of Australia*, [1891] W. N. 132). As to whether a claimant resident in Scotland in an English winding up may be required to give security for costs, notwithstanding the section, see *Fontaine's Case* (1889), 41 Ch. D. 118, C. A. In like manner orders, interlocutors, and decrees made by the court in Scotland for or in the course of winding up a company are to be enforced in England and Ireland, and orders made by the court in Ireland for or in the course of winding up a company are to be enforced in England and Scotland, by the courts which would respectively have jurisdiction in respect of that company if registered in that part of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if the order had been made by those courts (Companies (Consolidation) Act, 1908, s. 180 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 122]). As to enforcing payment of calls in a winding up by the court in Scotland, see *ibid.*, ss. 179 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 121], 181 (4) [Companies Act, 1886 (49 & 50 Vict. c. 23), s. 5]. An order of the Scotch or Irish court must, in order to be enforced in England, be made an order of the court having jurisdiction in this country (*Re Hollyford Copper Mining Co.* (1869), 5 Ch. App. 93; *Re City of Glasgow Bank* (1880), 14 Ch. D. 628). The application is by motion *ex parte* (*Re Scottish Pacific Coast Mining Co.*, [1886] W. N. 63).

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 180 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 123]. The court could not formerly give leave to serve notice of orders or proceedings on persons out of the jurisdiction (*Re*

SECT. 16.

(ii.) *Appeals.*Winding up
by the
Court.Appeals in
general.

929. Subject to rules of court, an appeal from any order or decision made or given in the winding up of a company by the court lies in the same manner and subject to the same conditions as an appeal from any order or decision of the court in cases within its ordinary jurisdiction (e). No appeal lies from an order allowing an extension of time for appealing from a judgment or order, or, without leave of the judge or the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a judge, except (*inter alia*) (1) where the liberty of the subject is concerned; (2) in case of granting or refusing an injunction or appointing a receiver; (3) in the case of any decision determining the claim of any creditor, or the liability of any contributory, or the liability of any director or other officer under the Companies Act, 1908, in respect of misfeasance or otherwise (f). An application for leave to appeal may be made *ex parte* or otherwise, as prescribed by rules of court (g). Subject as hereinafter mentioned, the practice on appeal from the winding-up judge is the same as in the case of any other judge of the Chancery Division.

Appeals from
winding-up
order.

930. An appeal against a winding-up order may be brought by a creditor or contributory who has appeared in the winding-up court or by the company itself. If the company is the only appellant, security for the costs of the appeal must be given (h), not out of the company's funds, but from an outside source, namely, by the directors or shareholders who are at the back of the appeal, and the security must be substantial (i).

An appeal from a winding-up order may be brought without

Anglo-African Steamship Co. (1886), 32 Ch. D. 348, C. A.); as to notice of an appointment to settle the list of contributories being served out of the jurisdiction, see *Re Newman (Nathan) & Co.* (1887), 35 Ch. D. 1, C. A.; *Re Liebig's (Baron) Cocoa and Chocolate Works, Ltd.*, [1888] W. N. 120. But any summons, order, or notice may now be directed to be served in a foreign country (R. S. C., Ord. 11, r. 8A).

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 181 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 124]; R. S. C., Ord. 58, r. 9.

(f) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38.

(g) Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (6).

(h) *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400, C. A.; *Re Photographic Artists' Co-operative Supply Association* (1883), 23 Ch. D. 370, C. A. Contributories or creditors who have not appeared below cannot appeal without leave (*Re Securities Insurance Co.*, [1894] 2 Ch. 410, C. A.). Other interested persons have no right to appeal, but may be heard as *amici curiæ* (*Re Bradford Navigation Co.* (1870), 5 Ch. App. 600). As to the costs of an unsuccessful appeal against a winding-up order, see *Re National Savings Bank Association* (1866), 1 Ch. App. 547. As to payment by directors out of assets of costs incurred against the wishes of a number of shareholders and a minority of the board, see *Smith v. Manchester (Duke)* (1883), 24 Ch. D. 611.

(i) *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] W. N. 66, C. A. Application for security must, except under special circumstances, be made before the appeal is in the paper for hearing (*Re Indian, Kingston and Sandhurst Mining Co.* (1882), 22 Ch. D. 83, C. A.). If notice of appeal has been given, but not set down, it is doubtful whether the court has such seisin of the appeal as to be able to order security.

the leave of the court, as the order is not an interlocutory order or interlocutory judgment (*k*). For the purpose of being promptly heard, however, such an appeal is to be treated as an interlocutory appeal (*l*).

SECT. 16.
Winding up
by the
Court.

An appeal does not stay the proceedings except so far as the judge or the Court of Appeal orders (*m*). The Court of Appeal will not stay execution while there is default in complying with an order to give security for costs (*n*). Where a winding-up order is discharged on appeal, all proceedings taken under it are also discharged (*o*).

931. Whether the appeal is from the winding-up order itself or from an order or decision in the winding up, the time for appealing is, except by special leave of the Court of Appeal, fourteen days, calculated from the time at which the order is signed, entered, or otherwise perfected, or, in the case of a refusal of an application, from the date of refusal (*p*). The time is seldom extended (*q*). The appeal is by notice of motion, which must be served within the fourteen days, the notice being a fourteen days' notice in the case of an appeal from the winding-up order or a final order in the winding up (*r*), and in the case of interlocutory (*s*) orders in the winding up a four days' notice. The notice must be served on all parties directly affected by the appeal (*t*). The appeal must be entered before the day named in the notice for the hearing of the appeal, or, if that day falls in vacation, before the next day on which the court is sitting (*u*).

Time for
appealing.

(*k*) *Re Stockton Iron Furnace Co.* (1879), 10 Ch. D. 335, 349, C. A.

(*l*) *Re Naval, Military and Civil Service Co-operative Society of South Africa*, [1903] W. N. 120, C. A.; and see *Re Allsopp (Samuel) & Sons, Ltd.*, [1903] W. N. 132, C. A.

(*m*) R. S. C., Ord. 58, r. 16. In some cases the court will order the advertisement of the winding-up order to be stayed pending an appeal from it.

(*n*) *Re Corporation of British Investors*, [1897] W. N. 36, C. A.

(*o*) *Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. App. 309, 314.

(*p*) R. S. C., Ord. 58, rr. 9, 15; *Re National Funds Assurance Co.* (1876), 4 Ch. D. 305, C. A.; *Re National Stores, Ltd.*, [1899] 2 Ch. 773.

(*q*) *Re Bastow (Samuel) & Co., Ex parte Bastow & Co.* (1867), 37 L. J. (CH.) 51; compare *Esdale v. Payne* (1889), 40 Ch. D. 520, 533, C. A.; *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, C. A.; *Re New Callao* (1882), 22 Ch. D. 484, C. A.

(*r*) R. S. C., Ord. 58, r. 3; *Re Stockton Iron Furnace Co.*, *supra*.

(*s*) *Ibid.*; and see *Re Madras Irrigation and Canal Co., Wood v. Madras Irrigation and Canal Co.* (1883), 23 Ch. D. 248, C. A.; *Re Reeves (Herbert) & Co.*, [1902] 1 Ch. 29, 33, C. A.; *Pheysey v. Pheysey* (1879), 12 Ch. D. 305, C. A.

(*t*) R. S. C., Ord. 58, r. 2. As to serving the official receiver, see *Re Webber, Ex parte Webber* (1889), 24 Q. B. D. 313, C. A. Where supporting creditors and contributories have been allowed sets of costs between them, unless it is sought to disturb that part of the order, notice of appeal need not be served on them, but letters should be sent informing them of the appeal, and that the order as to their costs is not intended to be affected. In that case a similar order as to their costs will be made if they appear on the appeal and it is unsuccessful. If, however, notice of appeal is given to them and the appeal is dismissed, they are entitled to separate sets of costs of appeal (*Re Ibo Investment Co.*, [1903] 2 Ch. 373, C. A.).

(*u*) *Re National Funds Assurance Co.*, *supra*; *Re Mansel, Rhodes v. Jenkins* (1878), 7 Ch. D. 711, C. A.; and see *Re Harker, Goodbarne v. Fothergill* (1879), 10 Ch. D. 613, C. A.

SECT. 16.
Winding up
by the
Court.

Palatine and
county
courts.

932. Appeals from the palatine courts now lie to the Court of Appeal, whose decisions are subject to appeal to the House of Lords (a).

Any appeal from a county court in a winding-up matter must be made to a Divisional Court of the King's Bench Division, and the decision of the Divisional Court is final unless leave to appeal is given by that court or by the Court of Appeal (b).

Registrar.

933. An appeal from a decision of any registrar (c) is brought by moving before the judge to discharge the order, and not by appealing directly to the Court of Appeal or Divisional Court (d). In the High Court the application must be made within fourteen days from the date of the decision (e). Applications before the registrar may at any time be, and frequently are, adjourned by him to be heard before the judge either in court or chambers (f).

Judge in
chambers.

934. Where the winding-up judge makes an order in chambers, a motion to discharge it must be made before the judge himself in court within fourteen days. Unless this is done, or the judge gives a certificate that he does not desire further argument in court, the Court of Appeal will not entertain an appeal from the decision (g).

Official
receiver.

935. An appeal from the official receiver as such to the court may be brought (1) in respect of his decision as to the costs and expenses of any person incurred in and about the preparation, making, and verification of the statement of affairs (h); (2) in respect of his decision, as chairman of a meeting, whether a proof should be admitted for the purpose of voting (i); (3) in respect of his decision, as provisional liquidator, whether a proof should be

(a) Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23), s. 4; Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47), s. 11. As to the jurisdiction of these courts, see p. 392, *ante*.

(b) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120; Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1 (5); *Re North Wales Gunpowder Co.*, [1892] 2 Q. B. 220, C. A.; *Re Ilkley Hotel Co.*, [1893] 1 Q. B. 248; *Re New Par Consols.*, [1898] 1 Q. B. 573.

(c) Namely, the registrar of the High Court, or, where the winding up is in the district registry of Liverpool or Manchester, the district registrar, or where the winding up is in a county court, the registrar or one of the joint registrars, or a deputy registrar, or, in any court other than the High Court, the officer of the court whose duty it is to exercise in relation to a winding up the functions which in the High Court are exercised by a registrar or master (Companies (Winding-up) Rules, r. 2).

(d) This is certainly the case in the High Court; see *Re Pretoria Pietersburg Rail. Co., Ltd.*, [1904] 2 Ch. 170, C. A.; *Re Brynda and Port Talbot Collieries, Ltd.*, [1904] W. N. 136. The practice is the same in actions transferred to the winding-up court where the registrar is acting as a master (Practice Note, [1905] W. N. 128).

(e) B. S. C., Ord. 58, r. 15.

(f) Companies (Winding-up) Rules, r. 7.

(g) *Re Pearce*, [1899] W. N. 114, C. A. As to an appeal from an order directing a public examination, see *Re National Stores, Ltd.*, [1900] 1 Ch. 27, C. A.

(h) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147 (4).

(i) Companies (Winding-up) Rules, r. 137; see *Re Canadian Pacific Colonization Corporation* (1891), 40 W. R. 40.

admitted for the purpose of dividend (*k*). Where he is liquidator, appeals from his decisions are regulated by the rules relating to appeals from the decisions of liquidators (*l*).

SECT. 16.
Winding up
by the
Court

An appeal to the court from the official receiver as such must be brought within twenty-one days from the time when the decision or act appealed against is done, pronounced, or made (*l*). The appeal, in whatever court the winding up is pending, must be heard in open court (*m*), and is by motion, on at least two clear days' notice (*n*).

936. If any person is aggrieved by any act or decision of the liquidator (*o*), that person may apply to the court, and the court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just (*p*). In particular, an appeal to the court is allowed from the liquidator's decision, as chairman of a meeting, as to whether a proof should be admitted for the purposes of voting or rejected (*q*), and from his decision as to rejection or admission of a proof for purposes of dividend (*r*). The appeal is brought in the High Court by summons in chambers, even when the official receiver is liquidator (*s*), and in other courts by motion, which must be heard in open court (*t*). The only case in which a certain time is limited for bringing an appeal is where it is from the rejection of a proof (*a*). The court may, on the application of a creditor or contributory, expunge or reduce a proof if the liquidator declines to interfere (*b*). Liquidator.

A person whose name has been finally settled on the list of contributories by the liquidator, whether he is also official receiver or not, may appeal to the court by summons within twenty-one days from the date of service on him of notice of settlement of the list (*c*).

(*k*) Companies (Winding-up) Rules, rr. 104, 108. Notice of the application to vary or reverse the decision must be given within twenty-one days from the date of service of the notice of rejection.

(*l*) *Ibid.*, r. 206.

(*m*) *Ibid.*, rr. 5 (1), 6 (1).

(*n*) *Ibid.*, r. 8 (1).

(*o*) This includes the official receiver when acting as liquidator or provisional liquidator (*ibid.*, rr. 2, 108).

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 158 (5) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 24]. The wording is taken from the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 90. As to who is a person aggrieved, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 37.

(*q*) Companies (Winding-up) Rules, r. 137.

(*r*) *Ibid.*, r. 104. The time for appealing is in this case twenty-one days from the date of service of the notice of rejection of the proof (*ibid.*).

(*s*) *Ibid.*, r. 5; *Re National Wholemeal Bread and Biscuit Co.*, [1892] 2 Ch. 457, which see, also, as to the costs of the appeal.

(*t*) Companies (Winding-up) Rules, rr. 6, 8 (1).

(*a*) See note (*k*), *supra*.

(*b*) Companies (Winding-up) Rules, r. 106; and see *ibid.*, r. 105.

(*c*) *Ibid.*, r. 81 (1). The official receiver, as liquidator or provisional liquidator, is not in any case personally liable to pay any costs of or in relation to an application to set aside or vary his act or decision settling the name of a person on the list of contributories (*ibid.*, r. 81 (2)). An ordinary liquidator seems to be treated in the same way; see *Salisbury-Jones and Dale's Case*, [1895] 1 Ch. 333, C. A.; *Smallpages and Brandon's Cases* (1885), 30 Ch. D. 598.

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Winding up
by the
Court.
From Board
of Trade.

937. There is no general right to appeal to the court from decisions of the Board of Trade, but in certain cases a right to appeal is expressly given. Where a liquidator has paid into the Companies Liquidation Account any money in his hands or under his control representing assets unclaimed or undistributed for six months after the date of their receipt, any person claiming to be entitled thereto may apply to the Board for payment, and he or any other person dissatisfied with the decision of the Board in respect of the claim may appeal to the High Court (*d*). When the Board grants or withholds the release of a liquidator, there is a right of appeal to the High Court (*e*). Appeals must be heard before the judge in open court. They are to be made by motion (*f*), and must be brought within twenty-one days from the time when the decision or act appealed against was done, pronounced, or made (*g*).

SUB-SECT. 15.—*Miscellaneous Practice and Procedure.*

(i.) *In General.*

Winding-up
Rules, 1909.

938. The practice as regards the winding up of companies is, for the most part, regulated by the Companies (Winding-up) Rules, 1909 (*h*), which came into operation on April 1st, 1909 (*i*). The rules apply to the proceedings in every winding up which commenced on and after April 1st, 1909, and also, so far as practicable, and subject to any general or special order of the court, to all proceedings taken or instituted after that date in a winding up which commenced on or after January 1st, 1891. Rules which,

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 224 (6), (7) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15 (5)].

(*e*) *Ibid.*, s. 157 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 22].

(*f*) Companies (Winding-up) Rules, rr. 5, 8.

(*g*) *Ibid.*, r. 206. The rules state that in courts other than the High Court appeals from the Board of Trade are to be heard in open court (*ibid.*, r. 6 (1)). The only right of appeal given by the Act is apparently to the High Court. But every court in England having winding-up jurisdiction has, for the purposes of that jurisdiction, all the powers of the High Court (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (6)). As the Board of Trade acquiesced in the making of the rules, it may be assumed that it will submit to its decisions being subject to appeal to the palatine courts and county courts where those courts are exercising winding-up jurisdiction.

(*h*) The rules were made by the Lord Chancellor with the concurrence of the Board of Trade. Having been laid before Parliament as required by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), they must be judicially noticed, and they have effect as if enacted by that Act (*ibid.*, s. 237 (2)). The effect of this provision is that the rules have statutory effect, and, as long as they remain in force, cannot be questioned by any court (*Patent Agents (Institute) v. Lockwood*, [1894] A. C. 347); compare *Re East of England Banking Co.* (1868), 4 Ch. App. 14, 19. As to the adoption of the rules by the authority empowered to make rules for regulating the practice and procedure in the Chancery Court of the County Palatine of Lancaster, see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 237 (4). As to the power to make regulations as to fees in winding-up proceedings, see *ibid.*, s. 237 (3).

(*i*) Companies (Winding-up) Rules, r. 221. These rules revoked and annulled the rules of 1903, subject to the provision that such revocation and annulment was not to prejudice or affect anything done or suffered before April 1st, 1901, under any revoked rule or order and that no rule or practice annulled or repealed by the Rules of 1903 was to be revived by reason of the revocation and annulment in 1909 (*ibid.*, r. 220).

however, from their nature and subject-matter are, or which by the headlines above the group in which they are contained or by their terms are made applicable only to the proceedings in a winding up by the court, do not apply to the proceedings in a voluntary winding up, or winding up under supervision (*h*).

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Winding up
by the
Court.

939. The forms in the appendix to the Rules of 1909 where applicable, and where they are not applicable forms of the like character, with such variations as circumstances may require, must be used. Where the forms are applicable, any costs occasioned by the use of any other or more prolix forms are to be borne by or disallowed to the party using them, unless the court otherwise directs (*l*).

Use of
prescribed
forms.

The Board of Trade may from time to time alter any forms which relate to matters of an administrative and not of a judicial character, or substitute new forms, such altered or substituted forms being published in the *London Gazette* (*m*).

940. The Board of Trade may also from time to time issue general orders or regulations for the purpose of regulating any matters under the Act of 1908, or the rules, which are of an administrative and not of a judicial character. Judicial notice is to be taken of any general orders or regulations printed by the King's printers and purporting to be issued under the authority of the Board (*n*).

Board of
Trade
regulations.

(*k*) Companies (Winding-up) Rules, r. 1. In the Companies (Winding-up) Rules, unless the context or subject-matter otherwise requires, "the Act" means the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); "the company" means a company which is being wound up, or against which proceedings to have it wound up have been commenced; "court" means the court which has jurisdiction to wind up the company; "creditor" includes a corporation, and a firm of creditors in partnership; "gazetted" means published in the *London Gazette*; "judge" means in the High Court the judge who for the time being exercises the jurisdiction of the High Court to wind up companies, and in any other court the judge thereof, or officer who exercises the powers of the judge thereof; "liquidator" includes an "official receiver" when acting as liquidator; "official receiver" includes any officer appointed by the Board of Trade to discharge the duties of official receiver under the Act; "palatine court" means one of the Chancery Courts of the Counties Palatine of Lancaster and Durham; "proceedings" means the proceedings in the winding up of a company under the Act; "registrar" means in the High Court any of the registrars in bankruptcy of the High Court, and any person who is appointed to fill the office of registrar under the rules, and, where a winding up of a company is in the District Registry of Liverpool or Manchester, means the district registrar; and in a county court where there are joint registrars, means either of such registrars, or a deputy registrar, and in any court other than the High Court, means the officer of the court whose duty it is to exercise in relation to a winding up the functions which in the High Court are exercised by a registrar or master; "the rules" means the Rules of 1909, and includes the prescribed forms; "sealed" means sealed with the seal of the court; "taxing officer" means the officer of the court whose duty it is to tax costs in the proceedings of the court under its ordinary jurisdiction. Words importing the masculine gender include females; words in the singular include the plural, and words in the plural include the singular. The expression "person" includes any body of persons corporate or unincorporate, while expressions referring to writing include printing, lithography, photography, and other methods of representing or reproducing words in a visible form (*ibid.*, r. 2).

(*l*) *Ibid.*, r. 3.

(*m*) *Ibid.*

(*n*) *Ibid.*, r. 215. In the High Court the registrar, and in the District

SECT. 16.

(ii.) *Gazetting and Advertising.*Winding up
by the
Court.Gazetting
notices.Advertise-
ments.Matters
heard in
open court.

941. All notices subsequent to the making by the court of a winding-up order, in pursuance of the Act or the rules, requiring publication in the *London Gazette*, are to be gazetted by the Board of Trade (o).

Where any winding-up order is amended, and also in any case in which any matter which has been gazetted has been amended or altered, or in which a matter has been wrongly or inaccurately gazetted, the Board is to re-gazette such order or matter, with the necessary amendments and alterations, in the prescribed form, at the expense of the company's assets, or otherwise as the Board may direct (p).

Whenever the *London Gazette* contains any advertisement relating to any winding-up proceedings, the official receiver or liquidator, as the case may be, is to file with the proceedings a memorandum referring to and giving the date of the advertisement (q). In the case of an advertisement in a local paper, he is to keep a copy of the paper, and a memorandum referring to and giving the date of the advertisement is to be placed on the file (r). For this purpose one copy of each local paper in which any advertisement is inserted is to be left with the official receiver or liquidator, as the case may be, by the person who inserts the advertisement (s). Any such memorandum is *prima facie* evidence that the advertisement to which it refers was duly inserted in the issue of the *Gazette* or newspaper mentioned in it (t).

(iii.) *Applications to the Court.*

942. In the High Court, the following matters and applications must be heard before the judge in open court, namely: Petitions; public examinations (u); appeals from the Board of Trade, and from

Registries of the High Court at Liverpool and Manchester respectively the district registrars of the High Court, and in a court other than the High Court, the registrar must keep books according to the Forms in the Appendix to the Rules, and the particulars given under the different heads in such books are to be entered forthwith after each proceeding has been concluded; and the officers whose duty it is to keep the books are to make and transmit to the Board of Trade such extracts from their books, and to furnish the Board with such information and returns as it may from time to time require (Companies (Winding-up) Rules, r. 208). In all proceedings in or before the court, or any judge, registrar, or officer thereof, or over which the court has jurisdiction under the Act and rules, where no other provision is made by the Act or rules, the practice, procedure, and regulations, unless the court otherwise in any special case directs, is in the High Court to be in accordance with the Rules of the Supreme Court and practice of the High Court, and in a palatine court and county court in accordance, as far as practicable, with the existing rules and practice of the court in proceedings for the administration of assets by the court (*ibid.*, r. 218); compare *Re Pretoria Pietersburg Railway* (No. 2), [1904] 2 Ch. 359.

(o) Companies (Winding-up) Rules, r. 209 (1); and see *ibid.*, Form 103.

(p) *Ibid.*, r. 209 (2).

(q) *Ibid.*, r. 210 (1); and see *ibid.*, Form 104.

Ibid., r. 210 (2).

Ibid., r. 210 (3).

Ibid., r. 210 (4).

(u) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175; and see p. 430, *ante*.

the official receiver when acting as official receiver and not as liquidator; applications to have the dissolution of companies declared void; applications by the Board of Trade with reference to pending liquidations (*a*); applications for the committal of any person to prison for contempt; such matters and applications as the judge may from time to time by any general or special orders direct to be heard before him in open court (*b*).

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by the
Court.

Private examinations of persons summoned before the High Court are to be held in court or in chambers as the court directs (*c*).

Every other matter or application under the Act of 1908, to which the rules apply, may be heard and determined in chambers (*d*).

943. In courts other than the High Court the following matters and applications to the court must be heard in open court, namely: Petitions; public examinations; applications in a winding up by or under the supervision of the court for directions to the liquidator to prosecute (*e*); applications to rectify the register; appeals from the official receiver and Board of Trade; appeals from any decision or act of the liquidator; applications relating to the admission or rejection of proofs; misfeasance proceedings; applications to have dissolutions of companies declared void; applications for the committal of any person to prison for contempt; such matters and applications as the judge may from time to time by any general or special orders direct to be heard before him in open court (*f*); but any other matter or application may be heard and determined in chambers (*g*).

Applications
in courts
other than
High Court.

Subject to the orders of the Lord Chancellor, the place of sitting of each county court having jurisdiction under the Act of 1908 is, for the purposes of such jurisdiction, to be the town and place in which the court holds its sittings for general business (*h*). Subject to the provisions of the Act of 1908, the times of the sitting of each court, other than the High Court, in winding-up matters are to be those which are appointed for the transaction of the general business of the court, unless the judge otherwise orders (*i*).

Sittings of
county
courts.

944. Every application in court, other than a petition, must be made by motion, notice of which must be served on every person against whom an order is sought, not less than two clear days before the day named in the notice or hearing the motion, which day must be one of the days appointed for the sittings of the court (*k*).

Motions.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 175; and see p. 455, *ante*.

(*b*) Companies (Winding-up) Rules, r. 5 (1).

(*c*) *Ibid.*, r. 5 (2); and see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174; and p. 475, *ante*.

(*d*) Companies (Winding-up) Rules, r. 5 (3).

(*e*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 217 (1); and p. 563, *post*.

(*f*) Companies (Winding-up) Rules, r. 6 (1).

(*g*) *Ibid.*, r. 6 (2).

(*h*) *Ibid.*, r. 9.

(*i*) *Ibid.*, r. 10.

(*k*) *Ibid.*, r. 8 (1).

SECT. 16.
Winding up
by the
Court.

Hearing in
chambers.

Powers of
registrar.

Summons.

Persons
attending
proceedings.

945. Applications not required to be heard in court, as above mentioned, may be heard and determined in chambers (*l*).

All winding-up proceedings in the High Court must from time to time be attached to one or more of the registrars, who, together with the necessary clerks and officers, are, subject to the Act of 1908 and Rules, to act under the general or special directions of the judge (*m*).

In every cause or matter within the jurisdiction of the judge, whether by virtue of the Act, or by transfer, or otherwise, the registrar, in addition to his powers and duties under the Rules, has all the powers and duties of a master, registrar, or taxing master (*n*).

Subject to the provisions of the Act and Rules, in every court the registrar may, under the general or special directions of the judge, hear and determine any application or matter which under the Act and Rules may be heard and determined in chambers. Any matter or application before the registrar may at any time be adjourned by him to be heard before the judge, either in chambers or in court. Any matter or application may, if the judge or, as the case may be, the registrar thinks fit, be adjourned from chambers to court, or from court to chambers (*o*).

946. Every application in chambers must be made by summons, which, unless otherwise ordered, must be served on every person against whom an order is sought, and must require the person or persons to whom the summons is addressed to attend at the time and place named in the summons (*p*). Every summons in a winding-up matter in the High Court must be prepared by the applicant or his solicitor, and issued from the office of the registrar. A summons when sealed is deemed to be issued. The person obtaining the summons must leave in the registrar's office a duplicate, which must be stamped with the prescribed stamp and filed (*q*).

(iv.) *Attendance and Appearance of Parties.*

947. Every person for the time being on the list of contributories, or whose proof has been admitted, is at liberty, at his own expense, to attend proceedings (*r*). He is also entitled, upon payment of the costs occasioned thereby, to have notice of all such proceedings as he by written request desires to have notice of. If the court is of opinion that his attendance upon any proceedings has occasioned any additional costs which ought not to be borne by the funds of

(*l*) Companies (Winding-up) Rules, rr. 5, 6.

(*m*) *Ibid.*, r. 4 (1). Every other registrar may act for and in place of such registrar as above mentioned in all proceedings under the Act of 1908 and Rules, including the holding of public examinations, and when so acting is deemed to be the registrar for the purposes of the Act and Rules (*ibid.*, r. 4 (2)).

(*n*) *Ibid.*, r. 4 (3).

(*o*) *Ibid.*, r. 7.

(*p*) *Ibid.*, r. 8 (2).

(*q*) *Ibid.*, r. 14.

(*r*) This does not include the examination before an examiner of a person suspected of having property of the company in his possession; such examination is strictly private (*Re Grey's Brewery Co.* (1883), 25 Ch. D. 400; *Re Norwich Equitable Fire Insurance Co.* (1884), 27 Ch. D. 515, O. A.).

the company, it may direct such costs, or a gross sum in lieu thereof, to be paid by him. Until he has paid them he will not be entitled to attend any further proceedings (s).

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Winding up
by the
Court

No creditor or contributory is entitled to attend any proceedings in chambers unless and until he has entered in a book, to be kept by the registrar for that purpose, his name and address, and the name and address of his solicitor (if any), and upon any change of his address or of his solicitor his new address, and the name and address of his new solicitor (t).

The court may from time to time appoint any one or more of the creditors or contributories to represent before the court, at the expense of the company, all or any class of the creditors or contributories, upon any question or in relation to any proceedings before the court, and may remove the person so appointed. If more than one person is so appointed to represent one class, the persons appointed must employ the same solicitor to represent them (a).

948. Where the attendance of the liquidator's solicitor is required on any proceeding in court or chambers, the liquidator need not attend in person, except in cases where his presence is necessary in addition to that of his solicitor, or the court directs him to attend (b).

Attendance
of liquidator

(v.) *Title, Sealing and Filing of Proceedings; Inspection of File.*

949. Every proceeding (c) in a winding-up matter must be dated, and, with any necessary additions, must be intitled as follows:—"In the — Court. Companies (Winding-up). In the Matter of the Companies (Consolidation) Act, 1908"—with the name of the matter to which it relates (d).

Title of
proceedings.

The first proceeding in every winding-up matter must have a distinctive number assigned to it in the office of the registrar, and all subsequent proceedings in the same matter must bear the same number (e).

Distinctive
number.

950. Every officer of a court who receives any document to which an adhesive stamp is affixed must immediately deface the stamp. No such document is to be filed or delivered until the

Defacing
stamps.

(s) Companies (Winding-up) Rules, r. 152 (1). A contributory is entitled not merely to attend the cross-examination by the official liquidator of a person claiming to be a creditor, but also to cross-examine the claimant himself (*Re Brompton and Longtown Rail. Co.* (1871), L. R. 11 Eq. 428).

(t) Companies (Winding-up) Rules, r. 152 (3).

(a) *Ibid.*, r. 152 (2). As to the costs of such a representative, see *Re Overend, Gurney and Co., Ex parte Oakes and Peake* (1867), L. R. 3 Eq. 576, 634; *Re International Life Assurance Society, McIver's Claim* (1870), 5 Ch. App. 424, 427.

(b) Companies (Winding-up) Rules, r. 153.

(c) All proceedings must be written or printed, or partly written or partly printed, on paper of the size of thirteen inches in length and eight inches in breadth, or thereabouts, and must have a stitching margin; but no objection is to be allowed to any proof or affidavit on account only of its being written or printed on paper of other size (*ibid.*, r. 12).

(d) *Ibid.*, r. 11 (1). Numbers and dates may be indicated by figures (*ibid.*).

SECT. 16. stamp has been defaced ; and it is the duty of the party presenting or receiving it to see that the defacement has been duly made (*f*).

**Winding up
by the
Court.**

Sealing.

951. All orders, summonses, petitions, warrants, process of any kind (including notices when issued by the court), and office copies in any winding-up matter must be sealed (*g*).

Filing.

952. All petitions, affidavits, summonses, orders, proofs, notices, depositions, bills of costs and other proceedings in the High Court in a winding-up matter must be kept and remain on record in the registrar's office. Subject to the directions of the court, they must be placed in one continuous file, and no proceeding in any winding-up matter is to be filed in the Central Office (*h*).

In courts other than the High Court a file of proceedings in every winding-up matter is to be kept, on which, subject to the directions of the court, all petitions, affidavits, summonses, orders, proofs, notices, depositions, and other proceedings in the matter are to be placed and remain of record as far as possible in continuous order (*i*).

**Inspection
of file.**

953. Every person who has been a director or officer of a company which is being wound up, and every duly authorised officer of the Board of Trade, is entitled, free of charge, and every contributory and every creditor whose claim or proof has been admitted, is entitled on payment of a fee of 1s. for each hour or part of an hour occupied, at all reasonable times, to inspect the file of proceedings and to take copies or extracts from any document therein, or to be furnished with such copies or extracts at a rate not exceeding 4d. per folio of seventy-two words (*k*).

In every court all office copies of petitions, affidavits, depositions, papers and writings, or any parts thereof, required by the official receiver or any liquidator, contributory, creditor, officer of a company, or other person entitled thereto, must be provided by the registrar. The copies must, except as to figures, be fairly written out at length, and be sealed and delivered out without any unnecessary delay, and in the order in which they have been bespoken (*l*).

**Board of
Trade and
official
receiver.**

Where, in the exercise of their functions under the Act of 1908 or Rules, the Board or the official receiver requires to inspect or use the file, the registrar must (unless it is at the time required for use in court or by him), on request, transmit the file to the Board or official receiver, as the case may be (*m*).

(*f*) Companies (Winding-up) Rules, r. 21. The stamp is to be defaced in the High Court in such manner as the Commissioners of Inland Revenue may from time to time direct, and in any other court by writing, partly on the stamp and partly on the document, the name of the matter, or in such other manner as the Commissioners of Inland Revenue may from time to time direct (*ibid.*).

(*g*) *Ibid.*, r. 13.

(*h*) *Ibid.*, r. 16.

(*i*) *Ibid.*, r. 17.

(*k*) *Ibid.*, r. 19.

(*l*) *Ibid.*, r. 18.

(*m*) *Ibid.*, r. 20.

(vi.) Evidence.

SECT. 16.
Winding up
by the
Court.
—

954. Where any company is being wound up, all books and papers of the company and of the liquidators are, as between the contributories of the company, to be *primâ facie* evidence of the truth of all matters purporting to be therein recorded (n).

955. Any affidavit may be sworn in Great Britain or Ireland, or elsewhere within the dominions of His Majesty, before any court, judge, or person lawfully authorised to take and receive affidavits, or before any of His Majesty's consuls or vice-consuls in any place outside His Majesty's dominions. All courts, judges, justices, commissioners, and persons acting judicially, are to take judicial notice of the seal or stamp or signature (as the case may be) of any such court, judge, person, consul, or vice-consul, attached, appended, or subscribed to any such affidavit, or to any other document to be used for the purposes of the winding-up (o).

Swearing
affidavits.

956. Judges of English county courts who sit at places more than twenty miles from the General Post Office, the judge exercising the bankruptcy jurisdiction of the High Court in Ireland, the assistant barristers and recorders in Ireland, and the sheriffs of counties in Scotland, are to be commissioners for the purpose of taking evidence where a company is wound up in any part of the United Kingdom. The court may refer the whole or any part of the examination of any witnesses under the Act of 1908 to any such commissioner, although he is out of the jurisdiction of the court that made the winding-up order. In addition to any powers which he might lawfully exercise as a judge of a county court, judge of the High Court, assistant barrister, or recorder, or sheriff, he has, in the matter so referred to him, all the same powers of summoning and examining witnesses, of requiring the production or delivery of documents, of punishing defaults by witnesses, and of allowing costs and expenses to witnesses, as the court which made the

Commis-
sioners to
take evidence

(n) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 220 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 154]. The term "books and papers" includes accounts, deeds, writings and documents (*ibid.*, s. 285). The section applies whether the winding up is compulsory under supervision or voluntary (*Re Kent Coalfields Syndicate*, [1898] 1 Q. B. 754, O. A.). A contributory may adduce evidence to show that the books are not correct, but the burden of showing that they are incorrect lies on him (*Arnot's Case* (1887), 36 Ch. D. 702, 712, O. A.; *Re Great Northern Salt and Chemical Works, Ex parte Kennedy* (1890), 44 Ch. D. 472, 483). The register of members is *primâ facie* evidence of the matters directed or authorised to be inserted therein (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 33); see p. 151, *ante*. Entries in the minute book may be sufficient admission of the liability of the company to pay a claim (*Re Teignmouth and General Mutual Shipping Association, Martin's Claim* (1872), L. R. 14 Eq. 148).

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 228 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 128]; and see R. S. C., Ord. 38, r. 6. If any person, on examination on oath authorised under the Act of 1908 or in any affidavit or deposition in or about the winding up of any company, or otherwise in or about any matter arising under the Act, wilfully and corruptly gives false evidence, he is liable to the penalties for wilful perjury (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 218 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 169]). As to perjury generally, see title CRIMINAL LAW PROCEDURE, Vol. IX., pp. 490 *et seq.*

SECT. 16.
Winding up
by the
Court.

Examination
in Scotland.

winding-up order. The examination so taken is to be returned or reported to the court which made the order in such manner as it directs (*p*).

957. The winding-up court may direct the examination in Scotland of any person for the time being in Scotland, whether a contributory of the company or not, in regard to the trade, dealings, affairs, or property of the company, or of any contributory, so far as the company may be interested therein by reason of his being a contributory. The order or commission to take the examination is to be directed to the sheriff of the county in which the person to be examined is residing or happens to be for the time. The sheriff is to summon him to appear before him, at a time and place to be specified in the summons, for examination on oath as a witness or as a haver (*q*), and to produce any books or papers called for which are in his possession or power. The sheriff may take the examination either orally or on written interrogatories, and is to report the same in writing in the usual form to the court. With the report he must transmit the books and papers produced, if the originals are required and specified by the order or commission, or otherwise copies or extracts authenticated by him. If any objection is stated to the sheriff by the witness, either on the ground of his incompetency as a witness, or as to the production required, or on any other ground, the sheriff may, if he thinks fit, report the objection to the court, and suspend the examination of the witness until it has been disposed of by the court (*r*).

(vii.) *Inspection of Books and Papers.*

Order by
court.

958. After an order for a winding up by or subject to the supervision of the court, the court may make such order as it thinks just for inspection by creditors and contributories of the company of its books and papers (*s*). The power to order inspection, however, only applies to books and papers in its possession or power (*t*); it does not empower the court to decide any question of right against third parties who possess the books and claim a right to possession (*u*).

Statutory
right.

The rights conferred upon members and creditors of a company, or persons who are neither creditors nor members, by statute or

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 226 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 126].

(*q*) A "haver" means a possessor of writings who is cited for the purpose of their production (Bell's Dictionary of the Law of Scotland, 3rd ed., Vol. I., p. 442; Green's Encyclopædia of Scots Law, Vol. III., p. 107).

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 227 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 127]. Failure to appear or refusal to be examined or to make the production required is dealt with according to the law of Scotland (*ibid.*). The sheriff and witnesses are entitled to the usual fees and allowances according to the law and practice of Scotland (*ibid.*).

(*s*) *Ibid.* [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 156]; and see *Re Imperial Land Co. of Marseilles*, [1882] W. N. 173.

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 221 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 156].

(*u*) *Re North Brazilian Sugar Factories* (1887), 37 Ch. D. 83, C. A.

the regulations of the company, to inspect its register of shares or mortgages, ceases when the winding up commences, and a creditor or contributory can then only obtain inspection by order of the court (*w*). Under the usual order to inspect and take copies, the applicant can take copies himself without paying for them (*x*).

SECT. 16.
Winding up
by the
Court.

An order for inspection will only be made on good cause being shown (*a*). Where winding up is for the purposes of reconstruction, the court has a discretion to refuse the order if the articles do not permit shareholders to inspect. Inspection is always refused if the applicant requires it to enable him or other persons to establish claims for their personal benefit against directors or promoters (*b*).

Grounds of
order.

(viii.) *Service of Proceedings.*

959. Any notice, summons, or other documents, other than those of which personal service is required, may be sent by prepaid post letter to the last known address of the person to be served, and is considered as served at the time that it ought to be delivered in the due course of post by the post office, and notwithstanding it may be returned by the post office (*c*).

Notice,
summons etc.

No service is to be deemed invalid by reason of the omission of the name or any of the names other than the surname of the person to be served from the document containing his name, provided the court is satisfied that in other respects the service has been sufficient (*d*).

960. It is the duty of the high bailiff of a county court to serve such orders, summonses, petitions, and notices as the court may require him to serve; to execute warrants and other process; to attend any sittings of the court (but not sittings in chambers); and to do and perform all such things as may be required of him by the court. Except where the court in any particular proceeding by order specially directs, no order, summons, petition, or

Ir. county
court.

(*w*) *Re Yorkshire Fibre Co.* (1870), L. R. 9 Eq. 650; *Re Birmingham Banking Co., Ex parte Brinsley* (1866), 36 L. J. (CH.) 150; *Re Kent Coalfields Syndicate*, [1898] 1 Q. B. 754, C. A.; *Somerset v. Land Securities Co.*, [1897] W. N. 29. As to such right of inspection, see pp. 152, 365, *ante*.

(*x*) *Re Arauco Co.*, [1899] W. N. 134.

(*a*) *Re Joint-Stock Discount Co., Ex parte Buchanan* (1866), 15 W. R. 99; *Re Imperial Land Co. of Marseilles*, [1882] W. N. 173. The same rule applied in the Stannaries Court (*Re West Devon Great Consols Mine* (1884), 27 Ch. D. 106, C. A.). An order may be made for inspection on the cross-examination of an officer of the company; but such inspection will be limited to the scope of the cross-examination (*Re Emma Silver Mining Co.* (1875), 10 Ch. App. 194; *Re Lisbon Steam Tramways Co.*, [1875] W. N. 54).

(*b*) *Morgan's Case* (1884), 28 Ch. D. 620; *Re Metropolitan and Provincial Bank, Ex parte Davis* (1868), 16 W. R. 668. Where the winding up is not for reconstruction, the clause in the articles is ineffectual (*Re Birmingham Banking Co., Ex parte Brinsley, supra*).

(*c*) Companies (Winding-up) Rules, r. 23 (1). A notice of intention to make a call may be served out of the jurisdiction; but orders and proceedings in the winding up may not be so served (*Re General International Agency Co.* (1867), 15 W. R. 973; *Re Anglo-African Steamship Co.* (1886), 32 Ch. D. 348, C. A.).

(*d*) Companies (Winding-up) Rules, r. 23 (2).

SECT. 16. notice need be served by a bailiff or officer of the court which is
Winding up not specially by the Act or rules required to be so served (e).
by the
Court.

(ix.) *Orders.*

Drawing up
orders.

961. Every order, whether made in court or in chambers, in the winding up of a company is to be drawn up by the registrar, unless in any proceeding, or classes of proceedings, the judge or registrar who makes the order directs that no order need be drawn up. In this case the note or memorandum of the order, signed or initialled by the judge or the registrar making the order, is sufficient evidence of the order having been made (f).

(x.) *Extending Time; Irregularity.*

Power of
court.

962. The court may, in any case in which it shall see fit, extend or abridge the time appointed by the rules, or fixed by any order of the court, for doing any act or taking any proceeding (g).

No proceeding under the Act of 1908 or Rules is to be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court (h).

No defect or irregularity in the appointment or election of a receiver, liquidator, or member of a committee of inspection will vitiate any act done by him in good faith (i).

(xi.) *Arrests and Commitments.*

Warrant.

963. A warrant of arrest, or any other warrant issued under the Act of 1908 and Rules, may be addressed to such officer of the court, or such high bailiff or officer of any county court, whether such county court has jurisdiction to wind up or not, as the court may in each case direct (j).

Prison to
be used.

Where a warrant for arrest is issued, the prison, which must be named in the warrant of arrest, to which the person is to be committed must, unless the court otherwise orders, be the prison used by the court in cases of orders of commitment made in the exercise of the court's ordinary jurisdiction (k).

Execution of
warrant.

Where a warrant for arrest has been issued by a court other than the High Court, the high bailiff, or other officer of the court to whom the warrant is addressed, may send it to the registrar of any other court (other than the High Court) within the ordinary jurisdiction or district of which the person to be committed then

(e) Companies (Winding-up) Rules, r. 22.

(f) *Ibid.*, r. 15. As to enforcement of orders, see p. 546, *ante*.

(g) *Ibid.*, r. 216; see *Re Reversionary Interest Society*, [1892] W. N. 60; *Re Brin's Oxygen Co.*, [1899] W. N. 44.

(h) Companies (Winding-up) Rules, r. 217 (1); compare *Re Land and Sea Telegraph Co.* (1870), 18 W. R. 1150; *Re City and County Bank* (1875), 10 Ch. App. 470, 477; *Re Army and Navy Hotel* (1886), 31 Ch. D. 644.

(i) Companies (Winding-up) Rules, r. 217 (2).

(j) *Ibid.*, r. 211.

(k) *Ibid.*, r. 212.

is or is believed to be, for execution by the high bailiff or other proper officer of his court (l).

SECT. 16.
Winding up
by the
Court.

964. The person arrested under a warrant of commitment issued under any provision of the Act of 1908 or Rules must, unless he is a person ordered to be privately or publicly examined, or an absconding contributory (*m*), be imprisoned in the prison of the court within the ordinary jurisdiction of which he is apprehended for the time mentioned in the warrant, unless he is sooner discharged by the court issuing the warrant, or otherwise by law (*n*).

Imprison-
ment

If he is a person ordered to be privately or publicly examined, or an absconding contributory (*m*), the governor of the prison must produce him before the court as it may from time to time direct, and safely keep him until such time as the court otherwise orders, or he is otherwise discharged by law. Where he is conveyed to a prison other than the prison ordinarily used by the court issuing the warrant, the court may order him to be transferred to the last-mentioned prison (*o*).

Production
of prisoner.

(xii.) *Disposal of Company's Books and Papers.*

965. When a company has been wound up by or under the supervision of the court and is about to be dissolved, the books and papers of the company and of the liquidators may be disposed of in such way as the court directs. After five years from the dissolution no responsibility rests on the company, or the liquidators, or any person to whom the custody of the books and papers has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein (*p*).

Direction of
the court.

The Board of Trade may, at any time during the progress of the liquidation, on the application of the liquidator or the official receiver, direct that such of the books, papers, and documents of the company or of the liquidator as are no longer required for the purpose of the liquidation may be sold, destroyed, or otherwise disposed of (*q*).

Direction
of Board
of Trade.

(xiii.) *Prosecutions.*

If it appears to the court in the course of a winding up by or subject to the supervision of the court that any past or present

Officers and
other
members.

(l) Companies (Winding-up) Rules, r. 213.

(m) *Ibid.*, r. 66; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 174, 176.

(n) Companies (Winding-up) Rules, r. 214 (1).

(o) *Ibid.*, r. 214 (2).

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 222 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 155]. At any time before documents have been disposed of, a liquidator may be ordered to produce them, if in his custody, though the company may have been dissolved (*London and Yorkshire Bank v. Cooper* (1885), 15 Q. B. D. 473, C. A.).

(q) Companies (Winding-up) Rules, r. 175 (2). In the case of banking companies the books should not be hastily destroyed, as they are evidence under the Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), even when in the custody or control of successors to the bank (*Asylum for Idiots v. Handycides* (1906), 22 T. L. R. 573, C. A.); see title BANKERS AND BANKING, Vol I., pp. 644 *et seq.*

SECT. 16.
Winding up
by the
Court.

Considerations guiding the court.

director (*r*), manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible (*s*), the court may, on the application of any person interested in the winding up, or of its own motion, direct the liquidator to prosecute for the offence, and may order the costs and expenses to be paid out of the assets of the company (*a*). The application in the High Court is by summons in chambers (*b*); but in other courts the application is by motion in open court (*c*).

In order to determine whether leave ought to be given to prosecute a director, and whether the costs of prosecution ought to be paid out of the assets, the court will look at the question from the point of view of an individual, and will consider whether it would be the duty of a good citizen, even at a loss to himself, to institute and carry on proceedings to punish the criminal. It is not necessary to find that the facts are so plain that a conviction must ensue. The proportion of creditors who support and oppose the application, and the effect which will be produced upon the estate by payment of costs, will be taken into consideration, but not the personal advantage of the individual, nor motives of vengeance against him, nor pecuniary benefits to be obtained for the creditors or shareholders. The fact that the law officers of the Crown have refused to allow the public prosecutor to proceed is not necessarily irrelevant (*d*). Leave to commence a prosecution may be refused on the ground of want of funds (*e*), but the refusal will not prevent the Treasury from undertaking the prosecution.

Indemnity against bail.

Where criminal proceedings as regards a company are pending, and bail is given on behalf of a prisoner, an indemnity given against liability in respect of the bail is illegal (*f*).

(xiv.) *Costs.*

In the Supreme Court.

967. The general principles applicable to the costs of proceedings in the Supreme Court (*g*) apply to the costs of winding-up proceedings (*h*). Subject to any express statutory provisions and to the Rules of the Supreme Court, the costs are in the discretion of the court or judge, and the court or judge has full power to determine by whom and to what extent they are to be paid (*i*).

(*r*) To convict a person of offences as a director under the Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 81, 83, it must be proved that he was properly appointed a director (*R. v. Atkins* (1900), 64 J. P. 361); see title CRIMINAL LAW AND PROCEDURE, Vol. IX., pp. 655 *et seq.*

(*s*) As to these offences, see pp. 311 *et seq.*, *ante*.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 217 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 167].

(*b*) Companies (Winding-up) Rules, r. 5. It is, of course, *ex parte*.

(*c*) *Ibid.*, rr. 6, 7.

(*d*) *Re London and Globe Finance Corporation*, [1903] 1 Ch. 728; and see *Re Denham & Co.* (1884), 53 L. J. (CH.) 1113.

(*e*) *Re Eupion Fuel and Gas Co.*, [1875] W. N. 10; see also *Re Northern Counties Bank* (1883), 31 W. R. 546. As to the admissibility of depositions at the trial, see *R. v. Coots* (1873), L. R. 4 P. C. 599.

(*f*) *Consolidated Exploration and Finance Co. v. Musgrave*, [1900] 1 Ch. 37.

(*g*) As to costs generally, see title PRACTICE AND PROCEDURE.

(*h*) *Re Appleton, French and Scrafton, Ltd.*, [1905] 1 Ch. 749.

(*i*) Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5. This provision does not alter the law with respect to a judge's discretion as to costs, or with respect to

In a county court all costs properly incurred in a winding up by the court are to be allowed on the lower scale in Appendix N to the Rules of the Supreme Court, and costs are to be taxed by the registrar in person (k).

SECT. 16.
Winding up
by the
Court.

968. No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, brokers, or other persons (other than payments for costs and expenses incurred and sanctioned with reference to the statement of affairs, and payments of bills which have been taxed and allowed under orders made for the taxation thereof), are to be allowed out of the assets of the company without proof that they have been considered and allowed by the registrar. The taxing officer must satisfy himself before passing such bills or charges that the employment of the solicitor or other person in respect of the matters mentioned in them has been duly sanctioned. The official receiver, however, when acting as liquidator, may, without taxation, pay and allow the costs and charges of any person other than a solicitor employed by him, where they are within the scale usually allowed by the court and do not exceed the sum of £2, subject to the Board of Trade requiring them to be taxed by the taxing officer (l).

Allowance
of payment.

969. Every solicitor, manager, accountant, auctioneer, broker or other person employed by an official receiver or liquidator in a winding up by the court must, on request by the official receiver or liquidator (to be made a sufficient time before the declaration of a dividend), deliver his bill of costs or charges to the official receiver or liquidator for the purpose of taxation. If he fails to do so within the time stated in the request, or such extended time as the court allows, the liquidator is to declare and distribute the dividend without regard to his claim, and, subject to any order of the court, the claim is to be forfeited (m).

Taxation
of bills.

If the costs or charges in a winding up by the court are incurred prior to the appointment of a liquidator, the bill must be lodged with the official receiver, and if incurred after such appointment, with the liquidator. The official receiver or the liquidator, as the case may be, is to lodge the bill with the proper taxing officer (n), who is then to give notice of an appointment to tax it, in a winding up by the court to the official receiver, and in every winding up

the powers of the Court of Appeal in dealing with that discretion; it merely brings within the ambit of the discretion certain cases in which it was doubtful whether costs were in the judge's discretion (*Civil Service Co-operative Society v. General Steam Navigation Co.*, [1903] 2 K. B. 756, 765, C. A.). As to the priority of costs in winding up, see p. 523, *ante*. As to the liquidator's costs, see p. 449, *ante*.

(k) Companies (Winding-up) Rules, r. 184.

(l) *Ibid.*, r. 187 (2). The rule does not apply to or affect costs which, in legal proceedings by or against a company in winding up by the court, are ordered by the court in which such proceedings are pending, or a judge thereof, to be paid by the company or the liquidator, or the rights of the person to whom such costs are payable (*ibid.*, r. 187 (3)).

(m) *Ibid.*, r. 177. For the form of request, see *ibid.*, Form 89. As to the costs of drawing bills of costs, see *Re National Bank of Wales*, [1902] 2 Ch. 412; *Re Mercantile Lighterage Co.*, [1906] 1 Ch. 491.

(n) Companies (Winding-up) Rules, r. 179.

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Court.

to the liquidator, and to the person to or by whom it is to be paid (*o*). A copy of the bill must also, on application of either the official receiver or the liquidator, be furnished on payment at the rate of 4d. per folio, which payment is charged on the assets of the company. The official receiver is to call the attention of the liquidator to any items which, in his opinion, ought to be disallowed or reduced, and may attend or be represented on the taxation (*p*).

Certificate
of official
receiver or
liquidator.

970. Where the bill is payable out of the assets of the company, a certificate in writing, signed by the official receiver or liquidator, as the case may be, must be produced to the taxing officer on the taxation, setting forth whether any, and if so what, special terms of remuneration have been agreed to, and in the case of the bill of costs of a solicitor, a copy of the resolution or other authority sanctioning the employment (*q*).

Certificate of
taxation.

On the taxation being completed, the taxing officer is to issue to the person presenting his bill for taxation his allowance or certificate of taxation, and the bill, together with the allowance or certificate, must be filed with the registrar (*r*).

Review.

971. Where any bill of costs, charges, fees or disbursements which are payable out of the assets of the company to any solicitor, manager, accountant, auctioneer, broker or other person has been taxed by a registrar of a court other than the High Court, the Board of Trade may require the taxation to be reviewed by the taxing officer of the High Court (*s*). In such a case the Board, upon giving notice to the person whose bill has been taxed, must apply to such taxing officer to appoint a time for the review, and give the person whose bill is to be reviewed notice of the time appointed. The registrar whose taxation is to be reviewed must forward the bill to the taxing officer (*t*). The Board may appear upon the review (*a*) and the taxing officer is to review the taxation and certify the result (*b*).

If, upon the review, the bill is allowed at a lower sum than that allowed on the original taxation, the amount disallowed must (if the bill has been paid) be repaid to the official receiver or the liquidator, or other person entitled. The certificate of the taxing officer is a sufficient authority to entitle the person to whom the amount disallowed ought to be repaid to demand it from the person liable to repay it (*c*).

(*o*) Companies (Winding-up) Rules, r. 178.

(*p*) *Ibid.*, r. 180. The official receiver may be heard on the taxation (*Re Nash & Sons, Ex parte Crofton, Craven, and Worthington*, [1896] 1 Q. B. 13, 19).

(*q*) Companies (Winding-up) Rules, r. 183.

(*r*) *Ibid.*, r. 182; and see *ibid.*, Form 90.

(*s*) *Ibid.*, r. 185 (1). The provision apparently applies to the costs of persons employed by the liquidator only, not to persons litigating with him; compare *Re Hunt, Ex parte Board of Trade*, [1898] 1 Q. B. 287 (a bankruptcy case).

(*t*) Companies (Winding-up) Rules, r. 185 (2), (3).

(*a*) *Ibid.*, r. 185 (4).

(*b*) *Ibid.*, r. 185 (2).

(*c*) *Ibid.*, r. 185 (4). As to cases on the similar rule in bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 128.

The costs of and incidental to the review are to be paid out of the assets of the company, or otherwise as the taxing officer or the court directs, provided that the cost of the attendance of a principal is not to be allowed if in the opinion of the taxing officer he could have been sufficiently represented by his London agent (*d*).

SECT. 16.
Winding up
by the
Court.

972. Any person, whether a party to, or affected by, any proceeding, desiring to apply for an order that he be allowed his costs, or any part of them, incident to such proceeding, must, if his application is not made at the time of the proceeding, serve notice of his intended application on the official receiver in a winding up by the court, and in every winding up on the liquidator. The official receiver (if any) and the liquidator may appear on the application and object thereto. No costs of or incident to the application are to be allowed to the applicant, unless the court is satisfied that the application could not have been made at the time of the proceeding (*e*).

Service of
notices on
official
receiver or
liquidator.

SUB-SECT. 16.—*Dissolution of Company.*

973. When the affairs of a company have been completely wound up, the court makes an order that the company be dissolved from the date of the order, and it is dissolved accordingly (*f*). The order must be reported by the liquidator to the Registrar of Joint Stock Companies, who makes in his books a minute of the dissolution (*g*).

Order to
dissolve
company.

It would seem that even a company incorporated by Act of Parliament for public purposes may be dissolved under this provision (*h*), though possibly only after public rights have been transferred or extinguished by another Act (*i*).

974. The dissolution puts an end to the existence of the company (*k*). Unless and until it has been set aside, it prevents any proceedings being taken against promoters, directors, or officers of the company, in respect of any misfeasance or breach of trust (*l*), or a creditor proving a debt against the company (*m*). When the company is dissolved, the statutory duty of the liquidator towards the creditors and contributories is gone; but if he has committed a breach of his duty to any creditor by distributing the assets

Effect of
dissolution.

(*d*) Companies (Winding-up) Rules, r. 185 (*5*).

(*e*) *Ibid.*, r. 181.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 172 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 111].

(*g*) *Ibid.*, s. 172 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 112]. A liquidator making default is liable to a fine not exceeding £5 for every day during which he is in default (*ibid.*), s. 172 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 113].

(*h*) *Re Bradford Navigation Co.* (1870), L. R. 10 Eq. 331, 341.

(*i*) See *ibid.*, affirmed (1870) 5 Ch. App. 600, 603.

(*k*) *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43. As to the effect of continuing obligations, see, however, *Re Haytor Granite Co.* (1865), 1 Ch. App. 77; *Tolhurst v. Associated Portland Cement Manufacturers* (1900), [1902] 2 K. B. 660, 678, C. A., affirmed without reference to this point, [1903] A. C. 414.

(*l*) *Coxon v. Gorst*, [1891] 2 Ch. 73.

(*m*) *Re Westbourne Grove Drapery Co.* (1878), 39 L. T. 30.

SECT. 16. without complying with the requirements of the Act of 1908 he
 Winding up is liable in damages to the creditor (*n*).
 by the
 Court.

A judgment obtained against a company after its dissolution is invalid, and the solicitor acting for the company is liable personally to pay the plaintiff's costs of the action from the date of the dissolution and consequent revocation of his authority (*o*). After dissolution, however, the court has jurisdiction to make an order upon an application made but not heard before the dissolution (*p*).

Personal
 property.

Where a company is dissolved, its personal property, including a right against a bankrupt's estate in respect of a debt, vests in the Crown as *bona vacantia* (*q*). The beneficial interest in personal chattels held on trust for the company also vests in the Crown (*r*); but if property is vested in the company as a trustee, the Crown recognises any equitable interests in the property (*s*).

Leaseholds
 and freeholds.

A lease to the company does not, however, vest in the Crown. Where no contract disposing of it has been entered into, the reversion is accelerated, the land reverting to the lessor, and if a surety has guaranteed payment of the rent during the term, his liability determines with the lease (*t*). Similarly, an interest in fee reverts on dissolution in the grantor (*a*). Where the company is dissolved before it has conveyed property, whether freehold or leasehold, to a purchaser, in pursuance of a contract under which it has received the purchase money, an appointment of a new trustee and a vesting order will be made under the Trustee Act, 1893 (*b*).

(*n*) *Pulsford v. Devenish*, [1903] 2 Ch. 625.

(*o*) *Yonge v. Toynbee*, [1910] 1 K. B. 215, C. A., disapproving *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43, where the solicitor was ordered to pay the plaintiff's costs, as between solicitor and client, from the date when he knew, or by using due diligence might have known, that the company was dissolved.

(*p*) *Re Crookhaven Mining Co.* (1866), L. R. 3 Eq. 69; *Whiteley Exerciser, Ltd. v. Gamage*, [1898] 2 Ch. 405.

(*q*) *Re Higginson and Dean, Ex parte A.-G.*, [1899] 1 Q. B. 325; as to whether a debt to a company is extinguished by its dissolution, see *ibid.*, and title CORPORATIONS, Vol. VIII., p. 401.

(*r*) *Ibid.*

(*s*) *Hodge v. A.-G.* (1839), 3 Y. & C. (EX.) 342; *A.-G. for Trinidad and Tobago v. Bourne*, [1895] A. C. 83, P. C.; *Re Ruddington Land*, [1909] 1 Ch. 701, 706.

(*t*) *Hastings Corporation v. Letton*, [1908] 1 K. B. 378, where PHILLIMORE, J., said that estates and interests in land did not vest in the Crown on the dissolution of a corporation; and that whether the interest was in fee simple, or for a term, the property then reverted to the grantor. As to leaseholds, compare *Pryce-Jones v. Williams*, [1902] 2 Ch. 517; and see title CORPORATIONS, Vol. VIII., p. 401.

(*a*) *Hastings Corporation v. Letton*, *supra*, at p. 387.

(*b*) 56 & 57 Vict. c. 53; *Re General Accident Assurance Corporation, Ltd.*, [1904] 1 Ch. 147; *Re No. 12, Cable Road, Hoylake, Cheshire*, [1904] W. N. 8; *Re Mills (Richard) & Co. (Brierly Hill), Ltd.*, [1905] W. N. 36; *Re No. 9, Bomore Road*, [1906] 1 Ch. 359; *Re Ruddington Land*, *supra*; see *contra*, *Re Taylor's Agreement Trusts*, [1904] 2 Ch. 737 (patents). As to the Crown being served, see *Re Ruddington Land*, *supra*. Having regard to *Hastings Corporation v. Letton*, *supra*, it would seem that in such a case the legal estate reverts to the grantor subject to the equitable rights of the purchaser, and that the vesting order should divest the grantor of the legal interest. As to objection to a title on the ground of a legal estate outstanding in a dissolved company, see *Pryce-Jones v. Williams*, *supra*.

975. Where a company has been dissolved, the court may, at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator, or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved (c). It is the duty of the applicant, within seven days after the making of the order, to file an office copy of it with the Registrar of Joint Stock Companies, and if the applicant fails so to do he is liable to a fine not exceeding £5 for every day during which the default continues (d).

SECT. 16.
**Winding up
by the
Court.**

Power to
declare
dissolution
void.

Where a corporation is revived after dissolution, its rights prior to dissolution are not affected (e).

976. A company which is being wound up may also be dissolved by being struck off the register by the registrar when no liquidator is acting and its affairs are fully wound up (f).

Dissolution
by striking
off register.

SECT. 17.—*Voluntary Winding up.*

SUB-SECT. 1.—*Companies which may Wind up Voluntarily.*

977. The following companies may be wound up voluntarily (g), namely: (1) A company formed and registered under the Act of 1908 (h); (2) an existing company (i)—that is to say, a company formed and registered under the Joint Stock Companies Acts (k), or the Companies Act, 1862 (l); (3) a company registered but not formed under the Joint Stock Companies Acts or the Companies Act, 1862 (m); (4) an unlimited company registered under the Companies Act, 1879 (n), as a limited company (o); (5) a company registered under Part VII. of the Act of 1908, although the registration has taken place with a view to the company being wound up (p),

What
companies
may wind up.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 223 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 31 (2)]. As to setting aside the dissolution, or making a winding-up order after it, on the ground of fraud before 1907, see *Re Pinto Silver Mining Co.* (1878), 8 Ch. D. 273, C. A.; *Re London and Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140, C. A.; and compare *Re Schooner Pond Coal Co.*, [1888] W. N. 70.

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 223 (2) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 31 (2)].

(e) *Colchester Corporation v. Seaber* (1766), 3 Burr. 1866; *Re Higginson and Dean, Ex parte A.-G.*, [1899] 1 Q. B. 325, 331.

(f) See p. 610, *post*.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 182 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 129].

(h) *Ibid.*, s. 285.

(i) *Ibid.*

(k) See p. 37, *ante*.

(l) 25 & 26 Vict. c. 89.

(m) Companies (Consolidation) Act, 1908 (8 Edw. 7, 69), s. 246.

(n) 42 & 43 Vict. c. 76.

(o) Companies (Consolidation) Act, 1908, s. 247.

(p) *Ibid.*, s. 249 (1); *Southall v. British Mutual Life Assurance Society* (1871), 6 Ch. App. 614; and see *Re London Indiarubber Co.* (1866), 1 Ch. App. 329; *Re Beaujolais Wine Co.* (1867), 3 Ch. App. 15; *Re Torquay Bath Co.* (1863), 32 Beav. 581. Registration between petition and order for winding up an

SECT. 17. but not an unregistered company (*q*); (6) a building society under the supervision of the court (*r*); (7) an industrial and Voluntary Winding up. provident society (*s*).

SUB-SECT. 2.—*In what Events Voluntary Winding up may take place.*

Requisites
for voluntary
winding up.

978. A company may be wound up voluntarily (1) when the period (if any) fixed for duration by its articles expires, or the event (if any) occurs on the occurrence of which the articles provide that it is to be dissolved, and the company in general meeting has passed a resolution requiring it to be wound up voluntarily (*t*); (2) if the company resolves by special resolution (*u*) that it be wound up voluntarily; (3) if the company resolves by extraordinary resolution (*a*) stating that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up (*b*). Creditors have no voice as to whether a company should be wound up voluntarily; but they may under an order of the court obtain a certain amount of control over the proceedings (*c*). The members' power to wind up voluntarily cannot be excluded by any provision in the articles, except to the extent of precluding certain shareholders or classes of shares from the right of voting at all (*d*).

SUB-SECT. 3.—*Meetings and Resolutions for Winding up.*

Ordinary
resolution.

979. An ordinary resolution alone is required for winding up a company because the time for its duration has expired, or the event on which it is to be dissolved has happened. Where only an ordinary resolution has been passed, there is no power to make a supervision order (*e*).

Extra-
ordinary
resolution.

980. An extraordinary resolution will only place a company in voluntary liquidation where it is to the effect that the company is

unregistered company is of no effect (*Re Hercules Insurance Co.* (1871), L. R. 11 Eq. 321).

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (ii.). Practically all companies which can be wound up by the court, except unregistered companies, can wind up voluntarily; see *Re Torquay Bath Co.* (1863), 32 Beav. 581.

(*r*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32; *Andrews v. Swansea Cambrian Benefit Society* (1880), 44 L. T. 106; see title BUILDING SOCIETIES, Vol. III., p. 394.

(*s*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 58; see title INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.

(*t*) Articles of association do not, as a rule, contain any provision as to the duration of the company, or mention any event on the happening of which the company is to be dissolved.

(*u*) As to special resolutions, see p. 259, *ante*.

(*a*) As to extraordinary resolutions, see *ibid*.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 182 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 129].

(*c*) See p. 572, *post*.

(*d*) See *Ellis v. Dadson* (1891), 60 L. J. (CH.) 353; *British Water Gas Syndicate, Ltd. v. Notts and Derby Water Gas Co., Ltd.*, [1889] W. N. 204; *Welton v. Saffery*, [1897] A. C. 299; *Re Peveril Gold Mines, Ltd.*, [1898] 1 Ch. 122, C. A.; *Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate*, [1899] 2 Ch. 80, C. A.; *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308; and p. 82 *ante*.

(*e*) See p. 594, *post*.

insolvent and should be wound up; in that case only one extraordinary general meeting is necessary (*f*). A special resolution requires two meetings, and is necessary where the company is not in a position to resolve that winding up is due to insolvency (*g*), as, for instance, where it is desirable to reconstruct the company, or there is no further use in continuing its existence.

SECT. 17.
**Voluntary
Winding up.**
**Special
resolution.**

Notices of meetings must be given, and the meetings must be held, in the manner pointed out by the articles (*h*). A resolution for voluntary winding up is not invalid by reason of its being passed contemporaneously with resolutions for a reconstruction scheme which are invalid (*i*). Where, however, notice is given of resolutions for voluntary winding up, the appointment of a liquidator, and the approval of a reconstruction, and a resolution for winding up only is passed, the resolution may be void, on the ground that there was no good notice to pass it, except as part of a general scheme (*k*). A resolution, on going into winding up, that a sum of money is to be distributed amongst officers and servants of the company is invalid, if the money is given as a gratuity, and not as remuneration for past or future services (*l*).

**Notice of
meeting.**

A copy of the special or extraordinary resolution must be sent in

(*f*) See pp. 259 *et seq.*, *ante*. The notice convening the meeting must inform the members clearly that it is proposed to pass such resolution (*Re Bridport Old Brewery Co.* (1867), 2 Ch. App. 191; *Re Silkstone Fall Colliery Co.* (1875), 1 Ch. D. 38, C. A.). A notice stating that a resolution in the terms of s. 182 (3) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), will be proposed is sufficient (*Stone v. City and County Bank* (1877), 3 C. P. D. 282, C. A.).

(*g*) See pp. 259 *et seq.*, *ante*.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 69 (6). A special resolution has been held good although shareholders abroad got less than the number of days' notice prescribed by the articles (*Re Union Mill Silver Co.* (1870), 22 L. T. 400). Where the articles so provide notice of both the meetings required for a special resolution may be given by one document (*Re North of England Steamship Co.*, [1905] 2 Ch. 15, C. A.). The notices summoning the meetings must be issued by authority of a resolution of the board of directors (*Re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230; *Re Wyoming (State) Syndicate*, [1901] 2 Ch. 431). But the want of authority may be waived by the presence of all those who have a right to vote (*R. v. Hill* (1825), 4 B. & C. 426). Where a winding-up petition is pending it is a contempt of court to issue a circular to the shareholders containing misrepresentations with intent to obtain the passing of a voluntary winding-up resolution and thereby mislead the court as to the real view of the shareholders (*Re Parsonage (Septimus) & Co.*, [1901] 2 Ch. 424). As to the declaration of the chairman being conclusive, see *Re Hadleigh Castle Gold Mines, Ltd.*, [1900] 2 Ch. 419; *Arnot v. United African Lands, Ltd.*, [1901] 1 Ch. 518, C. A.; *Re Caratal (New) Mines, Ltd.*, [1902] 2 Ch. 498; compare *Young v. South African and Australian Exploration and Development Syndicate*, [1896] 2 Ch. 268.

(*i*) *Thomson v. Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 765, C. A.; *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176; *Cleeve v. Financial Corporation* (1873), L. R. 16 Eq. 363; compare *Stone v. City and County Bank* (1877), 3 C. P. D. 282, 307, 313, C. A.

(*k*) *Re Teede and Bishop, Ltd.* (1901), 70 L. J. (CH.) 409, as explained in *Thompson v. Henderson's Transvaal Estates, Ltd.*, *supra*; compare *Re Gutta Percha Corporation*, [1900] 2 Ch. 665, 670.

(*l*) *Stroud v. Royal Aquarium and Summer and Winter Garden Society* (1903), 19 T. L. R. 656.

SECT. 17. print to the registrar within fifteen days (*m*), and the company must give notice of the special or extraordinary resolution by advertisement in the *London Gazette* (*n*).
Voluntary Winding up.

SUB-SECT. 4.—Liquidators.

(i.) *Appointment.*

Liquidator appointed by the company.

981. The company in general meeting must appoint one or more liquidators for the purpose of winding up its affairs and distributing its assets (*o*). Unless and until an effective resolution to wind up voluntarily has been passed, the company cannot appoint a liquidator. Thus, a resolution that a certain person shall be liquidator, passed at the first meeting where a special resolution is passed, is inoperative until confirmed at the subsequent meeting (*p*). A liquidator may, however, be appointed at the general meeting at which a special resolution is confirmed, or an extraordinary resolution is passed, without any special notice being given that a resolution to appoint a liquidator will be proposed (*q*). If notice is given that a certain person will be proposed at the meeting for the office of liquidator, and the motion for that purpose fails, the meeting may appoint another person (*r*). The resolution to wind up usually proceeds to appoint the liquidator; but the notice sometimes mentions that the appointment will be part of the business of the meeting. When there is a question as to the validity of the appointment of a sole liquidator, the court will appoint him (*s*).

Delegation of appointment to creditors.

982. A company about to be, or in course of being, wound up voluntarily may, by extraordinary resolution, delegate to its creditors, or to any committee of them, the power of appointing liquidators or any of them, and of supplying vacancies among them, or enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised. Any act done by creditors in pursuance of any such delegated power has the same effect as if it had been done by the company (*t*).

Creditors' rights as to appointment.

983. The liquidator appointed by the company must, within seven days from his appointment, send notice by post to all persons who appear to him to be its creditors that a meeting of creditors

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 70 (1).

(*n*) *Ibid.*, s. 185 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 132].

(*o*) *Ibid.*, s. 186 (ii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133].

(*p*) *Re Indian Zoedone Co.* (1884), 26 Ch. D. 70, C. A.; *Re London and Australian Agency Co.* (1873), 22 W. R. 45; *Re Petersburg and Viborg Gas Co., Ex parte Hartmont* (1875), 33 L. T. 637.

(*q*) *Re Welsh Flannel and Tweed Co.* (1875), L. R. 20 Eq. 360; *Re Overend, Gurney & Co., Oakes v. Turquand and Harding* (1867), L. R. 2 H. L. 325, 355.

(*r*) *Re Trench Tubeless Tyre Co., Bethell v. Trench Tubeless Tyre Co.*, [1900] 1 Ch. 408, 410, C. A.; *contra, Re Stearic Acid Co.* (1863), 11 W. R. 980.

(*s*) *Re Indian Zoedone Co.*, *supra*.

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 190 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 135]. This power has been seldom, if ever, exercised.

will be held on a date, not being less than fourteen nor more than twenty-one days after his appointment, and at a place and hour, to be specified in the notice. He must also advertise notice of the meeting once in the *London Gazette* and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company was situate (a). At the meeting the creditors are to determine whether an application shall be made to the court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection. If the creditors so resolve, an application may be made accordingly to the court at any time, not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose at the meeting (b).

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Winding up.
—

984. On any such application the court may make an order, either for the removal of the liquidator appointed by the company and for the appointment of some other person as liquidator, or for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, either together with or without any such appointment of a liquidator, or such other order as, having regard to the interests of the creditors and contributories, may seem just, and no appeal lies from the order. The court is to make such order as to the costs of the application as it may think fit. If it is of opinion that, having regard to the interests of the creditors in the liquidation, there were reasonable grounds for the application, it may order the costs of the application to be paid out of the assets of the company, notwithstanding that the application is dismissed or otherwise disposed of adversely to the applicant (c).

Court's power
on creditor's
application.

(ii.) *Powers and Duties.*

985. The liquidator must, within twenty-one days after his appointment, file with the registrar a notice of his appointment in the form prescribed by the Board of Trade. If he fails to do so he is liable to a fine not exceeding £5 for every day during which the default continues (d).

Filing
notice of
appointment.

986. The liquidator may, without the sanction of the court, exercise all powers by the Act of 1908 given to the liquidator in a winding up by the court (e). In particular, he may exercise the

Powers of
voluntary
liquidator.

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 188 (1) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 27 (1)].

(b) *Ibid.*, s. 188 (2). The application may be made by originating summons, which should be served on the liquidator. It is usual to appoint an additional liquidator, and give the two or either of them liberty to apply generally.

(c) *Ibid.*, s. 188 (3), (4), (5).

(d) *Ibid.*, s. 187 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 26].

(e) *Ibid.*, s. 186 (iv.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133]. As to the powers which in a winding up by the court may be exercised by the liquidator, see p. 446, *ante*. An agreement for sale of the company's property is *intra vires* (*Re Bank of South Australia* (No. 2), [1895] 1 Ch. 578, C. A.); and this is so also in a winding up under supervision (*Re Colonial and General Gas Co.*, [1867] W. N. 42; *Re Sankey Brook Coal Co.*, *Re Badley and Bramall* (1871), L. R. 12 Eq. 472).

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Winding up.

powers of the court under the Act of 1908 of settling a list of contributories, and of making calls; he must pay the debts of the company, applying its property in satisfaction of its liabilities *pari passu*, and, subject thereto, must, unless the articles of association otherwise provide, distribute its property amongst its members, according to their rights and interests in the company, and adjust the rights of the contributories among themselves (*f*).

He has power to sanction the continuance of the powers of the directors, which cease on his appointment (*g*). He is an officer of the company, and as such must pay out of the company's assets the stamp duty on any unfilled contract for the allotment of shares for a consideration other than cash, and must file the contract (*h*).

He may also, with the sanction of an extraordinary resolution of the company, pay any classes of creditors in full, and make certain compromises and arrangements (*i*). With the sanction of a special resolution, he may enter into and carry into effect an agreement for a reconstruction or amalgamation (*k*).

Powers where
several
liquidators.

987. When several liquidators are appointed, the statutory powers of a liquidator may be exercised by such one or more of them as may be determined at the time of their appointment. In default of such determination, two at least must act (*l*); and they cannot delegate their powers generally to one of themselves, although all concur in making the delegation (*m*). When one of two liquidators dies, the survivor cannot act alone, and a new liquidator must be appointed (*n*).

Summoning
meetings of
company.

988. The liquidator may summon general meetings of the company for the purpose of obtaining its sanction by special or extraordinary resolution, or for any other purposes he may think

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133]. Notice of the settlement of the list of contributories is usual, but not necessary, and absence of notice is no defence to an action for calls (*Brighton Arcade Co. v. Dowling* (1868), L. R. 3 C. P. 175, 187; compare *Re London Bank of Scotland*, [1867] W. N. 114). Fully-paid shareholders are "contributories" in a voluntary winding up (*Re Anglesea Colliery Co.* (1866), L. R. 2 Eq. 379). A call made to adjust the rights of contributories *inter se*, after all debts and costs are provided for, is valid (*ibid.*).

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133]. Before his appointment sanction may be given by a general meeting of the company (*Tadd's Case*, [1893] 3 Ch. 450).

(*h*) *Re X Co., Ltd.*, [1907] 2 Ch. 92.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 214 [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 159, 160; Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (1) (3)]; and pp. 602 *et seq.*, *post*.

(*k*) See p. 584, *post*. A compromise with a creditor of the company, without the assent of a meeting, is valid, if not set aside (*Cycle Makers' Co-operative Supply Co. v. Sims*, [1903] 1 K. B. 477).

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 (vii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133].

(*m*) *Re London and Mediterranean Bank, Ex parte Birmingham Banking Co.* (1868), 3 Ch. App. 651; *Re London and Mediterranean Bank, Ex parte Agra and Masterman's Bank* (1871), 6 Ch. App. 206; *Re London and Mediterranean Bank, Ltd., Ex parte London and South-Western Bank* (1867), 36 L. J. (CH.) 807.

(*n*) *Re Metropolitan Bank and Jones* (1876), 2 Ch. D. 366.

fit (o). In the event of the winding up continuing for more than one year, he must summon a general meeting at the end of the first year from the commencement of the winding up, and of each succeeding year, or as soon thereafter as may be convenient, and must lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year (p).

SECT. 17.
Voluntary
Winding up

(iii.) *Remuneration.*

989. The company in general meeting may fix the remuneration to be paid to the liquidator or liquidators (q).

Voluntary
liquidator's
remuneration

Each case as to the allowance of a voluntary liquidator's remuneration by the court must be considered with regard to its own particular circumstances (r). Where the resolution for winding up is set aside as invalid, and the company is afterwards ordered to be wound up, the liquidator is not entitled to be paid anything for his services as such, either under the Act of 1908 (s) or on a *quantum meruit*. He is, however, entitled to reasonable remuneration as regards any work done by him which has been useful to the company for business purposes unconnected with the voluntary liquidation, or which has been used by the official receiver and liquidator with full knowledge of the facts (t).

990. In the absence of any express agreement the solicitor to a voluntary liquidator has no claim for the payment of his costs against the liquidator personally. His claim is against the assets of the company only (a); but his costs are payable in priority to the liquidator's remuneration (b).

Solicitor's
costs.

(iv.) *Accounts.*

991. The only accounts which, under the Act of 1908, the liquidator in a voluntary winding up is required to keep are (1) the account which he is required to make up when the affairs of the company are fully wound up (c); (2) the account of his acts and dealings and of the winding up, which, if the winding up continues for more than a year, he must at the end of each year lay

Accounts of
voluntary
liquidator.

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 194 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 139].

(p) *Ibid.*, s. 194 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 139].

(q) *Ibid.*, s. 186 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133]. If the remuneration is not fixed by the company in general meeting, the liquidator or a contributory may apply by summons, and have it fixed by the Companies Winding-up Registrar. As to the priority of the remuneration, see p. 581, *post*.

(r) *Re Amalgamated Syndicates, Ltd.*, [1901] 2 Ch. 181. As to the charges allowed for letter writing, see *ibid*.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 149 (10) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 67].

(t) *Re Allison, Johnson and Foster, Ltd., Ex parte Birkenshaw*, [1904] 2 K. B. 327.

(a) *Re Trueman's Estate, Hooke v. Piper* (1872), L. R. 14 Eq. 278.

(b) *Re Massey, Re Freehold Land and Brickmaking Co.* (1870), L. R. 9 Eq. 367. As to the solicitor's lien, see p. 525, *ante*; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 98.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 195 (1); see p. 592, *post*.

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Voluntary
Winding up.

before a general meeting of the company (*d*); and (3) the statements which he must send to the registrar when the winding up is not concluded within a year after its commencement (*e*). Since he is, however, agent of the company, though not strictly a trustee for its creditors or contributories (*f*), and as such under a liability to account at reasonable times, the court may at any time order him to bring in an account on an application by a creditor or contributory (*g*).

(v.) *Vacancies; Removal and Appointment of new Liquidator.*

Filling up
vacancies.

992. If a vacancy occurs in the office of liquidator appointed by the company, by death, resignation, or otherwise, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy. A general meeting for the purpose may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators. The meeting must be held in the manner prescribed by the articles, or determined by the court on application by any contributory or by the continuing liquidators (*h*).

The court may, on the application of a contributory, appoint a liquidator if from any cause whatever there is no liquidator acting (*i*).

Removal.

993. The court may, on cause shown, remove a liquidator and appoint another liquidator (*k*). It has also power to remove a liquidator on an application in pursuance of a resolution of creditors at their statutory meeting (*l*) and to appoint another liquidator in

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 194 (2).

(*e*) *Ibid.*, s. 224 (1) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 15]; see p. 455, *post*. The provisions of the section apply to a voluntary liquidation (*Re Stock and Share Auction and Banking Co.*, *Re Spiral Wood Cutting Co.*, *Re Hull Land Property and Investment Co.*, [1894] 1 Ch. 736); and rr. 192, 193 of the Companies (Winding-up) Rules apparently empower the Board of Trade to require a voluntary liquidator to submit, at any time, a verified account of the sums received and paid by him. As to what are undistributed assets within the section, see *Re Land Mortgage Bank of Florida*, [1898] 1 Ch. 444.

(*f*) *Knowles v. Scott*, [1891] 1 Ch. 717; compare *Pulsford v. Devenish*, [1903] 2 Ch. 625.

(*g*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 193; *Wright's Case* (1870), 5 Ch. App. 437.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 189 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 140]. The "arrangement with creditors" is the arrangement referred to in *ibid.*, s. 190; see p. 572, *ante*. There seems to be no power for the company to fill up vacancies in the office of a voluntary liquidator who has been appointed by the court. As to the appointment of a liquidator on a supervision order, where the shareholders have not made the appointment, see *Re London Quays and Warehouses Co.* (1868), 3 Ch. App. 394.

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 (viii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 141]. An additional liquidator has been appointed in one case (*Re Sunlight Incandescent Gas Lamp Co.*, [1900] 2 Ch. 728). As to the grounds for removing a liquidator, see p. 461, *ante*.

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 (viii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 141]. The distribution of circulars seeking for support to an application for removal will not be restrained by the court (*Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860). A voluntary liquidator may be removed on the ground of his not being in a sufficiently independent position (*Re Chartered Gold Fields, Ltd.* (1909), 26 T. L. R. 132).

(*l*) See p. 573, *ante*.

his place, if he is willing to retire (*m*). The application can only be made by a contributory, or a liquidator, or a creditor (*n*). Where a contributory applies to remove the liquidator and to restrain him from employing any solicitor other than the one then acting, the court will order a meeting to be called to consider the question of change of solicitor (*o*). A lunatic liquidator may be removed (*p*). A liquidator may appeal from an order removing him (*q*); but the removal is a matter of judicial discretion, and if that has been exercised according to law, the Court of Appeal has no power to interfere (*r*).

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**Voluntary
Winding up.**

SUB-SECT. 5.—*Commencement and Consequences of Voluntary Winding up.*

994. A voluntary winding up commences at the time of the passing of the resolution authorising the winding up (*s*), that is to say, at the date of the passing of the extraordinary resolution, or the date of the confirmatory resolution in the case of a special resolution (*t*). The date of commencement is not altered by a supervision order being made; but it is altered by a compulsory winding-up order being made (*a*), whether a supervision order has been made or not.

Commence-
ment of
winding up.

995. Where a company goes into voluntary winding up its corporate state and corporate powers, notwithstanding anything to the contrary in its articles, continue until it is dissolved. The company must, however, from the commencement of the winding up cease to carry on its business, except so far as may be required for its beneficial winding up (*b*). Contracts with a company which are not required for its beneficial winding up are not, however, illegal as between the company and the other contracting party (*c*).

Consequences
of voluntary
winding up.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 (ix.); *Re New De Kaap, Ltd.*, [1908] 1 Ch. 589.

(*n*) *Re Sheppey Portland Cement Co.* (1892), 68 L. T. 83.

(*o*) *Re Coopers, Ltd.* (1897), 14 T. L. R. 144, C. A.

(*p*) *Re North Molton Mining Co.* (1886), 54 L. T. 602.

(*q*) *Re Eyton (Adam), Ltd., Ex parte Charlesworth* (1887), 36 Ch. D. 299, C. A.

(*r*) *Re Urmston Grange Steamship Co.* (1901), 17 T. L. R. 553, C. A.; compare *Re Pooley, Ex parte Sheard* (No. 1) (1880), 16 Ch. D. 107, C. A. (a bankruptcy case).

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 183 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 130].

(*t*) *Weston's Case* (1868), 4 Ch. App. 20; *Dawes' Case* (1868), L. R. 6 Eq. 232.

(*a*) See p. 419, *ante*.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 184 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 131]. This may cause inconvenience where a company sells its business to another company which is not a private company, as the new company itself cannot commence business for some time; see p. 262, *ante*. But the liquidator, or the company in general meeting, may sanction the continuance of the directors' powers to carry on the business; see *ibid.*, s. 186 (iii.); and p. 578, *post*. From the commencement of winding up a company's existence continues solely for the purpose of the winding up, and not for another purpose, such as an amalgamation (*Re London, Bombay and Mediterranean Bank, Ltd., Drew's Case* (1867), 36 L. J. (CH.) 785, 789).

(*c*) *Bateman v. Ball* (1887), 56 L. J. (Q. B.) 291, not dissented from in *Hire Purchase Furnishing Co. v. Richens* (1887), 20 Q. B. D. 387, 389, C. A., where it was held that, assuming that such contracts were illegal, the onus of proving that the contract was not required for the beneficial winding up of the company lies in the person affirming the illegality.

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Winding up.

Effect of
winding up
on contract
of service.

The decisions are conflicting as to whether a voluntary winding up operates as a dismissal of the company's servants (*d*).

The voluntary winding-up, even if for the purpose of reconstruction only, may cause a forfeiture of a lease to the company (*e*).

The passing of a resolution for voluntary winding up does not, *per se*, cause the powers of the directors to cease; but on the appointment of a liquidator all their powers cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof (*f*). A general meeting may elect directors, and sanction the exercise by them of any powers which they possessed before the company went into liquidation (*g*).

Transfer of
shares.

996. Every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company (*h*) made after the commencement of the winding up, is void (*i*). The liquidator may, without the sanction of the court, sanction, absolutely or conditionally (*j*), transfers during the liquidation, and the power to sanction a transfer involves the power to alter the register of members (*k*). When successive transfers are sanctioned by the liquidator, the

(*d*) In *Midland Counties District Bank, Ltd. v. Attwood*, [1905] 1 Ch. 357, it was held that the servants were not dismissed; but compare *Shirreff's Case* (1872), L. R. 14 Eq. 417; *Re Forster & Co., Ex parte Schumann* (1887), 19 L. R. Ir. 240.

(*e*) *Horsey Estate, Ltd. v. Steiger*, [1899] 2 Q. B. 79, C. A.; *Pannell v. City of London Brewery Co.*, [1900] 1 Ch. 496; *Fryer v. Ewart*, [1902] A. C. 187.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 (iii.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 133]. A transfer registered between the passing and confirming of a resolution for winding up is unaffected (*Re Ottoman Co., Ltd., Hornby's (Admiral) Case* (1868), 16 W. R. 1164).

(*g*) *Ladd's Case*, [1893] 3 Ch. 450; compare *Hirsch & Co. v. Burns* (1897), 77 L. T. 377, H. L.

(*h*) As to the meaning of these words, see *Taylor, Phillips and Rickard's Cases*, [1897] 1 Ch. 298, 306, C. A.; *Baye's Case* (1868), L. R. 5 Eq. 420. The execution of a transfer without the liquidator's sanction is void but not illegal, and an action may lie for refusal to execute a transfer although the sanction has not been obtained (*Biederman v. Stone* (1867), L. R. 2 C. P. 504).

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 131].

(*j*) *Taylor, Phillips, and Rickards' Cases*, [1897] 1 Ch. 298, C. A. As to rectification where transfers are executed before the winding up, see *Re Violet Consolidated Gold-Mining Co.* (1899), 68 L. J. (CH.) 535. The power of rectification given by s. 32 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), is exercisable in any of the cases therein mentioned whether the company is in liquidation or not, and in a liquidation the power is not limited to rectification for the purposes of settling the list of contributories; and where the rectification is by placing the name of a transferee on the register as on a day prior to the passing of the winding-up resolution, the validity of the notices of the meetings is not affected (*Re Sussex Brick Co.*, [1904] 1 Ch. 598, C. A., where the winding up was voluntary, but the order was made by the court). As to proofs by shareholders who have obtained rectification on the ground of misrepresentation, see *Re British Gold Fields of West Africa*, [1899] 2 Ch. 7, C. A. It is doubtful whether a shareholder can in any circumstances repudiate his shares after a resolution to wind up has been passed (*Stone v. City and County Bank* (1897), 3 C. P. D. 282, 298, 299, C. A.). As to damages against the liquidator for not allotting shares which the company has agreed to allot at a future date, see *Hirsch & Co. v. Burns & Co.* (1897), 77 L. T. 377, H. L.

(*k*) *Cleve v. Financial Corporation* (1873), L. R. 16 Eq. 363. As to transfers of shares to the liquidator, see *Vining's Case* (1870), 6 Ch. App. 96.

ultimate transferee only is liable to contribute as a present member, the transferor and prior transferees being liable as past members (l).

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Where after liquidation commenced a person buys shares and has them transferred with the liquidator's assent to a person who is an infant, and the infant subsequently transfers them with the liquidator's assent to another infant, the original purchaser cannot be placed on the list of contributories, as there is no contractual relation between him and the company (m). The right to transfer debentures is not affected by the winding up (n).

Transfer
to infant.

A valid forfeiture of shares before the commencement of the winding up cannot be cancelled by the liquidator (o),

SUB-SECT. 6.—Creditors.

997. All debts and claims provable in a winding up by the court (p) are provable in a voluntary winding up; and where the company is insolvent the bankruptcy rules (q) similarly apply (r).

Proof of
debts.

The same priorities as to the rights of the Crown, and in respect of rates and taxes, wages of clerks, and workmen's compensation, apply as in the case of a compulsory winding up (s), except that the date up to which the amounts are to be calculated is the date of the commencement of the voluntary winding up, whether a compulsory order is or is not subsequently made, and that the priority in respect of workmen's compensation does not apply where the voluntary winding up is merely for the purpose of reconstruction or amalgamation (t).

Priorities.

Subject to the commencement of the winding up being different, the same rules apply as regards set-off and secured creditors (a). The liquidator may, with the sanction of an extraordinary resolution, pay any classes of creditors in full (b).

998. The Rules of 1909 as to proof of debts, for the most part, apply in the case of a voluntary winding up (c). There is, however,

Application
of rules.

(l) *Taylor, Phillips, and Rickards' Cases*, [1897] 1 Ch. 298, C. A.

(m) *Re National Bank of Wales, Ltd., Massey and Giffin's Case*, [1907] 1 Ch. 582. A transfer to an infant who does not come of age till the winding up has commenced may be avoided by the liquidator (*Castello's Case* (1869), L. R. 8 Eq. 504); *Symon's Case* (1870), 5 Ch. App. 298).

(n) *Re Goy & Co., Ltd., Farmer v. Goy & Co., Ltd.*, [1900] 2 Ch. 149. As to the equities against the transferor prevailing against the transferee, see *Re Palmer's Decoration and Furnishing Co.*, [1904] 2 Ch. 743; *Re Rhodesia Goldfields, Ltd., Partridge v. Rhodesia Goldfields, Ltd.*, [1910] W. N. 7.

(o) *Dawes' Case* (1868), L. R. 6 Eq. 232.

(p) See p. 508, *ante*.

(q) See p. 512, *ante*.

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 206, 207.

(s) See p. 516, *ante*.

(t) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209.

(a) See pp. 515, 519, *ante*. As to cross-claims for debt and misfeasance claims by companies in liquidation, see *Re Leeds and Hanley Theatres of Varieties, Ltd.*, [1904] 2 Ch. 45. As to cross-claims between two companies in liquidation in respect of money lent and calls in arrears, see *Re Auriferous Properties, Ltd.* (1), [1898] 1 Ch. 691.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 214 (1)(i). [Companies Act, 1862, (25 & 26 Vict. c. 89), s. 159].

(c) For the rules, see Companies (Winding-up) Rules, rr. 89—92, 94—100,

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no provision that every creditor must prove his debt unless the court otherwise directs, as in the case of a compulsory winding up. The voluntary liquidator need not, therefore, require every creditor to prove; but he may, unless otherwise ordered by the court, fix a day on which creditors are to prove or be excluded. In that case he must give notice in writing of the day so fixed by advertisement, and also to the last known address or place of abode of each person who to his knowledge claims to be a creditor and whose claim has not been admitted (*d*). So long as a company is in voluntary liquidation, interest continues to accrue on debts carrying interest, and creditors can prove for interest accrued after the passing of the winding-up resolution (*e*); but if a supervision order is made, then the creditors cannot prove for interest accrued after the passing of the winding-up resolution, unless there is a surplus remaining over after the other liabilities of the company have been discharged (*f*).

Security
for costs.

999. Where a person resident out of the jurisdiction applies for a declaration that he is entitled to prove, the court can order him to give security for costs (*g*).

SUB-SECT. 7.—Contributories.

Settling list.

1000. In a voluntary winding up the same persons are contributories, and are under the same liability in that capacity, as in the case of a winding up by order of the court (*h*). The liquidator may exercise the powers of the court of settling a list of contributories and of making calls, and may adjust the rights of contributories among themselves (*i*).

The Act contemplates the making out of a list of contributories, which is to be *prima facie* evidence of the liability of the persons named therein to be contributories (*j*). The list of contributories ought to comprise not only all persons properly on the register, but also all those who, although not on it, ought to be put on it (*k*). If the liquidator thinks a person ought to be on the list, he

subject as therein respectively pointed out; and as to the rules applicable in voluntary winding up to the admission and rejection of proofs, see Companies (Winding-up) Rules, rr. 102—106; see p. 521, *ante*. As to a landlord being restrained from distraining on the ground that he is entitled to prove for rent, see *Re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731; compare *Re Carriage Co-operative Supply Association, Ex parte Clemence* (1883), 23 Ch. D. 154.

(*d*) Companies (Winding-up) Rules, r. 102; see p. 507, *ante*.

(*e*) *Re East of England Banking Co.* (1868), 4 Ch. App. 14. But, in the case of an insolvent company the bankruptcy rules apply, and no claim can be sustained for interest subsequent to a judgment (*Re Salt (Thomas) & Co., Ltd.*, [1908] W. N. 63).

(*f*) *Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge* (1870), L. R. 11 Eq. 478, 499.

(*g*) *Re Pretoria Pietersburg Rail. Co.* (No. 2), [1904] 2 Ch. 359.

(*h*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 123—128, which are not in terms confined to winding up by the court. The provisions of the Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any mode (*ibid.*, s. 122).

(*i*) *Ibid.*, s. 186 (v.).

(*j*) *Ibid.*, s. 186 (vi.).

(*k*) *Taylor, Phillips, and Rickards' Cases*, [1897] 1 Ch. 298, 308, C. A.

should put him on and leave him to apply to get off, and should not himself apply to the court for a declaration of liability and an order for payment (l). The rules relating to the list of contributories do not apply to a voluntary winding up (m); but the practice in a winding up by the court (n) should be followed as closely as is practicable.

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1001. If the voluntary liquidator makes a call (o) on contributories, he can apply by summons for a balance order (p) against those contributories who do not pay, directing them to pay to him the amount of the call. Although a contributory may not up to that time have raised any objection to his name being placed on the list, he may on the hearing of the application resist the call on the ground that his name has been improperly included. The liquidator may also obtain an order to enforce any calls made by the directors before the winding up commenced (q). Where an action for calls has been brought before winding up, to which set-off has been pleaded as a defence, but there has been no judgment, no allowance can be made, on the liquidator applying for a balance order, by way of set-off against the amount of calls (r). Where the liquidator in such a case settles the defendant on the list of contributories, and, after giving notice to discontinue the action, applies for a balance order, this application will not be stayed until he pays the taxed costs of the action, but the amount of taxed costs will be allowed out of the moneys recovered by him (s). A person whose name is settled by a voluntary liquidator on the list of contributories is liable for any calls made by the latter, even although the contributory has received no notice that he has been settled on the list (t). Calls.

SUB-SECT. 8.—Distribution of Assets.

1002. The liquidator is appointed for the purpose, *inter alia*, of distributing the assets of the company (u), which are to be applied (1) in payment of all costs, charges, and expenses properly incurred in the voluntary winding up (including the remuneration of the liquidator) which are payable in priority to all other claims (a); Application of assets.

(l) *Re Cornwall Brick, Tile, and Terra Cotta Co.*, [1893] W. N. 9.

(m) See Companies (Winding-up) Rules, rr. 77—82, which form a group headed "List of Contributories in a winding up by the court."

(n) See p. 492, *ante*.

(o) As to the enforcement of calls by a receiver in the name of the liquidator, see *Fowler v. Broad's Patent Night Light Co.*, [1893] 1 Ch. 724; *Harrison v. St. Etienne Brewery Co.*, [1893] W. N. 108; *Re Westminster Syndicate, Ltd.*, [1908] W. N. 236; and p. 500, *ante*.

(p) See p. 502, *ante*.

q) *Stone v. City and County Bank* (1877), 3 C. P. D. 282, C. A.

r) *Re Hiram Maxim Lamp Co.*, [1903] 1 Ch. 70.

s) *Re United Service Association*, [1901] 1 Ch. 97.

t) *Brighton Arcade Co. v. Dowling* (1868), 1 L. R. 3 C. P. 175, 187; compare *the London Bank of Scotland*, [1867] W. N. 114.

(u) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 [Companies Act, 1862, (25 & 26 Vict. c. 89) s. 133]. The assets include uncalled capital (*Webb v. Whiffin* (1872); L. R. 5 H. L. 711, 724).

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 196 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 144]. If an order is made continuing a voluntary winding up under supervision, the costs of the voluntary liquidator

SECT. 17. (2) in satisfaction of the company's liabilities *pari passu*; and
 Voluntary (3) unless the articles otherwise provide, in distribution among the
 Winding up. members according to their rights and interests in the company (b).

SUB-SECT. 9.—*Applications to the Court.*

Powers of
 the court.

1003. Where a company is being wound up voluntarily, the liquidator (c), or any contributory or creditor, may apply to the court having jurisdiction to wind up the company (d) to determine any question arising in the winding up, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court (e). The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just (f). The application (g) may be made by motion or originating summons (h). Applications may be transferred to another court having winding-up jurisdiction (i).

incurred prior to such order have priority over the petitioner's costs of obtaining the supervision order (*Re New York Exchange Co.*, [1893] 1 Ch. 371); compare *Re Sanitary Burial Association*, [1900] 2 Ch. 289, C. A., where the voluntary liquidator's costs were held to be postponed to the taxed costs of the petitioner, and of the liquidator's solicitor, and to any further costs of work properly done by the solicitor by the authority of the liquidator subsequently to the supervision order. As to the costs of drawing bills of costs, see *Re National Bank of Wales*, [1902] 2 Ch. 412.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 186 [*Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 133]; see *Elkins v. Capital Guarantee Society* (1900), 16 T. L. R. 423, C. A., where the balance of a fund set apart for payment of bondholders, whose bonds were not payable until fifty years had elapsed, had not been claimed for over ten years after advertisements, and the court refused to order the unclaimed balance to be paid to the liquidator on behalf of the shareholders. But an order may be made excluding from the benefit of a scheme sanctioned by the court all bondholders who do not accept it within a limited time (*Suragossa and Mediterranean Rail. Co. v. Collingham*, [1904] A. C. 159, reversing *Collingham v. Sloper*, [1901] 1 Ch. 769, C. A.).

(c) The liquidator may apply for the determination of any question fairly arising in the liquidation (*Re Central de Kaap Gold Mines*, [1899] W. N. 216, 235); but the practice now is only to answer specific questions. Claims for damages will not be decided on such an application (*Crawford v. McCulloch*, [1909] S. C. 1063).

(d) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 235; and see p. 391, *ante*. In *Re Alexandra Printing Ink Co., Ltd.* (1868), 18 L. T. 18, it was held that where an action had been instituted under a voluntary winding up, any other proceedings in the same matter should be in the same court.

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 193 (1) [*Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 138; Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 25]. As to the object of this provision, see *Rance's Case* (1870), 6 Ch. App. 104, 114, 115.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 193 (2) [*Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 138].

(g) As to the rules applicable to a voluntary winding up, see Companies (Winding-up) Rules, r. 1; and p. 553, *ante*.

(h) *Re New Terras Tin Mining Co.*, [1894] 2 Ch. 344; *Re Union Bank of Kingston-upon Hull* (1880), 13 Ch. D. 808, and see p. 554, *ante*. Under the rules of 1862, the application was only to be made by summons if the judge so directed, but the direction could be given on the hearing of a summons issued without any previous direction (*Re British Envelope Manufacturing Co.*, [1885] W. N. 84).

(i) See p. 541, *ante*.

1004. An order may be made for a private examination (*k*): but a voluntary liquidator is not entitled to an order as of right; he must satisfy the court that it is just and beneficial that an order for examination should be made (*l*). SECT. 17.
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On an application to obtain relief where there has been non-compliance with the statutory requirements on the issue of shares not paid for in cash (*m*), the applicant ought to give the liquidator, in good time, information to enable him to decide whether he should oppose (*n*). Application
for relief.

Where it appears that promoters, directors, or other officers have been guilty of misfeasance, proceedings may be taken as in the case of a winding up by the court (*o*). Misfeasance.

1005. In the event of a voluntary winding up taking place, a transaction which would be deemed a fraudulent preference in the bankruptcy of an individual is invalid against the company, the passing of the resolution for voluntary winding up being deemed to correspond with the act of bankruptcy in the case of an individual, unless the winding up is placed under supervision or superseded by a compulsory winding up, in each of which cases the date of the petition is substituted (*p*). Fraudulent
preference.

SUB-SECT. 10.—*Staying and Restraining Proceedings and Staying Winding up.*

1006. The passing of resolutions for voluntary winding up does not, like an order for winding up by or under supervision of the court, stay any proceedings, or invalidate executions or distresses, or prevent actions or other proceedings being brought or continued against the company without the leave of the court (*q*). On application, however, the court (*r*) has jurisdiction to stay any action (*s*), proceeding, attachment, distress or execution (*t*) against the company, or its estate or effects, upon such terms as it thinks fit. Until the stay is granted, a creditor may commence or continue any action or proceeding, or put in force any attachment, distress, execution or analogous proceeding; and, therefore, a Effect of
winding-up
resolutions
on outside
litigation.

(*k*) Under Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 174; see p. 474, *ante*.

(*l*) *Heiron's Case* (1880), 15 Ch. D. 139, C. A.; and see *Re Gold Co.* (1879), 12 Ch. D. 77, C. A.

(*m*) See p. 180, *ante*.

(*n*) *Stephenson's Case*, [1900] 2 Ch. 442.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 215; see p. 478, *ante*.

(*p*) *Ibid.*, s. 210; see p. 544, *ante*; *Re Russell Hunting Record Co.*, [1910] W. N. 142.

(*q*) See pp. 420, 534, *ante*.

(*r*) In this case the court in which the action is pending (*Currie v. Consolidated Kent Collieries Corporation*, [1906] 1 K. B. 134). In the case of a distress the court is the one having jurisdiction to wind up the company (*Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, [1897] 1 Ch. 373).

(*s*) *Re Keynsham Co.* (1863), 33 Beav. 123; *Harrison v. Mortgage Insurance Corporation* (1893), 10 T. L. R. 141; see also *Re Hermann Loog, Ltd.* (1887), 36 Ch. D. 502; *Re Rio Grande Do Sul Steamship Co.* (1877), 5 Ch. D. 282, C. A.

(*t*) *Re Thurso New Gas Co.* (1889), 42 Ch. D. 486; *Re Sablonière Hotel Co.* (1866), L. R. 3 Eq. 74; *Westbury v. Twigg & Co.*, [1892] 1 Q. B. 77; *Re Roundwood Colliery Co., Lee v. Roundwood Colliery Co.*, *supra*, at p. 381; *Re Poole Firebrick and Blue Clay Co.* (1873), L. R. 17 Eq. 268, which see as to the terms on which an execution will be stayed.

SECT. 17. liquidator may obtain a supervision order to protect him against actions which are threatened, and so save the expense of applying for the stay or restraint of proceedings against the company (u).

Voluntary Winding up.

Discretion of the court.

In the case of a voluntary winding up the onus lies on the liquidator of showing that an action against the company should be stayed. The court has a discretion, and will not stay the action where there is a dispute as to the liability, although, if the liability is admitted, and there is a mere dispute as to the amount, the matter should be determined in the liquidation (a). Where an action is pending against the company when the winding up commences, and the liquidator disputes the claim and is unsuccessful at the trial, the plaintiff is entitled to have the costs paid in full out of the company's assets (b).

Staying winding up.

Where a company is in voluntary liquidation, the court having jurisdiction to wind up the company has power to make an order staying all proceedings in the winding up (c).

SUB-SECT. 11.—Reconstruction and Amalgamation.

(i.) *In General.*

Meaning of "reconstruction" and "amalgamation."

1007. Neither "reconstruction" nor "amalgamation" has any definite legal meaning. Each word is a commercial and not a legal term, and as a commercial term has no exact definite meaning. Where an undertaking is being carried on by a company, and is in substance preserved and transferred, not to an outsider, but to another company, consisting substantially of the same shareholders, with a view to its being continued by the transferee company, that is a reconstruction. It is none the less a reconstruction because all the assets do not pass to the new company, and all the shareholders of the transferor company are not shareholders in the transferee company, and the liabilities of the transferor company are not taken over by the transferee company. To constitute amalgamation there must be a blending of substantially two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which holds the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. It is not necessary that a resolution for winding up should refer to reconstruction or amalgamation in order to constitute a winding up for the purpose of reconstruction or amalgamation; but the purpose of the winding up may be gathered from the whole of the circumstances which result in reconstruction or amalgamation (d).

(u) *Re Zoedone Co.* (1883), 53 L. J. (CH.) 465.

(a) *Currie v. Consolidated Kent Collieries Corporation, Ltd.*, [1906] 1 K. B. 134, C. A.

(b) *Re Wenborn & Co.*, [1905] 1 Ch. 413.

(c) *Re Condes Co. of Chili* (1892), 36 Sol. Jo. 593; *Re Steamship "Titian" Co.* (1888), 36 W. R. 347; *Re Schanschieff Electric Battery Syndicate, Ltd.*, [1888] W. N. 166; *Re Steamship Chigwell, Ltd.* (1888), 4 T. L. R. 308.

(d) *Re South African Supply and Cold Storage Co., Wild v. Same Co.*, [1904] 2 Ch. 268. Both words have since been adopted by the legislature; see

1008. A clause in a company's memorandum of association giving power to sell all its assets and all its undertaking and to distribute the proceeds does not enable such a sale and distribution to be made without regard to the statutory provisions (e). Nor can a company limited by shares effectually provide, as part of its constitution, by its memorandum and articles, that in a specified event a member shall either submit to a liability in excess of the limit of liability on his shares, or be dispossessed of his status as a member (f).

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Voluntary Winding up.
Reconstruction under memorandum powers.

Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 5 (6); Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 209 (1); see also *Hooper v. Western Counties and South Wales Telephone Co.* (1892), 68 L. T. 78 (reconstruction); *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.; *Re Bank of Hindustan, China and Japan, Higgs's Case* (1865), 2 Hem. & M. 657; *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622, C. A.; *Re Empire Assurance Corporation, Ex parte Bagshaw* (1867), L. R. 4 Eq. 341, 349; *Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan* (1868), L. R. 6 Eq. 91; *Re Borax Co., Foster v. Borax Co.*, [1899] 2 Ch. 130, 135; *Greenwich Pier Co. v. Thames River Conservators* (1905), 21 T. L. R. 669 (amalgamation). As to amalgamation of assurance companies, see p. 633, *post*. As to arrangements and compromises, see p. 602, *post*.

(e) Namely, those contained in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 192; see p. 586, *post*.

(f) *Bisgood v. Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 743, C. A.; compare *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308. The case may be different where the sale is of part of the assets only; see *Wall v. London and Northern Assets Corporation*, *supra*. It had been usual for many years for companies to state, in their memoranda of association, that one of the objects was to sell the undertaking or any part thereof for any consideration, and in particular for shares or other securities of any other company having similar objects. Such a power was held to be valid, even when the whole of the company's assets were sold, and the winding up, which is required before the proceeds of the sale can be distributed amongst the shareholders, was not resolved upon at the same time (*Cotton v. Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454). Hence, dissentient members under the provision for which s. 192 (3) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), is substituted were deprived of any rights which they would have possessed on a statutory reconstruction to have their interests paid for. The fact that a resolution for voluntary winding up was passed at the time when the sale was sanctioned was held to be immaterial (*Doughty v. Lomagunda Reefs, Ltd.*, [1902] 2 Ch. 837; and see *Re Paterson, Laing and Bruce, Ltd.* (1902), 18 T. L. R. 515). It was further held that unless there was something in the memorandum or articles to qualify the meaning of the word "shares" a company could, under its memorandum power of sale, accept partly-paid shares in another company (*Mason v. Motor Traction Co., Ltd.*, [1905] 1 Ch. 419). Where the memorandum expressly gave power to sell for fully or partly paid shares, the Court of Appeal, without deciding that such a power was illegal, held that an agreement with another company which provided for the distribution of the partly-paid shares of the purchasing company among the shareholders of the selling company, and the proceeds of sale of the shares not taken up being applied in reduction of the purchase-money, was not within the power (*Manners v. St. David's Gold and Copper Mines, Ltd.*, [1904] 2 Ch. 593, C. A.). An agreement, under which the proceeds of the partly-paid shares unclaimed were to be distributed rateably amongst the members who might have claimed them, was also held to be *ultra vires* (*Bisgood v. Nile Valley Co., Ltd.*, [1906] 1 Ch. 747). In a somewhat similar case the agreement was held to be valid (*Fuller v. White Feather Reward, Ltd.*, [1906] 1 Ch. 823). But the Court of Appeal in *Bisgood v. Henderson's Transvaal Estates, Ltd.*, *supra*, subsequently approved *Bisgood v. Nile Valley Co., Ltd.*, *supra*, and overruled *Cotton v. Imperial and Foreign Agency and Investment Corporation*, *supra*, and *Fuller v. White Feather Reward, Ltd.*, *supra*.

SECT. 17.
Voluntary
Winding up.

Statutory
reconstruction.

1009. Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, the liquidator of the transferor company may, with the sanction of a special resolution of that company, conferring on him either a general authority or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company. Any such sale or arrangement is binding on the members of the transferor company (g).

The statutory power of sale is in addition to any powers conferred on the company under its regulations, and may be exercised although *ultra vires* of the company (h). The making of a supervision order does not take away the power (i), and it may be subsequently exercised without the sanction of the court (j). The sale binds both the shareholders and the creditors of the transferor company (k), though mortgagees may be entitled under the terms of their mortgage to prevent a sale of its assets (l).

Special
resolution.

1010. A special resolution sanctioning a transfer is not invalid because it is passed before or concurrently with a resolution for winding up the company, or for appointing liquidators. If, however, an order is made within a year for winding up the company by or subject to the supervision of the court, the special resolution is not valid unless sanctioned by the court (m). The sanction of the court must

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 192 (1), (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161].

(h) *Clinch v. Financial Corporation* (1868), L. R. 5 Eq. 450, 472, affirmed (1868) 4 Ch. App. 117, 121, 123; *Nicholl v. Eberhardt Co.* (1889), 61 L. T. 489, C. A. But the new company must have power under its memorandum to accept the transfer (*Pulbrook v. New Civil Service Co-operation* (1877), 26 W. R. 11). As to the powers of unincorporated companies under deeds of settlement to transfer their undertaking, see *Re Era Assurance Society, Ex parte Williams, Ex parte Anchor Assurance Co.* (1860), 30 L. J. (CH.) 137; *Kearns v. Leaf* (1864), 1 Hem. & M. 681; *Ernest v. Nicholls* (1857), 6 H. L. Cas. 401; *Doman's Case* (1876), 3 Ch. D. 21, C. A.; *Re Argus Life Assurance Co.* (1888), 39 Ch. D. 571.

(i) *Re Imperial Mercantile Credit Association* (1871), L. R. 12 Eq. 504; *Re Cambrian Mining Co.* (1882), 48 L. T. 114.

(j) *Wright's Case* (1870), 5 Ch. App. 437.

(k) *Re City and County Investment Co.* (1879), 13 Ch. D. 475, C. A.

(l) *Re Boraz Co., Foster v. Boraz Co.*, [1899] 2 Ch. 130; compare *Re Vivian (H. H.) & Co., Ltd., Metropolitan Bank of England and Wales, Ltd. v. Vivian (H. H.) & Co., Ltd.*, [1900] 2 Ch. 654.

(m) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 192 (5) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161]. A supervision order is sometimes obtained in order to obtain the court's sanction (*Re New Flagstaff Mining Co.*, [1889] W. N. 123); and a compulsory order will be made, when a scheme appears unfair, in order that the scheme may not be carried through without the court's sanction (*Re Consolidated South Rand Mines Deep, Ltd.*, [1909] 1 Ch. 100).

be obtained at or after the making of the winding-up or supervision order, and cannot be previously obtained in the voluntary winding up (*n*). When a voluntary winding-up resolution states that, for the purpose of effecting the amalgamation or reconstruction, the company is wound up voluntarily, the winding-up resolution is not rendered invalid by reason of the intended amalgamation or reconstruction being *ultra vires* (*o*).

SECT. 17.
Voluntary
Winding up.

A special resolution is invalid unless the notice convening the first meeting distinctly states that it is intended to proceed under the statutory provision (*p*). It is invalid so far as it authorises the liquidator to pay for the underwriting of the shares of the transferee company out of the assets of the transferor company (*q*) unless the statutory requirements as to underwriting are complied with (*r*).

When
invalid.

1011. Under the statutory power the transferor company can only sell to another company (*s*). If, however, such company is a corporate body, it is immaterial in what way it has been incorporated, so long as it is a company as defined by the Act of 1908 (*t*). A sale to a person who intends to re-sell at a profit to a company is invalid (*u*); but a sale to an agent or trustee for a company to be formed may be within the section (*w*).

Transferee
company.

1012. The agreement for sale may validly provide that the transferor company shall call up its unpaid capital and transfer the amount so realised to the transferee company (*a*), or that shares in

Incidents of
agreement.

(*n*) *Re Callao Bis Co.* (1889), 42 Ch. D. 169, C. A. In the case of life assurance companies the court's sanction is always required (Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 14); and see Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 13; and p. 634, *post*.

(*o*) *Cleve v. Financial Corporation* (1873), L. R. 16 Eq. 363; *Stone v. City and County Bank* (1877), 3 C. P. D. 282, C. A.

(*p*) *Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan* (1868), L. R. 6 Eq. 91; *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176, 193; compare *Re Teede and Bishop, Ltd.*, [1901] W. N. 52.

(*q*) *Re Canning Jarrah Timber Co. (Western Australia), Ltd.*, [1900] 1 Ch. 708, C. A.

(*r*) *Barrow v. Paringa Mines* (1909), *Ltd.*, [1909] 2 Ch. 658. As to underwriting shares, see p. 92, *ante*.

(*s*) *Bird v. Bird's Patent Deodorizing and Utilizing Sewage Co.* (1874), 9 Ch. App. 358.

(*t*) This does not include a foreign company (*Thomas v. United Butter Cos. of France*, [1909] 2 Ch. 484). As to cases before the Act, see *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176, 192. As to the companies which are within the section, see p. 36, *ante*; and s. 285 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). An unregistered company can, by registering under the Act of 1908, avail itself of the reconstruction section (*Southall v. British Mutual Life Assurance Society* (1871), 6 Ch. App. 614).

(*u*) *Re Hester & Co.* (1875), 44 D. J. (CH.) 757, 759, C. A.

(*w*) *Ibid.*; *Re Canning Jarrah Timber Co. (Western Australia), Ltd.*, *supra*.

(*a*) *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622, 630, C. A.; *Re Bank of South Australia* (2), [1895] 1 Ch. 578, C. A.; but the agreement cannot validly provide for a call to be made on the shares of the transferor company in case its assets do not realise a specified amount (*Clinch v. Financial Corporation* (1868), 4 Ch. App. 117).

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Voluntary
Winding up.

the transferee company shall be allotted either to the liquidator, or directly to the members of the transferor company, and as either partly or fully paid up. A liability to pay cash, however, cannot be imposed on the members of the transferor company by allotting them shares credited as partly paid up, except with their consent (b). If they accept such shares they become liable for the amount not credited as paid on them, the shareholder sometimes being required to make a payment of parts of the amount on application and on allotment (c).

Rights of
members.

A member of the transferor company, even if he has not served notice of dissent, cannot be compelled to accept shares in the transferee company; but if he has served no such notice he is not entitled to receive compensation for his interest in the transferor company (d).

Compensa-
tion to
directors.

The agreement for sale is not invalid because it provides that part of the purchase-money shall be paid to the directors and secretary of the transferor company, as compensation for loss of office (e).

Payment by
instalments
etc.

The court has no power to authorise a sale to a transferee company in consideration of its agreeing to pay the creditors of the transferor company by instalments (f). Nor can it authorise an agreement or resolution compelling the members of the transferor company to pay a premium upon the shares of the transferee company (g).

An agreement that the members of one company shall, in

(b) See *Re City and County Investment Co.* (1879), 13 Ch. D. 475, 482, C. A.; *Re Imperial Mercantile Credit Association* (1871), L. R. 12 Eq. 504; *Simpson v. Palace Theatre, Ltd.* (1893), 69 L. T. 70, C. A. For the form of scheme, see *Postlethwaite v. Port Phillip and Colonial Gold Mining Co.* (1889), 43 Ch. D. 452.

(c) *Weston v. New Guston Co.* (1889), 1 Meg. 225, 352, C. A.; affirmed (1891) 64 L. T. 815, H. L.; *Postlethwaite v. Port Phillip and Colonial Gold Mining Co.*, *supra*; *Burdett-Coutts v. True Blue (Hannan's) Gold Mine*, [1899] 2 Ch. 616, C. A. Where the shares are to be taken as partly paid, the agreement should provide for the allotment being made directly to the members of the old company so as to free the liquidator from any liability. A shareholder may be required to elect within a reasonable time whether he will accept such shares (*Zuccani v. Nacupai Gold Mining Co.* (1889), 61 L. T. 176, C. A.).

(d) *Re Bank of Hindustan, China and Japan, Ex parte Los* (1865), 34 L. J. (CH.) 609; *Re Bank of Hindustan, China and Japan, Higges's Case* (1865), 2 Hem. & M. 657; *Re Bank of Hindustan China and Japan, Martin's Case* (1865), 2 Hem. & M. 669; *Re Empire Assurance Corporation, Ex parte Bagshaw* (1867), L. R. 4 Eq. 341; *Re London, Bombay and Mediterranean Bank, Drew's Case* (1867), 36 L. J. (CH.) 785; see p. 591, *post*.

(e) *Southall v. British Mutual Life Assurance Society* (1871), 6 Ch. App. 614; compare *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358, C. A. The proposed payment must be fully disclosed to the shareholders (*Tiersen v. Henderson*, [1899] 1 Ch. 861; compare *Normandy v. Ind Coope & Co., Ltd.*, [1908] 1 Ch. 84. As to gratuities to officers and servants, see p. 220, *ante*. As to agreements providing for a distribution other than in accordance with the rights of members, see *Griffith v. Paget* (1877), 5 Ch. D. 894; 6 Ch. D. 511; *Postlethwaite v. Port Phillip and Colonial Gold Mining Co.*, *supra*; *Simpson v. Palace Theatre, Ltd.*, *supra*.

(f) *Re General Exchange Bank* (1867), 15 W. B. 477.

(g) *Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan* (1868), L. R. 6 Eq. 91.

exchange for their shares therein, take shares in another company is chargeable with *ad valorem* duty (*h*).

The consideration for the sale must be distributed among the members of the selling company in proportion to their rights and interests, under its regulations, in the assets of the company remaining after payment of its liabilities. The persons prejudicially affected by any other mode of distribution can only be bound by their individual consents (*i*). Where the liquidator disposes of all the shares in the transferee company without reserving any for a member of the transferor company who is entitled thereto, the court has no jurisdiction to award the member damages in the winding up of the transferor company (*k*). Nor can the question as to the validity of the sale be decided in the winding-up proceedings, but only in an action instituted by a non-assenting shareholder suing on behalf of himself and all other shareholders (*l*).

SECT. 17.
Voluntary
Winding up,
Distribution
of proceeds.

(ii.) *Rights of Dissident Members.*

1013. If any member of the transferor company, who has not voted in favour of the special resolution at either of the meetings held to pass and confirm the same, expresses his dissent in writing addressed to the liquidator, and left at the registered office of the company within seven days after the confirmation of the resolution, he may require (*m*) the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in the prescribed manner (*n*). A notice of dissent served before the confirmatory

Notice of
dissent.

(*h*) *Chesterfield Brewery Co. v. Inland Revenue Commissioners*, [1899] 2 Q. B. 7.

(*i*) *Griffith v. Paget* (1877), 6 Ch. D. 511; *Postlethwaite v. Port Phillip and Colonial Gold Mining Co.* (1889), 43 Ch. D. 452; *Simpson v. Palace Theatre, Ltd.* (1893), 69 L. T. 70; *Re Lake View Extended Gold Mine (Western Australia), Ltd.*, [1900] W. N. 429; *Re North West Argentine Railway*, [1900] 2 Ch. 882, where WRIGHT, J., in fact repudiated his former decision in *Re Beeston Pneumatic Tyre Co.*, [1898] W. N. 34.

(*k*) *Re Hill's Waterfall Estate and Gold Mining Co.*, [1896] 1 Ch. 947.

(*l*) *Re Imperial Bank of China, India and Japan* (1866), 1 Ch. App. 339, 347, 348; *Re International Life Assurance Society* (1868), 20 L. T. 433; *Clinch v. Financial Corporation* (1868), L. R. 5 Eq. 450; *Bird v. Bird's Patent Deodorizing and Utilizing Sewage Co.* (1874), 9 Ch. App. 358; compare *Re City and County Investment Co.* (1879), 13 Ch. D. 475, C. A.; *Re Hester & Co.* (1875), 44 L. J. (CH.) 757, C. A. As to adding the transferee company as a party, see *Doughty v. Lomagunda Reefs, Ltd.*, [1903] 1 Ch. 673, C. A.

(*m*) The requisition must be contained in the notice of dissent (*Re Union Bank of Kingston-upon-Hull* (1880), 13 Ch. D. 808). Where the registered office of the company is abroad the notice given to the liquidator in England within the requisite term is sufficient (*Brailey v. Rhodesia Consolidated, Ltd.* (1910), 129 L. T. 10).

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 192 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161]. As to the clauses to be inserted in the reconstruction or amalgamation agreement to provide funds to pay dissentients, see *Re Hester & Co.*, *supra*. For the purposes of arbitration the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), with respect to the settlement of disputes by arbitration, are incorporated with the Act of 1908, and in the construction of those provisions the Act of 1908 is deemed to be the special Act, and "the company" means the transferor company, and any appointment by the incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, or if there is more than one liquidator, then

SECT. 17. meeting, and not objected to or returned within a month, is valid (o).
 Voluntary Winding up.

An article of association providing that the sum payable to a dissentient member shall be such sum as the liquidator can obtain by selling the shares to which the dissentient member, but for his dissent, would have been entitled does not constitute an agreement as to the price to be paid to dissentient members (p). An article which purports to authorise what may be done under the Act, but omits the proviso in favour of dissentient shareholders, is invalid (q).

Amount payable.

1014. Interest is not payable on the amount awarded until payment is demanded in writing; but from that time it is payable at the rate of 4 per cent. until payment (r). In practice, the price to be paid in shares by the transferee company is disregarded on the arbitration, and the value of a dissentient member's interest depends on the nature of the reconstruction (s). A commission to examine witnesses abroad may be granted in order to ascertain the value of the assets (t). The court will not, however, allow a shareholder to examine officers of the company in order to obtain evidence for use on the arbitration (u).

If the liquidator elects to purchase the member's interest, the liquidator must raise the purchase-money and pay it in such manner as may be determined by special resolution before the company is dissolved (w). Unless provision is made to satisfy money payable to a dissentient member, an injunction will be granted to restrain the liquidator from parting with the assets without providing for his claim (a).

A dissentient member is not entitled to have his name omitted from the list of contributories, although he transfers his shares to the liquidator (b); but the transfer relieves him from liability as to the costs of the liquidation (c).

of any two or more of them (*ibid.*, s. 192 (6) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 162]; but if the articles of association provide for arbitration between the company and its members, either that or the statutory mode of arbitration may be resorted to (*De Rosaz v. Anglo-Italian Bank* (1869), L. R. 4 Q. B. 462); see title ARBITRATION, Vol. I., pp. 439 *et seq.*; see p. 601, *post*).

(n) *Re London and Westminster Bread Co.* (1890), 59 L. J. (OH.) 155.

(p) *Baring Gould v. Sharpington Combined Pick and Shovel Syndicate*, [1899] 2 Ch. 80, C. A.

(q) *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308; *Re Irrigation Co. of France*, *Ex parte Fox* (1871), 6 Ch. App. 176.

(r) *Re United States Direct Cable Co.* (1879), 48 L. J. (OH.) 665.

(s) *Re Mysore West Gold Mining Co.* (1889), 42 Ch. D. 535.

(t) *Ibid.*

(u) *Re British Building Stone Co., Ltd.*, [1908] 2 Ch. 450; nor can the books of the company be examined by the dissentient to see whether acceptance of the offer would be for his advantage (*Morgan's Case* (1884), 28 Ch. D. 620).

(w) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 89), s. 192 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161].

(a) *Re Hester & Co.* (1875), 44 L. J. (OH.) 757; [1875] W. N. 179, C. A.; *Baring Gould v. Sharpington Combined Pick and Shovel Syndicate*, *supra*; *Payne v. Cork Co., Ltd.*, [1900] 1 Ch. 308.

(b) *Re Imperial Land Co. of Marseilles*, *Ex parte Jeaffreson* (1870), L. R. 11 Eq. 109; *Vining's Case* (1870), 6 Ch. App. 96; *Part's Case* (1870), L. R. 10 Eq. 622.

(c) *Re Marine Investment Co., Ex parte Poole's Executors* (1873), 8 Ch. App. 702, 710.

Where a scheme is eminently unfair, a dissentient minority may stop it by obtaining a compulsory winding-up order (*d*).

SECT. 17.
Voluntary
Winding up.

1015. If a member who has not dissented but has not expressly or impliedly assented to the sale declines to accept his proportion of the shares payable by the transferee company, he cannot be compelled to accept them (*e*); but he obtains nothing (*f*) unless they are allotted and sold by the liquidator, in which case he is entitled to the net proceeds of sale (*g*).

Member
neither
assenting nor
dissenting.

1016. A special resolution directing shares in the purchasing company to be offered to members of the old company, and fixing a reasonable limit of time for acceptance, is *intra vires* (*h*). In the absence of such a stipulation a reasonable time must be allowed, and if the time is not reasonable the members are not bound thereby (*i*).

Time
limit for
acceptance.

1017. A proper contract with regard to the fully or partly paid shares in the new company, and a return of the allotments, must be filed (*k*). A contract for sale does not create a contractual relation between a member of the transferor company and the new company, and if he applies for shares in the new company in pursuance of the scheme, he may withdraw his offer before it is accepted (*l*). The new company is in no sense the servant or agent of the transferor company, and is not bound by injunctions granted against it (*m*).

Filing.

1018. Where, under a contract made prior to the reconstruction scheme being sanctioned, the purchaser is entitled to be registered as transferee of shares in the old company, and the vendor obtains the allotment of the shares in the new company, to which the owner of such shares is entitled under the scheme, the allottee is a trustee of them for the purchases, although he has delayed registration of the transfer (*n*).

Allotment
to wrong
person.

d) *Re Consolidated South Rand Mines Deep, Ltd.*, [1909] 1 Ch. 491.

e) See note (*d*), p. 588, *ante*.

f) *Weston v. New Guston Co.* (1889), 1 Meg. 225, 352, C. A.; affirmed (1891) 64 L. T. 815, H. L.; *Zuccani v. Nacupai Gold Mining Co.* (1889), 61 L. T. 176, C. A.

g) *Re Lake View Extended Gold Mine (Western Australia), Ltd.*, [1900] W. N. 44.

h) *Postlethwaite v. Port Phillip and Colonial Gold Mining Co.* (1889), 43 Ch. D. 452; *Burdett Coutts v. True Blue (Hannan's) Gold Mine*, [1899] 2 Ch. 616, C. A.; compare *Nicholl v. Eberhardt Co.* (1889), 59 L. J. (CH.) 103, C. A.

i) *Zuccani v. Nacupai Gold Mining Co.*, *supra*; *Re South Australian Petroleum Fields, Ltd.*, [1894] W. N. 189.

k) As to filing contracts and returns, see p. 179, *ante*. Where a reconstruction has been carried out by forming a new company with the same name, which takes over all the liabilities of the transferor company, payments made by the former to a creditor of the latter who dealt with the former under the belief that he was continuing to deal with the transferor company must be applied in discharge of debts of the old company, and not of those due to him by the transferee company (*Re Taurine Co., Anning and Cobb's Claim* (1878), 38 L. T. 53).

l) *Wallace's Case*, [1900] 2 Ch. 671.

m) *Dosch v. Simms Manufacturing Co.* (1909), 25 T. L. R. 419.

n) *Rooney v. Stanton* (1900), 17 T. L. R. 28, C. A.

SECT. 17.

**Voluntary
Winding up.**Prosecution
by liquidator.SUB-SECT. 12.—*Prosecution of Delinquent Directors and Others.*

1019. If it appears to the liquidator in the course of a voluntary winding up that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the liquidator, with the previous sanction of the court, may prosecute the offender. All expenses properly incurred by him in the prosecution are payable out of the assets of the company in priority to all other liabilities (o).

SUB-SECT. 13.—*Disposal of Books.*Disposal of
books.

1020. When a company has been wound up voluntarily and is about to be dissolved, the books and papers of the company and of the liquidator may be disposed of in such way as the company by extraordinary resolution directs. After five years from the dissolution no responsibility rests on the company, or the liquidator, or any person to whom the custody of the books and papers has been committed, by reason of their not being forthcoming to any person claiming to be interested (p). If, after the dissolution, any documents remain in the custody of the liquidator, he may be ordered to produce them (q).

SUB-SECT. 14.—*Dissolution of Company.*General
meeting of
the company.

1021. In the case of every voluntary winding up, as soon as the affairs of the company are fully wound up, the liquidator must make up an account of the winding up, showing how it has been conducted and how the property of the company has been disposed of. He must then call a general meeting of the company for the purpose of laying before it the account and giving any explanation that may be required (r). The meeting must be called by advertisement in the *London Gazette*, specifying the time, place, and object, and published one month at least before the meeting (s).

Notice of
meeting to
registrar.

Within one week after the meeting, the liquidator must make a return to the registrar of the holding of the meeting, and of its date. In default of so doing, he is liable to a fine not exceeding £5 for every day during which the default continues (t). The registrar on receiving the return is forthwith to register it, and on the expiration of three months from the registration of the return the company is deemed to be dissolved (a). The court may, however, on the application of the liquidator or of any other person who appears to be interested, make an order

(o) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 217 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 168]; see pp. 564, 581, *ante*.

(p) *Ibid.*, s. 222 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 155].

(q) *London and Yorkshire Bank v. Cooper* (1885), 15 Q. B. D. 473, C. A.

(r) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 195 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 142].

(s) *Ibid.*, s. 195 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 142].

(t) *Ibid.*, s. 195 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 143; Companies Act, 1907 (7 Edw. 7, c. 50), s. 50; Sched. III.].

(a) *Ibid.*, s. 195 (4) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 143; Companies Act, 1907 (7 Edw. 7, c. 50), Sched. III.].

deferring the date at which the dissolution is to take effect for such time as it thinks fit (b).

The person on whose application such an order is made must within seven days after the making of the order file with the registrar an office copy of the order. If he fails so to do he is liable to a fine not exceeding £5 for every day during which the default continues (c).

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Winding up.

1022. If proceedings are instituted against the company after the date of the registration of the liquidator's return, but before the expiration of three months from that date, the court has, in certain cases, jurisdiction to make an order against the company, even although the hearing does not take place until after the expiration of the three months (d). The court has no jurisdiction after dissolution to make a winding-up order except perhaps where the dissolution proceedings are invalidated by fraud (e); but it may set aside the dissolution (f).

Effect of
dissolution.

Even after dissolution the liquidator is liable in damages for breach of his statutory duty to a creditor or contributory by distributing the assets without providing for his debt or claim, after taking proper steps to ascertain it (g).

SUB-SECT. 15.—*Superseding Voluntary Winding up.*

1023. The voluntary winding up of a company does not bar the right of any creditor, whether his debt accrued before or after the commencement of the voluntary winding up (h), or contributory, to have it wound up by the court, if the court is of opinion that the rights of the creditor or contributories, as the case may be, will be prejudiced by a voluntary winding up (i). Where the court

Procedure.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 195 (4) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 31 (1)]. Before the Act of 1907 there was no power to make an order directly extending the time, but the court could do so indirectly by staying all proceedings in the winding up (*Re Eastern Investment Co., Ltd.*, [1905] 1 Ch. 352).

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 195 (5) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 31 (3)]. As to the effect of dissolution, see p. 592, *ante*; *Re London and Caledonian Marine Insurance Co.* (1879), 11 Ch. D. 140, C. A.; *Re Schooner Pond Coal Co.*, [1888] W. N. 70. As to *bona vacantia*, see also *Cunnack v. Edwards*, [1896] 2 Ch. 679, C. A.; *Re Printers and Transferrers Amalgamated Trades Protection Society*, [1899] 2 Ch. 184; *Brown v. Dale* (1878), 9 Ch. D. 78; *Re Bond, Panes v. A.-G.*, [1901] 1 Ch. 15.

(d) *Whiteley Exerciser, Ltd. v. Gamage*, [1898] 2 Ch. 405; *Re Crookhaven Mining Co.* (1866), L. R. 3 Eq. 69; compare *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43.

(e) *Re Pinto Silver Mining Co.* (1878), 8 Ch. D. 273, 282, C. A.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 223 [Companies Act, 1907 (7 Edw. 7, c. 50), s. 31].

(g) *Pulsford v. Devenish*, [1903] 2 Ch. 625.

(h) *Re Bank of South Australia* (2), [1895] 1 Ch. 578, 595, C. A., doubting *Re Bank of South Australia*, [1894] 3 Ch. 722, where it was held that there was no jurisdiction to make a supervision order on the petition of a creditor whose debt was incurred after the voluntary winding up commenced.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 197 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 145]; see p. 416, *ante*. It is immaterial whether the resolution for voluntary winding up is passed before or after the presentation of the winding-up petition (*Re New York Exchange, Ltd.* (1888),

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Winding up.

Alternative
to super-
session.

orders the company to be wound up by the court, it may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up (j). Such proceedings are not, however, invalidated by reason of the court not adopting them (k).

Instead of making a winding up order, an order may be made for continuing the voluntary winding up under the supervision of the court (l).

The existence of a voluntary winding up is not a strong reason against a compulsory order where the resolution for voluntary winding up has been passed with a specific object, such as reconstruction, which has failed (m). The fact that a winding-up resolution has been passed in breach of faith towards a creditor is an important factor in determining whether there should be a compulsory order (n).

SECT. 18.—Winding up under the Supervision of the Court.

SUB-SECT. 1.—In General.

Where
supervision
order may
be made.

1024. The court cannot order the voluntary winding up of a company to be continued under the supervision of the court unless there is in existence a valid resolution for voluntary winding up (o). The jurisdiction is now confined to cases where the resolution is a special or extraordinary one, in which case the court

39 Ch. D. 415, C. A.). S. 145 of the Companies Act, 1862 (25 & 26 Vict. c. 89), only in terms prevented the voluntary winding up being a bar where the rights of a creditor were prejudiced; but even then a contributory could petition (*Re Gold Co.* (1879), 11 Ch. D. 701, C. A.); and orders were made where creditors supported the petition (*Re Bishop (E.) & Sons, Ltd.*, [1900] 2 Ch. 254; and see *Re Vron Colliery Co.* (1885), 20 Ch. D. 442, C. A.), or where the resolution was passed fraudulently (*Re Gold Co.*, *supra*), or by the votes of members whose conduct required investigation (*Re Varieties, Ltd.*, [1893] 2 Ch. 235; *Re West Surrey Tanning Co.* (1866), L. R. 2 Eq. 737); or where the court was satisfied that the voluntary winding up was existing under circumstances likely to prejudice the shareholders (*Re National Distribution of Electricity Co., Ltd.*, [1902] 2 Ch. 34, C. A.). Compare *Re Bank of Gibraltar and Malta* (1865), 1 Ch. App. 69; and see *Re National Debenture and Assets Corporation*, [1891] 2 Ch. 505, C. A.; *Re New York Exchange, Ltd.* (1888), 39 Ch. D. 415; *Re West Hartlepool Ironworks Co.* (1875), 10 Ch. App. 618. The decision in *Re Greenwood & Co.*, [1900] 2 Q. B. 306, that an order for the compulsory winding up of a company already in liquidation, although it would benefit the petitioner, ought not to be made unless it would be in the interest of the general body of the creditors, is more than doubtful. The fact that the voluntary liquidator is the nominee of the shareholders may be sufficient of itself to satisfy the court that the rights of the creditors will be prejudiced (*Re Medical Battery Co.*, [1894] 1 Ch. 444, 448; *Re Tramway Wheel Plant and General Foundry Co.*, [1873] W. N. 160). Where the company has no assets except uncalled capital, and the voluntary liquidator will not make calls, the creditors are clearly prejudiced (*Re Bank of South Australia* (2), [1895] 1 Ch. 578, C. A.).

(j) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 146 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 146].

(k) *Thomas v. Patent Lionite Co.* (1881), 17 Ch. D. 250, C. A.; *Cleve v. Financial Corporation* (1873), L. R. 16 Eq. 363.

(l) See *infra*.

(m) *Re Gutta Percha Corporation*, [1900] 2 Ch. 665.

(n) *Re A. B. Cycle Co.* (1902), 19 T. L. R. 84.

(o) *Re Bridport Old Brewery Co.* (1867), 2 Ch. App. 191; *Re Patent Floor-Cloth*

may make an order that the voluntary winding-up shall continue, but subject to such supervision of the court, and with such liberty for creditors, contributories, or others, to apply to the court, and generally on such terms and conditions as the court thinks just (*p*).

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of the Court.

The courts having jurisdiction to make supervision orders are the same as those having jurisdiction to make compulsory orders (*q*).

SUB-SECT. 2.—*Petition and Procedure thereon.*

1025. Every petition for the winding up of a company subject to the supervision of the court must be in the prescribed form, with such variations as circumstances require (*r*). The practice with regard to presenting petitions and making orders is practically the same as that on application for a compulsory order down to and including the completion of the order (*s*).

Petition for
order.

For the purpose of giving jurisdiction to the court over actions, the petition is deemed to be a petition for winding up by the court (*t*). If an action by the company is continued with leave after the supervision order, and judgment is given for the defendant with costs, the costs are payable in full even if the order giving leave is silent on the subject (*u*).

1026. The Act of 1908 is silent as to the persons who may apply to the court to make a supervision order; but such persons as may apply for a compulsory order are entitled to apply for a supervision order, namely, the company itself, or any creditor or contributory. A person who has merely a claim for unliquidated damages against

Who may
apply.

Co. (1869), L. R. 8 Eq. 664; *Re Sheffield Mortgage and Estates Co.*, [1887] W. N. 218; *Re Caloric Engine and Siren Fog Signals Co.* (1885), 52 L. T. 846; *Re Teede and Bishop, Ltd.*, [1901] W. N. 52.

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 199 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 147, varied]. The Companies Act, 1862 (25 & 26 Vict. c. 89), gave jurisdiction to make a supervision order whenever a resolution had been passed to wind up voluntarily, and a company can resolve so to wind up in some cases by an ordinary resolution (see p. 570, *ante*). There seems to be now no jurisdiction to make a supervision order where an ordinary resolution has been passed requiring a company to be wound up because the period fixed for its duration has expired, or the event has occurred on the happening of which it is to be dissolved.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285; and see p. 392, *ante*.

(*r*) Companies (Winding-up) Rules, r. 25, but the prescribed forms (4 and 5) are petitions for compulsory orders. The petition should state that the resolution for voluntary winding up was duly passed on a certain date, and should state the terms of it.

(*s*) See pp. 398 *et seq.*, *ante*.

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 200 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 148]; see pp. 420, 534, *ante*. The court has power to stay proceedings in the voluntary winding up; see p. 584, *ante*.

(*u*) *Re London Drapery Stores, Ltd.*, [1898] 2 Ch. 684. As to the priority of liquidator's and other costs, see *New York Exchange Co.*, [1893] 1 Ch. 371; *Re Sanitary Burial Association*, [1900] 2 Ch. 289.

SECT. 18. **Winding up under the Supervision of the Court.** the company cannot petition either for a compulsory or for a supervision order (*w*). The liquidator of a company in voluntary liquidation can, in pursuance of the powers conferred on him in the voluntary winding up, apply to the court for a supervision order (*a*).

Service. **1027.** The petition, unless presented by the company, must be served on the company as in the case of a petition for a compulsory order, and also upon the voluntary liquidator (*b*). Where presented by the company, it should not be served on the liquidator, and the costs of service on him and his appearance are not allowed (*c*).

Hearing. Where a creditor petitions for a compulsory winding-up order, but at the hearing asks only for a supervision order, the court cannot make a compulsory order, although requested to do so by a majority of the creditors (*d*). The court has full discretion to grant or refuse a supervision order; but it may, in deciding between a winding up by the court and a winding up subject to supervision, in the appointment of liquidators, and in all other matters relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence (*e*). A supervision order will not, as a

(*w*) *Re Pen-y-Van Colliery Co.* (1877), 6 Ch. D. 477; *Re Milford Docks Co., Lister's Petition* (1883), 23 Ch. D. 292. The question whether the debt of a creditor was incurred before or after the voluntary liquidation commenced seems to be immaterial; see *Re Bank of South Australia* (2), [1895] 1 Ch. 578, C. A.; compare *Re Bank of South Australia*, [1894] 3 Ch. 722.

(*a*) *Re Hooker's Cream Milk Co.* (1879), 23 Sol. Jo. 231. Probably the court would not now, as a rule, accede to such an application unless supported by the creditors, if the company was insolvent, or by the contributories, if the company was solvent, even if it would in any case make an order on the petition of the liquidator alone; but in *Re Zoedone Co.* (1883), 53 L. J. (CH.) 465, an application by a voluntary liquidator, though opposed by contributories, was granted.

(*b*) Companies (Winding-up) Rules, r. 28; compare *Re Petroleum Co.* (1866), 15 L. T. 169. If the petition is by the liquidator alone the company must be served (*Re Panonia Leather Cloth Co.* (1865), cited 13 W. R. 1015, n.).

(*c*) *Re Chester (Edward) & Co.* (1903), 52 W. R. 189.

(*d*) *Re Chepstow Bobbin Mills Co.* (1887), 36 Ch. D. 563; followed by BYRNE, J., in an unreported case. As to making a compulsory order on a petition for a supervision order, see *Re Electric and Magnetic Co.*, [1881] W. N. 98.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 201 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 149]. Supervision orders were made in *Re Owen's Patent Wheel, Tire and Axle Co.* (1873), 29 L. T. 672; *Re West Hartlepool Ironworks Co.* (1875), 10 Ch. App. 618; *Re Trowbridge Water Supply Co.* (1868), 18 L. T. 115; *Re New York Exchange, Ltd.* (1888), 39 Ch. D. 415, C. A., where a petition was presented before the resolution to wind up voluntarily was passed. As to ascertaining the wishes of creditors and contributories by summoning meetings, see ss. 145, 219 of the Act of 1908; *Re Beaujolais Wine Co.* (1867), 3 Ch. App. 15; *Re Electrical Engineering Co.* (1891), 64 L. T. 658; *Re Bishop (E.) & Sons, Ltd.*, [1900] 2 Ch. 254; *Re Hermann Lichtenstein & Co.* (1907), 23 T. L. R. 424. After the passing of the Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), supervision orders were not so frequently made as theretofore, but were often accepted as a compromise when the petition was by a creditor for a compulsory order; and although up to 1901 the creditor could not

rule, be made on the petition of a contributory unless the resolution to wind up has been passed by fraud, or undue influence, or a creditor appears in support of the petition (*f*).

The liquidator, and not the company, ought to appear at the hearing (*g*).

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1028. The supervision order may direct that the voluntary winding up shall be continued subject to such supervision, and with such liberty for creditors, contributories, or otherwise to apply to the court and generally on such terms and conditions as the court thinks just. In practice, however, the order is in the following form, namely: (1) that the voluntary winding up of the company shall be continued, but subject to the supervision of the court;

Form of
order.

apply to the court in a voluntary winding up (see Companies Act, 1862 (25 & 26 Vict. c. 89), s. 138), winding up under supervision was a form of liquidation approved by the winding-up court (*Re Land Securities Co.* (1894), 1 Mans. 369, where a supervision order was made, the liquidator undertaking with all due diligence to investigate and report to the court whether in his opinion an examination of the officers of the company, or any of them, before the court should be ordered, and the order giving liberty to any creditor or contributory to attend and examine and providing that if the report should be against examination, any creditor or contributory should be at liberty to apply for such an order). The Companies Act, 1900 (63 & 64 Vict. c. 48), s. 25, enabled any creditor of the company to apply to the court in a voluntary winding up, and shortly afterwards supervision orders were made by consent (*Re Cheque Bank, Ltd.*, *Re New London Discount Co., Ltd.*, *Re London and Globe Finance Corporation*, reported in Practice Note, [1901] W. N. 14, where the winding-up judge said that in future he should not be disposed to allow the costs of a winding-up order unless it could be shown that there was some sufficient reason for making the order). The advantages of a supervision order still remaining are that the petition for it gives jurisdiction to stay actions against the company (see p. 595, *ante*), the order automatically stays them (Companies (Consolidation) Act, 1903 (8 Edw. 7, c. 69), ss. 142, 147, 203; see p. 600, *post*), the cost of a separate application to stay is saved, and the liquidator has to make quarterly reports and submit his remuneration and costs for taxation as provided by the usual form of supervision order (see *infra*).

(*f*) *Re Bank of Gibraltar and Malta* (1865), 1 Ch. App. 69; *Re Gold Co.* (1879), 11 Ch. D. 701, C. A.; *Re London and Mercantile Discount Co.* (1865), L. R. 1 Eq. 277; *Re Beaujolais Wine Co.* (1867), 3 Ch. App. 15. A supervision order has been made, on a shareholder's petition, where the only reason for making it was that in a proposed sale of the company's assets the representatives of the new company were much the same persons as those who controlled the liquidation (*Donald v. Eglinton Chemical Co., Ltd.* (1900), 2 F. (Ct. of Sess. 402); but it has been refused where the only ground for it was allegations of misconduct by the voluntary liquidator (*Re Star and Garter Hotel Co.*, [1873] W. N. 74; *Re Imperial Bank of China, India and Japan* (1866), 1 Ch. App. 339; *Re Yorkshire Fibre Co.* (1870), L. R. 9 Eq. 650). For other cases in which a supervision order has been made on a shareholder's petition, see *Re Oriental Commercial Bank* (1866), 15 L. T. 8; *Re Imperial Mercantile Credit Association, Ex parte Coleman, M'Andrew, Doyle and Figdor*, [1866] W. N. 257; *Re Prince of Wales Slate Quarry Co.* (1868), 18 L. T. 77; *Re General International Agency Co.* (1865), 13 W. R. 363. Where a resolution for voluntary winding up has been passed irregularly, a contributory aware of the circumstances should not at once present a petition, but should procure another meeting to be called to consider the circumstances (*Re London Flour Co.* (1868), 19 L. T. 136, C. A.).

(*g*) *Re Hall (A. W.) & Co.*, [1885] W. N. 190; *Re Mont de Piété of England*, [1892] W. N. 166.

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(2) that any of the proceedings under the voluntary winding up may be adopted as the court shall think fit; (3) that the voluntary liquidator shall on a named day, and thenceforth every three months, file with the registrar a report in writing as to the position of, and the progress made with, the winding up of the company, and with the realisation of the assets thereof, and as to any other matters connected with the winding-up, as the court may from time to time direct; (4) that no bills of costs, charges or expenses, or special remuneration of any solicitor employed by the liquidator, or any remuneration, charges or expenses of such liquidator, or of any manager, accountant, auctioneer, broker, or other person, shall be paid out of the assets of the company, unless such costs, charges, expenses, or remuneration shall have been taxed or allowed by the registrar; (5) that all such costs, charges, expenses, and remuneration be taxed and ascertained accordingly; (6) that the costs of the petitioner and of persons appearing at the hearing shall be dealt with as directed; and (7) that the creditors, contributories, and liquidator of the company, and all other persons interested, are to be at liberty to apply generally as there may be occasion (*h*).

The court may, however, by directions as to a committee of inspection, make a supervision order, which has in many respects the effect of a compulsory winding-up order (*i*).

The court may by the supervision order appoint an additional liquidator (*k*).

Advertising
order.

1029. A supervision order must, before the expiration of twelve days from the date thereof, be advertised by the petitioner once in the *London Gazette*, and must be served on such persons (if any), and in such manner, as the court directs (*l*).

SUB-SECT. 3.—Commencement of Winding up.

Time of
commence-

1030. Where a supervision order is made, the winding up is

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 199; Companies (Winding-up) Rules, Form 16. The form is founded on *Re Civil Service Brewery Co.*, [1893] W. N. 5; *Re Waterproof Materials Co.*, [1893] W. N. 18; *Re Pritchard, Offor & Co.*, [1893] W. N. 153; and *Re Horner & Co.*, [1898] W. N. 159. The petitioner's costs have priority over the costs of the voluntary liquidator previously incurred (*Re Sanitary Burial Association*, [1900] 2 Ch. 289, C. A.).

(*i*) *Re Watson & Sons, Ltd.*, [1891] 2 Ch. 55. In one case the order was that the liquidator should conduct the winding up subject to such restrictions as an official liquidator would in a voluntary winding up be subject to, except so far as the court might, on application for that purpose, modify or dispense with such restrictions in any case or class of cases (*Re London Quays and Warehouses Co.* (1868), 3 Ch. App. 394).

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 202 (1); see p. 600, *post*.

(*l*) Companies (Winding-up) Rules, r. 41 (2). Where, owing to delay in drawing up the order, the advertisement cannot be made in time, leave to post-date the order may be given (*Re East Cambrian Gold Mining Co.* (1865), 12 L. T. 587; *Re Warland Commercial Co.*, [1876] W. N. 279); but only in the presence of all parties (*Re Disderi & Co.* (1868), 18 L. T. 870). The advertisement is notice to all the world and operates as notice of discharge to the

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deemed to commence at the time of the passing of the resolution for a voluntary winding up, and not at the date of the presentation of the petition (*m*). Where after petition presented a provisional liquidator is appointed, and before the petition is heard an extraordinary resolution for voluntary winding up is passed, and at the hearing a supervision order is made, the winding up commences, not as from the date of the petition, but as from the date of the passing of the resolution (*n*), and if the voluntary winding-up is brought about by special resolution, the winding up commences at the date of the confirmatory resolution passed at the second meeting (*o*). The making of a supervision order does not alter the date of the commencement of the voluntary winding up (*p*). If the proceedings are superseded by a compulsory winding-up order, the date of commencement of the winding up is altered to the date of the filing of the petition for a compulsory order (*q*).

The date of the petition for a supervision order is, however, when a supervision order has been made, the date to be regarded in computing the three months in case of a fraudulent preference (*r*). As regards rates, taxes, wages, and compensation to workmen, the date to be regarded is the date of the commencement of the winding up (*s*).

SUB-SECT. 4.—*Consequences of Supervision Order.*

1031. After the making of a supervision order the liquidator may, subject to any restrictions imposed by the court, exercise all his powers, without the sanction or intervention of the court, in the same manner as if the company were being wound up altogether voluntarily (*t*). Liquidator's powers.

1032. The supervision order is, with certain exceptions, deemed to be an order for winding up by the court for all purposes, including

company's servants on the day when the order is made (*Chapman's Case* (1866), L. R. 1 Eq. 347); compare p. 578, *ante*.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 183 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 130]; *Weston's Case* (1868), 4 Ch. App. 20; *Hodgkinson v. Kelly* (1868), L. R. 6 Eq. 496; *Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge* (1871), L. R. 11 Eq. 478, 499; *Re Colonial Trusts Corporation, Ex parte Bradshaw* (1879), 15 Ch. D. 465, 470; *Re Dry Docks Corporation of London* (1888), 39 Ch. D. 306, C. A.; *Re West Cumberland Iron and Steel Co.* (1889), 40 Ch. D. 361; and see p. 419, *ante*.

(*n*) *Re West Cumberland Iron and Steel Co.*, *supra*; compare *Re Colonial Trusts Corporation, Ex parte Bradshaw*, *supra*.

(*o*) *Weston's Case*, *supra*; *Re Emperor Life Assurance Society* (1885), 31 Ch. D. 78; *Dawes' Case* (1868), L. R. 6 Eq. 232; *Re Ottoman Co.*, *Hornby's Case* (1868), 37 L. J. (CH.) 929; *Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge*, *supra*; compare *Re Hydraulic Tube-Drawing and Steel Ordnance Co.* (1868), 16 W. R. 572.

(*p*) See *Re Dry Docks Corporation of London*, *supra*; and the cases cited, *supra*.

(*q*) See p. 419, *ante*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 210; see p. 544, *ante*.

(*s*) *Ibid.*, s. 209 (5).

(*t*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 203 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 151]; see p. 573, *ante*.

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of order.

the staying of actions and other proceedings (*u*) the making and enforcement of calls, and the exercise of all other powers (*x*). The following provisions of the Act of 1908 do not apply, namely: those relating to a statement of affairs being submitted (*y*); to any report or further report being made by the official receiver (*a*); to the appointment or remuneration of or other matters relating to a liquidator (except that the acts of a liquidator are to be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification) (*b*); to the summoning of first meetings of creditors and contributories, and appointing liquidators, or the official receiver becoming liquidator (*c*); to the liquidator giving facilities to the official receiver (*d*); to payments by the liquidator into the Companies Liquidation Account while the winding up is going on (*e*); to the general audit of a liquidator's account by the Board of Trade (*f*); to the books to be kept by a liquidator (*g*); to the release of a liquidator (*h*); to the general control of the liquidator by creditors, contributories, and the committee of inspection (*i*); to the general control of the Board of Trade over liquidators (*k*); to the committee generally (*l*); to the appointment of a special manager (*m*); to the settlement of the list of contributories in a compulsory winding up (*n*); to the general rules which may be made for enabling a liquidator to exercise certain powers of the court (*o*); or to public examinations (*p*).

The liquidator may, on the application of a contributory, be ordered to bring in an account (*q*).

SUB-SECT. 5.—*Appointment and Removal of Liquidators.*

Power of
court.

1033. Where an order is made for a winding up subject to supervision, the court may, by the same or any subsequent order, appoint an additional liquidator (*r*), and if the company, in passing a resolution for a voluntary winding up, has omitted to

(*u*) See p. 420, *ante*.

(*x*) The liquidator may enter into an arrangement for sale of the assets to another company for shares therein (*Wright's Case* (1870), 5 Ch. App. 437).

(*y*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 147.

(*a*) *Ibid.*, s. 148.

(*b*) *Ibid.*, s. 149.

(*c*) *Ibid.*, s. 152.

(*d*) *Ibid.*, s. 153.

(*e*) *Ibid.*, s. 154.

(*f*) *Ibid.*, s. 155.

(*g*) *Ibid.*, s. 156.

(*h*) *Ibid.*, s. 157.

(*i*) *Ibid.*, s. 158.

(*k*) *Ibid.*, s. 160.

(*l*) *Ibid.*, s. 159.

(*m*) *Ibid.*, s. 161.

(*n*) *Ibid.*, s. 163.

(*o*) *Ibid.*, s. 173.

(*p*) *Ibid.*, s. 175. But the court can, of its own motion, direct an examination under *ibid.*, s. 174 (*Re Land Securities Co.*, [1894] W. N. 91); see p. 474, *ante*.

(*q*) *Wright's Case*, *supra*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 202 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 160].

appoint any liquidator, may appoint a liquidator by the supervision order (s).

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An additional liquidator appointed by the court has the same powers, is subject to the same obligations, and in all respects stands in the same position as if he had been appointed by the company in the voluntary winding up (a). Where the voluntary liquidator has not given security, an additional liquidator appointed by the court in supervision proceedings is required to give security (b).

The court may remove any liquidator appointed by the court, or continued under the supervision order, and fill any vacancy occasioned by removal, death, or resignation (c).

SECT. 19.—*Arrangements and Compromises.*

SUB-SECT. 1.—*Before Winding up.*

(i.) *Arbitrations.*

1034. A company may by writing under its common seal agree to refer and may refer to arbitration, in accordance with the Railway Companies Arbitration Act, 1859 (d), any existing or future difference between itself and any other company or person (e). Companies parties to the arbitration may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body (f). Arbitration.

The Arbitration Act, 1889 (g), applies to every arbitration under any Act passed before or after the Act of 1889, as if the arbitration were pursuant to a submission, except in so far as the Act of 1889 is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act (h).

(s) *Re London Quays and Warehouses Co.* (1868), 3 Ch. App. 394.

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 202 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 150].

(b) *Re Hampshire Land Co.*, [1894] 2 Ch. 632; see *Re European Bank, Ex parte Paul* (1870), 19 W. R. 268, where such security was not required from a substituted liquidator.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 202 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 150, varied and extended]. Under *ibid.*, s. 186 (ix.) the court may, on due cause shown, remove a liquidator and appoint another liquidator; and due cause must be shown when the voluntary winding up is continued under supervision; see also *Re Montrotier Asphalte and Cement Concrete Paving Co.* (1874), 22 W. R. 895; *Re Scotch Granite Co.* (1867), 17 L. T. 533; *Re Old Wheel Neptune Mining Co.* (1864), 2 De G. J. & Sm. 348, C. A.; *Re United Merthyr Collieries Co.*, [1867] W. N. 99; and compare *Re Devonshire Silkstone Coal Co.*, [1878] W. N. 71, 173, C. A.

(d) 22 & 23 Vict. c. 69; see title RAILWAYS AND CANALS. All the provisions of the Act apply to such arbitrations; and in the construction of those provisions "the companies" shall include companies under the Act of 1908 (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 119 (3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 73]).

(e) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 119 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 72].

(f) *Ibid.*, s. 119 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 72].

(g) 52 & 53 Vict. c. 49.

(h) *Ibid.*, s. 24; see title ARBITRATION, Vol. I., pp. 439, 492, 493.

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Arrangements
and Com-
promises.

Arrangements with
court's
sanction.

(ii.) *Arrangements sanctioned by the Court.*

1035. Where a compromise or arrangement is proposed between any company liable to be wound up under the Act of 1908 and its creditors, or any class of them, or between the company and its members or any class of them, the court having jurisdiction to wind up the company (*i*) may, on the application in a summary way of the company or any creditor or member of the company, order meetings to be called. Any compromise or arrangement agreed to by a majority in number representing three-fourths in value of the creditors, or class of creditors, or of the members, or class of members, as the case may be, is, if sanctioned by the court, binding on all the creditors, or the class of creditors, or on the members or class of members, as the case may be, and also on the company (*k*).

(iii.) *Arrangements by a Company about to Wind up Voluntarily.*

Before
voluntary
winding up.

1036. Any arrangement entered into between a company about to be wound up voluntarily and its creditors is, subject to appeal by any creditor or contributory, binding on the company, if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of them (*l*).

SUB-SECT. 2.—*After Winding up.*(i.) *In Voluntary Winding up.*

During
voluntary
winding up.

1037. Any arrangement entered into between a company in the course of being wound up voluntarily and its creditors is binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors (*m*). Any creditor or contributory may, however, within three weeks from the completion of the arrangement, appeal to the court having jurisdiction to wind up the company (*n*) against it, and the court may thereupon, as it thinks just, amend, vary, or confirm the arrangement (*o*).

(ii.) *General Power of Liquidator.*

General
scheme of
liquidation.

1038. The liquidator may, with the sanction either of the court or of the committee of inspection in a winding up by the court, or of

(*i*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285; and see p. 392, *ante*.

(*k*) *Ibid.*, s. 120; and see p. 604, *post*. Prior to 1907 the power to sanction and render binding a proposed compromise or arrangement only existed where it was between the company and its creditors or any class of them, and the company was in the course of being wound up voluntarily, or by or under the supervision of the court (Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), s. 2, which was by s. 24 of the Companies Act, 1900 (63 & 64 Vict. c. 48), extended to companies, or arrangements between a company and its members or any class thereof; and by s. 38 of the Companies Act, 1907 (7 Edw. 7, c. 50), was further extended to cases in which the company was not in the course of being wound up).

(*l*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 191.

(*m*) *Ibid.*, s. 191 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 136].

(*n*) *Ibid.*, s. 285; and see p. 392, *ante*.

(*o*) *Ibid.*, s. 191 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 137].

the court in the case of a winding up subject to supervision, or of an extraordinary resolution of the company in the case of a voluntary winding up, (1) pay any classes of creditors in full; (2) make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable; (3) compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory, or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof (p).

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In the case of a winding up by the court the exercise of the above powers is subject to the control of the court, and any creditor or contributory may apply to the court with respect to their exercise or proposed exercise (q). The court has, however, no jurisdiction to compel a liquidator to consent to a compromise with a contributory or with a creditor (r). In the case of a winding up under supervision, the voluntary liquidator may, unless the court has otherwise directed, make a compromise without obtaining the sanction of the court (a). Any creditor or contributory may appear either to support or to oppose an application for the sanction of the court. If the sanction is obtained by misrepresentation, it will be rescinded (b).

Control of
the court.

1039. Before sanctioning a compromise the court must be satisfied as to the facts on which it is based (c). For this purpose it may hear a report from the official receiver as to the terms of the scheme, and as to the conduct of the directors and other officers of the company, and as to any other matters which, in the opinion of the official receiver or the Board of Trade, ought to be brought to its attention. The report is not, however, to be placed upon the file unless and until the court directs it to be filed (d).

Report of
official
receiver.

(p) Companies (Consolidation) Act, 1903 (8 Edw. 7, c. 69), s. 214 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 159, 160; Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (1), (3)].

(q) *Ibid.*, s. 214 (2) [Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), s. 12 (3)].

(r) *Pearson's Case* (1872), 7 Ch. App. 309; *Re International Contract Co., Hankey's Case* (1872), 41 L. J. (OH.) 385.

(a) *Wright's Case* (1870), 5 Ch. App. 437.

(b) *Re Leeds Banking Co., Ex parte Clarke* (1866), 14 W. R. 856; compare *Re Central Darjeeling Tea Co.*, [1866] W. N. 361; *Re Home Counties Life Assurance Co., Ex parte Garstin* (1862), 10 W. R. 457.

(c) *Re Northumberland and Durham District Banking Co., Ex parte Totty* (1860), 1 Drew. & Sm. 273. If an application with respect to a claim has been made to the court in a voluntary winding up, the court has seisin of the matter and its sanction is necessary (*Re Lama Coal Co., Ex parte Miller* (1867), 2 Ch. App. 692).

(d) Companies (Winding-up) Rules, r. 74

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ments
and Com-
promises.Effect of
compromise.

1040. A general compromise of claims upon contributories as a class may be sanctioned (e), but not so as to be binding on an unwilling minority (f). A compromise with contributories on the A list does not release contributories on the B list (g), or affect the liability of other contributories on the A list (h).

A compromise by a voluntary liquidator of a claim by the company against a third party is, if not set aside, binding on the company although entered into without the sanction of an extraordinary resolution (i).

A power to compromise rights presupposes some dispute about them or difficulties in enforcing them (k). A compromise, however, is good if both parties *bonâ fide* believe that there is a question in dispute, although it may not really be doubtful (l).

(iii.) *Arrangements binding on Minorities.*General
scheme of
arrange-
ments.

1041. Where a compromise or arrangement is proposed between any company liable to be wound up under the Act of 1908 (m) and its creditors or any class of them, or between the company and its members or any class of them (n), the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs (o). If a majority in number representing

(e) *Bank of Hindustan, China and Japan v. Eastern Financial Association* (1869), L. R. 2 P. C. 489; *Re Smith, Knight & Co.* (1868), 37 L. J. (CH.) 864; see *Re Commercial Bank Corporation of India and the East* (1869), L. R. 8 Eq. 241.

(f) *Re Albert Life Assurance Co.* (1871), 6 Ch. App. 381.

(g) *Re Accidental Death Insurance Co.* (1878), 7 Ch. D. 568; *Roberts v. Crowe* (1872), L. R. 7 C. P. 629.

(h) *Re Barned's Bank, Helbert v. Banner* (1871), L. R. 5 H. L. 28; *Hudson's Case* (1871), L. R. 12 Eq. 1; *Nevill's Case* (1870), 6 Ch. App. 43.

(i) *Cyclomakers' Co-operative Supply Co. v. Sims*, [1903] 1 K. B. 477.

(k) *Mercantile Investment and General Trust Co. v. International Co. of Mexico* (1891), cited [1893] 1 Ch. 484, n., 489, n., C. A.; *Sneath v. Valley Gold, Ltd.*, [1893] 1 Ch. 477, 494, C. A.

(l) *Lucy's Case* (1853), 4 De G. M. & G. 356, C. A.; and see *Mother Lode Consolidated Gold Mines v. Hill* (1903), 19 T. L. R. 341; *Parry v. Liverpool Mult Co.*, [1900] 1 Q. B. 339.

(m) As to schemes of arrangement by railway companies, see *Railway Companies Act, 1867* (30 & 31 Vict. c. 127), ss. 6—22; and title RAILWAYS AND CANALS.

(n) As to classes, see *Re Dominion of Canada Freehold Estate and Timber Co.* (1886), 55 L. T. 347, 352.

(o) *Companies (Consolidation) Act, 1908* (8 Edw. 7, c. 69), s. 120 (1), (3) [Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), s. 2, as extended by *Companies Act, 1900* (63 & 64 Vict. c. 48), s. 24, and *Companies Act, 1907* (7 Edw. 7, c. 50), s. 38]. Before the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), a single creditor could, without reason, or for his own benefit, prevent a meritorious scheme from being adopted; see *Re Dominion of Canada Freehold Estate and Timber Co.* (1886), 55 L. T. 347, 351. The Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), was confined to cases of and related to liquidation, and in effect provided an alternative or substitute, in cases where it was applicable, for the ordinary method

three-fourths in value of those present, either in person or by proxy, at the meeting agree to any compromise or arrangement, the compromise or arrangement is, if sanctioned by the court, binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company (*p*).

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1042. The application for an order to summon meetings is made by originating summons, and the proposed compromise or arrangement should be made an exhibit to the affidavit in support of the scheme. The order directing a meeting to be summoned usually appoints some one—the liquidator, for instance—to act as chairman of the meeting, and directs him to report the result of it to the court, and also directs what advertisements are to be issued. Where a class of creditors to be summoned consists of holders of bearer securities, the only practicable method of summoning them is to give public notice of the meeting by advertisement in selected newspapers. Where the company is not in winding up, and a petition for winding up is not pending, the court cannot, after ordering meetings to be summoned and before approving the scheme, stay an execution on a judgment recovered before the order (*q*).

Procedure.

1043. The forms of any advertisements, notices, and proxy papers that may be required are settled in the chambers of the winding-up court. The proxy papers used must be in the special form approved by the court (*r*). For the purposes of a meeting of any particular class proxies can only be given to members of that class (*s*). Where, in the case of a company being wound up, the official receiver is acting as liquidator, foreign creditors may be authorised to give proxies to a person named by him, and to deposit them at a place named by him in the foreign country. Proxies so given are valid, and may be used at the meeting, particulars of them being telegraphed to the chairman of the meeting (*t*).

Advertisements,
notices, and
proxies.

Where there are several classes of creditors or contributories, and the scheme does not affect the rights of some particular class, it is not the practice, nor is it necessary, for notice of any meeting to be sent to the members of such class (*a*). It is,

of winding up a company under the Companies Acts (*Re English, Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, 393, 394, C. A.; *Re Alabama, New Orleans, Texas and Pacific Junction Rail. Co.*, [1891] 1 Ch. 213, 236, C. A.; *Re London Chartered Bank of Australia*, [1893] 3 Ch. 540, 546).

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 120 (2).

(*q*) *Booth v. Walkden Spinning and Manufacturing Co., Ltd.*, [1909] 2 K. B. 368; and see *Re Richards & Co.* (1879), 11 Ch. D. 676, where the company was in winding up.

(*r*) *Re Inter-Oceanic Railway of Mexico* (1896), 3 Mans. 162.

(*s*) *Re Central Bahia Rail. Co.* (1902), 18 T. L. R. 503.

(*t*) *Re English, Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, C. A. These proxies require a 10s. stamp, and where executed abroad can be stamped within thirty days after they arrive in England (*ibid.*); and see *Sadgrove v. Bryden*, [1907] 1 Ch. 318.

(*a*) *Re Tea Corporation, Ltd., Sorbis v. Same Co.*, [1904] 1 Ch. 12, C. A. The dissent of a class which is not interested may be disregarded (*ibid.*).

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however, necessary for different classes of those affected by the scheme to have separate meetings (b). Thus, where there are matured and unmatured policy-holders of an insurance company, a dissentient holder of a matured policy is not bound by a resolution passed at a meeting to which all the policy-holders are summoned (c).

Majorities
required at
meetings.

1044. The majority required in the case of creditors is a majority in number representing three-fourths in value of the creditors, or class of creditors, present at the meeting in person or by proxy, whether they vote or abstain (d). Debentures payable to bearer must be produced at the meeting, to entitle the bearers to vote and to estimate the value represented by the votes (e). Where the debentures are registered, only the registered holder or his proxy can vote.

The court will not sanction a scheme when the required majority is made up of persons not acting *bonâ fide* in the interest of the class to which they belong, as, for instance, where their votes are given to get rid of their liability for amounts unpaid on their shares (f). In the absence of any improper motive, there is nothing to prevent a creditor, who is also a shareholder of the company, from voting (g). If the first meeting is unsatisfactory, a second meeting may be called (h).

Meaning of
"creditor."

1045. No distinction is made between different kinds of creditors, the word "creditor" being general, and there is nothing to except any particular class of creditors from the jurisdiction of the court (i). Every person having a pecuniary claim against the company, whether actual or contingent, is a creditor. Thus, the assignor of a lease to the company, whom the company has indemnified against liability under the lease, is barred by a scheme under which the assets and liabilities of the company giving the indemnity are to be transferred to another company, and cannot assert any claim to have the assets of the former impounded to meet any claim arising under the indemnity (j). Secured

(b) *Re Wedgwood Coal and Iron Co.* (1877), 6 Ch. D. 627; *Re Alabama, New Orleans, Texas and Pacific Junction Rail. Co.*, [1891] 1 Ch. 213, C. A. As to what is meant by a class for this purpose, see *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q. B. 573, 580, 583, C. A.

(c) *Sovereign Life Assurance Co. v. Dodd*, *supra*.

(d) *Re Bessemer Steel and Ordnance Co.* (1875), 1 Ch. D. 251; and see *Labouchere v. Wharnclyffe (Earl)* (1879), 13 Ch. D. 346, 354. The court will not sanction a scheme where it is impossible to estimate the amount of debts (*Re Albert Life Assurance Co.* (1871), 6 Ch. App. 381). At meetings of members or classes of members the majority required is probably a majority of the members or class of members present in person or by proxy at the meeting, and entitled to vote, representing three-fourths in number of the votes to which such members are by the articles of the company entitled.

(e) *Re Wedgwood Coal and Iron Co.*, *supra*, at p. 634.

(f) *Ibid.*

(g) *Re Madras Irrigation and Canal Co.*, [1881] W. N. 172.

(h) *Re Alabama, New Orleans, Texas and Pacific Junction Rail. Co.*, [1891] 1 Ch. 213, 240, C. A.

(i) *Re Empire Mining Co.* (1890), 44 Ch. D. 402, 409.

(j) *Craig's Claim*, [1895] 1 Ch. 267, C. A., compromised on appeal to the

creditors are included, and also foreign and colonial creditors when their rights are in question in England (k).

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and Compromises.

Compromises
or arrangements
sanctioned.

1046. Any kind of compromise or arrangement may be sanctioned. The court must, however, be satisfied that the statutory provisions have been complied with, that the classes of creditors or members have been fairly represented by those who attended, and that the statutory majority approving the scheme is acting *bonâ fide* in the interests of the class it professes to represent. The arrangement must also be such as a man of business would reasonably approve (l), and fair and reasonable as regards the different classes, if any (m).

Schemes have been sanctioned containing the following provisions:—that first mortgage debenture-holders are to be postponed to other debentures or charges about to be issued or created (n); that debenture-holders and other creditors of the old company are to accept shares in the new company in satisfaction of their debts (o); that debentures, the interest on which is to be only payable out of the profits of the company, are to be taken in

House of Lords, *sub nom. Craig v. Midland Coal and Iron Co.* (1896), 74 L. T. 744, H. L. Before the Companies Act, 1900 (63 & 64 Vict. c. 48), was passed, if the proposed scheme of arrangement affected both creditors and members, as when a reconstruction was to be carried out, which, without the court's sanction, could only be effected under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161, the court could sanction the scheme. In a voluntary winding up, the scheme was sometimes first approved by a special resolution under s. 161. But this was unnecessary, as a liquidator, in a compulsory winding up with the sanction of the court, and a voluntary liquidator without its sanction, could sell the undertaking. And the consideration for a sale made with the sanction of the court could be shares in the buying company, and the surplus consideration, after satisfying creditors, might be distributed in specie (*Re Agra and Masterman's Bank, Ex parte Pollock* (1866), 15 W. R. 554). An extraordinary resolution of the members was not required by the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104) (*Re Brownfields Guild Pottery Society*, [1898] W. N. 80); but the court usually required the sanction of a meeting of members (*Re Cambrian Mining Co.* (1882), 48 L. T. 114), and if the case was one where rights were affected, which, without the court, could only be done under s. 161 of the Companies Act, 1862 (25 & 26 Vict. c. 89), the court sometimes required a special resolution (*Re Akankoo (Gold Coast) Mining Co.* (1888), 1 Meg. 43). The court could, and probably can, secure the rights of dissentient members (*Re Canning Jarrah Timber Co. (Western Australia), Ltd.*, [1900] 1 Ch. 708, O. A.).

(k) *Re Alabama, New Orleans, Texas and Pacific Junction Rail. Co.*, [1891] 1 Ch. 213, O. A.; *New Zealand Loan and Mercantile Agency Co. v. Morrison*, [1898] A. C. 349, 357, P. C. As to secured creditors, see also *Re Dynevor, Dyffryn and Neath Abbey Collieries Co.* (1879), 11 Ch. D. 605; as to foreign and colonial creditors, *Armani v. Castrique* (1844), 13 M. & W. 443, per POLLOCK, C.B., at p. 447; *Gibbs & Sons v. Société Industrielle et Commerciale des Métaux* (1890), 25 Q. B. D. 399, C. A.; *Dane v. Mortgage Insurance Corporation Ltd.*, [1894] 1 Q. B. 54, 57, C. A., where a scheme was sanctioned by the colonial as well as the English court in order to bind the company's assets in both jurisdictions.

(l) *Re Alabama, New Orleans, Texas and Pacific Junction Rail. Co.*, *supra*.

(m) *Re English, Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385; compare *Re Neath and Brecon Rail. Co.*, [1892] 1 Ch. 349, C. A.; *Re London Chartered Bank of Australia*, [1893] 3 Ch. 540, 545.

(n) *Re Western of Canada Oil, Lands and Works Co.*, [1874] W. N. 148.

(o) *Slater v. Darlaston Steel and Iron Co.*, [1877] W. N. 165; *Re Empire Mining Co.* (1890), 44 Ch. D. 402.

SECT. 19.

Arrangements and Compromises.

Purposes of arrangements.

satisfaction of debentures the interest on which is payable whether profits are made or not (*p*).

Arrangements may be entered into for the purpose of reconstructing the company, staying any pending winding-up proceedings, or distributing assets amongst creditors (*q*). They may also involve the reduction or reorganisation of the company's capital; but, if so, the proceedings must comply with the other requirements of the Act applicable in such cases (*r*). Where a company in winding up is to continue to carry on its business, the scheme should provide for the liquidation being stayed, the liquidator discharged, and the assets handed over by him to the company. In this case an order, on the application of a creditor or contributory, must be obtained to stay the winding up (*s*). The court will not sanction a scheme which provides for payment of costs or remuneration, unless it also provides for their taxation or allowance (*t*).

Words used in schemes ought, *primâ facie*, to have attributed to them their ordinary commercial meanings. Thus, the word "discount," as used in a scheme, means rebate of interest, not true discount (*a*). A scheme need not expressly reserve the rights of any creditors against sureties for debts of the company, as such rights are unaffected by a scheme (*b*). It should provide that it may be modified with the approval of the court, and the court has frequently acted on such a clause (*c*).

Petition for sanction of scheme.

1047. The application to the court to sanction the scheme, after it has been approved at the meetings, is by petition, intituled in the matter of the company and the Act (*d*). The application is by the liquidator, but he should be neutral (*e*). If there is a winding up by the court pending, a report may be required from the official receiver (*f*).

Order sanctioning scheme.

The court may and often does impose conditions on its sanction to a scheme (*g*). A scheme may be sanctioned, although one or

(*p*) *Re Alabama, New Orleans, Texas and Pacific Junction Rail. Co.*, [1891] 1 Ch. 213.

(*q*) *Re Bessemer Steel and Ordnance Co.* (1875), 1 Ch. D. 251; *Re Dynevor, Dyffryn and Neath Abbey Collieries Co.* (1879), 11 Ch. D. 605, C. A.; *Re Dominion of Canada Freehold Estate and Timber Co.* (1886), 55 L. T. 347; *Re Marine Investment Co., Ex parte Poole's Executors* (1873), 8 Ch. App. 702.

(*r*) *Re Cooper, Cooper and Johnson, Ltd.*, [1902] W. N. 199. For a reduction and arrangement scheme involving the issue of participation certificates, see *Re Hoare & Co., Ltd. and "Reduced,"* [1910] W. N. 87.

(*s*) See p. 583, *ante*.

(*t*) *Re Mortgage Insurance Corporation*, [1896] W. N. 4.

(*a*) *Re Land Securities Co., Ex parte Farquhar*, [1896] 2 Ch. 320, C. A. As to interest payable on debts which are payable in preference to promissory notes given to the creditors of the transferor company, see *Re New English Bank of River Plate* (1898), 14 T. L. B. 526, C. A.

(*b*) *Re London Chartered Bank of Australia*, [1893] 3 Ch. 540, 546; *Dane v. Mortgage Insurance Corporation*, [1894] 1 Q. B. 54, C. A.; *Finlay v. Mexican Investment Corporation*, [1897] 1 Q. B. 517.

(*c*) See *Re Canning Jarrah Timber Co. (Western Australia), Ltd.*, [1900] 1 Ch. 708, C. A.

(*d*) The sanction of the meeting is generally obtained before the sanction of the court, but it is immaterial in what order the sanctions are obtained (*Re Dynevor, Dyffryn and Neath Abbey Collieries Co.*, *supra*).

(*e*) *Re Alabama, New Orleans, Texas and Pacific Junction Rail. Co.*, *supra*.

(*f*) Companies (Winding-up) Rules, r. 74.

(*g*) Where the scheme proposes that a company in difficulties is to make over

more previous schemes have been sanctioned (*h*). A scheme once sanctioned is binding on all contributories (*i*). It cannot, however, be pleaded as a defence to an action in a colonial court by a non-assenting creditor suing for the whole of his debt (*j*).

SECT. 19.
Arrangements and Compromises

1048. Persons whose interests are affected by a scheme, but who have not opposed it at a meeting or appeared at the hearing of the petition, cannot appeal without leave from the order sanctioning the scheme (*k*).

Appeal from court's sanction.

1049. Where under a scheme approved by the court a fund has been set aside for specific purposes, the amount is not undistributed assets which must be paid into the Companies Liquidation Account (*l*).

Companies Liquidation Account.

SECT. 20.—*Defunct Companies.*

SUB-SECT. 1.—*Removal from Register of Companies.*

1050. Where the registrar has reasonable cause to believe that a company is not carrying on business or in operation, he is to send to the company by post a letter (*m*) inquiring whether the company is carrying on business or in operation (*n*). If within one month of sending the letter he does not receive any answer, he is, within fourteen days after the expiration of the month, to

Preliminary procedure.

its assets to a new company, the sanction may be refused, unless the scheme provides that the new company will undertake to obey the order of the court as to any proceedings which it may think it right to have taken against officers of the old company (Practice Note, [1894] W. N. 166). In one case the order on the assignment of the undertaking to a new company provided that the rights of the official receiver and liquidator to take misfeasance proceedings against officers of the transferor company should be preserved, and that the proceeds of any such proceedings should be held for the benefit of the shareholders of the transferor company (*Re Olympia, Ltd.* (1900), 16 T. L. R. 564). In another case the court gave its sanction on the undertaking of the liquidator to pay the unsecured creditors in full out of the assets in his hands, not to act upon the resolution as regarded underwriting, and to procure the cancellation of underwriting agreements; and provided that three shareholders who opposed should, if they elected within a prescribed time to dissent from the special resolution, be entitled to the rights of dissentient shareholders on an ordinary reconstruction (*Re Canning Jarrah Timber Co. (Western Australia), Ltd.*, [1900] 1 Ch. 708, C. A.).

(*h*) *Re Mortgage Insurance Corporation*, [1896] W. N. 4.

(*i*) *Nicholl v. Eberhardt Co.* (1889), 61 L. T. 489, C. A.

(*j*) *New Zealand Loan and Mercantile Agency Co. v. Morrison*, [1898] A. C. 349, P. C.; *Gibbs & Sons v. Société Industrielle et Commerciale des Métaux* (1890), 25 Q. B. D. 399, C. A. As to the effect of a colonial scheme, see *Dane v. Mortgage Insurance Corporation*, [1894] 1 Q. B. 54, C. A.

(*k*) *Re Securities Insurance Co.*, [1894] 2 Ch. 410, C. A.; see also titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 270; CONFLICT OF LAWS, Vol. VI., p. 247.

(*l*) *Re Land Mortgage Bank of Florida*, [1898] 1 Ch. 444.

(*m*) This or any other letter or notice under the section may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director or officer of the company, or, if there is no director or officer of the company whose name and address are known to the registrar, may be sent to each of the persons who subscribed the memorandum of association addressed to him at the address therein mentioned (Companies (Consolidation) Act, 1909 (8 Edw. 7, c. 69), s. 242 (7) [Companies Act, 1880 (43 Vict. c. 19), s. 7 (6)]).

(*n*) *Ibid.*, s. 242 (1) [Companies Act, 1880 (43 Vict. c. 19), s. 7 (1)].

SECT. 20.
Defunct
Companies.

send to the company by post a registered letter, referring to the first letter and stating that no answer has been received, and that if an answer is not received to the second letter within one month, a notice will be published in the *London Gazette* with a view to striking the name of the company off the Register of Companies (o).

If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the *London Gazette* and send to the company by post a notice that at the expiration of three months from the date of the notice the name of the company will, unless cause is shown to the contrary, be struck off the register and that the company will be dissolved (p).

Advertise-
ment and
effect.

1051. At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register. Notice to that effect must be published in the *London Gazette*, and on its publication the company is dissolved. The liability (if any), however, of every director, managing officer, and member of the company continues and may be enforced as if the company had not been dissolved (q). A creditor or member who wishes, with a view to enforcing such liability, to obtain a winding-up order, should, before applying for an order, have the name of the company restored to the register (r).

Companies in
liquidation.

1052. If, in any case where a company is being wound up, the registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice by the registrar demanding the returns has been sent by post to the company, or to the liquidator at his last known place of business, the registrar may publish in the *London Gazette* and send to the company such notice as he would send after the second letter above mentioned (s) to the company, and at the expiration of the time therein mentioned the same consequences are to ensue as if the company were not in winding up (t).

(o) Companies (Consolidation) Act, 1909 (8 Edw. 7, c. 69), s. 242 (2) [Companies Act, 1880 (43 Vict. c. 19), s. 7 (2)].

(p) *Ibid.*, s. 242 (3) [Companies Act, 1880 (43 Vict. c. 19), s. 7 (3)].

(q) *Ibid.*, s. 242 (5) [Companies Act, 1880 (43 Vict. c. 19), s. 7 (4)]. As to the effect of dissolution in ordinary cases, see p. 567, *ante*.

(r) *Ibid.*, s. 242 (6); see p. 611, *post*. The liability could formerly only be enforced by a creditor by obtaining a winding-up order before he could apply to have the name of the company restored to the register (*Re Anglo-American Exploration and Development Co.*, [1898] 1 Ch. 100; *Re "Grosvenor" House Property Acquisition and Investment Building Society*, [1902] W. N. 115; compare *Re Born, Curnock v. Born*, [1900] 2 Ch. 433, 435).

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 242 (4) [Companies Act, 1900 (63 & 64 Vict. c. 48), s. 26 (1)]. As to the returns to be made, see *ibid.*, ss. 26, 75 (1).

(t) *Ibid.*, s. 242 (5).

SUB-SECT. 2.—*Restoration to Register.*

SECT. 20.

Defunct Companies.

Restoration of company's name to register.

1053. If the company, or any member or creditor, feels aggrieved by the company having been struck off the register, the court, on the application of the company or member or creditor, may, if satisfied that the company was at the time of the striking off carrying on business or in operation (a), or otherwise that it is just that it be restored to the register, order its name to be restored to the register. In that case the company is to be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position, as nearly as may be, as if its name had not been struck off (b).

The power to restore applies where the company, when it was struck off the register, was in voluntary liquidation, and carrying on business only for the purposes of the winding up (c).

Where a company has been abortive, and has never carried on business, or had any directors or manager, the court will not make a restoration order for the mere purpose of saving stamp duty and putting the company in a position to acquire property out of which a debt owing to its solicitor may be paid (d).

1054. The judge to whom the winding up of companies is for the time being assigned has jurisdiction to make restoration orders (e). The application is by petition, which must be intituled in the matter of the company and in the matter of the Act of 1908. If the company is in liquidation, the liquidator cannot petition in his own name, but must petition in the name of the company or join it as a petitioner (f). The petitioner should ask that the order should direct, and it should direct, the registrar to advertise the order in his official name in the *London Gazette* (g). On an application to restore the name, the court has no power to impose a penalty as a condition of making the order (h). The restoration of the name does not relieve directors, or others, from any liability; to relieve them from the personal liability incurred by carrying on business after the company has been dissolved, the

Procedure.

(a) A company, although not carrying on business, may be in operation; see *Re Financial Corporation* (1883), 27 Sol. Jo. 199 (voluntary winding up); *Re Estates Investment Co.* (1883), 27 Sol. Jo. 585 (compulsory winding up).

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 242 (6) [Companies Act, 1880 (43 Vict. c. 19), s. 7 (5), as amended by Companies Act, 1900 (63 & 64 Vict. c. 48), s. 26 (2)]; and see *Re Carpenter's Patent Davit Boat Lowering and Detaching Gear Co.* (1888), 1 Meg. 26.

(c) *Re Outlay Assurance Society* (1887), 34 Ch. D. 479.

(d) *Re British Incandescent Heating Syndicate, Ltd.* (1904), not reported, February 9 (BYRNE, J.).

(e) *Re Mining Shares Investment Co.*, [1893] 2 Ch. 660, 665; *Re Johannesburg Mining and General Syndicate*, [1901] W. N. 46. But other judges of the Chancery Division have exercised the jurisdiction (*Re City Lands Investment Corporation, Ltd.*, [1897] W. N. 162; *Re Chaco (Paraguay) Land Co., Ltd.*, [1901] W. N. 124).

(f) *Re Johannesburg Mining and General Syndicate*, *supra*.

(g) *Ibid*.

(h) *Re Brown Bayley's Steel Works, Ltd.* (1905), 21 T. L. R. 374.

SECT. 20.
Defunct
Companies.

court must make a special order, and this order will not be made in a flagrant case (*i*).

Where a company is in winding up, it is not the practice for the Board of Trade to require, or for the court to order, the making of the returns which ought to have been sent to the registrar before the winding up (*k*).

Part V.—Banking Companies.

SECT. 1.—Classification.

Various kinds
of banking
companies.

1055. Besides the Bank of England, which is a company incorporated by a royal charter granted under the powers of a special Act of Parliament (*l*), the banking companies which now exist, or may exist, are (1) banking companies incorporated under charters or special Acts; (2) unincorporated partnerships for banking business consisting of not more than ten persons (*m*); (3) unincorporated partnerships for banking purposes, consisting of more than six persons, established before May 6th, 1844 (*n*); (4) companies formed before that date and subsequently incorporated by royal charter under the Act of 1844 (*o*); (5) companies formed either before or after May 6th, 1844, and registered, either under the Act of 1844 (*o*), or under the Joint Stock Companies Acts

(*i*) *Re Brown Bayley's Steel Works, Ltd.* (1905), 21 T. L. R. 374.

(*k*) *Re Johannesburg Mining and General Syndicate*, [1901] W. N. 46.

(*l*) See title BANKERS AND BANKING, Vol. I., p. 570.

(*m*) Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49), s. 12, which is kept in force by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205, Sched. VI., Part II. For the object of saving this enactment from repeal, and that referred to in the following note, see Lindley on Companies, 6th ed., p. 1342. The effect of the exception from repeal is now practically of only historical interest, as most of the old private banking partnerships have been absorbed in banking companies registered under the Companies Act, 1862 (25 & 26 Vict. c. 89), or some preceding Act, or the Companies (Consolidation) Act, 1908.

(*n*) These partnerships, which are governed by the Country Bankers Act, 1826 (7 Geo. 4, c. 46), are preserved by the Joint Stock Banks Act, 1844 (7 & 8 Vict. c. 113), s. 47, which is kept in force by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 205, Sched. VI., Part II. Banking companies governed by the Act of 1826 cannot now be formed (Joint Stock Banks Act, 1844 (7 & 8 Vict. c. 113), s. 1). They have the right of suing and being sued in the names of registered public officers, and have to make annual returns to the stamp office; see, further, Lindley on Companies, 6th ed., pp. 148, 379—385, and title BANKERS AND BANKING, Vol. I., p. 581. As to execution against members of banking companies under the Act of 1826, see title EXECUTION.

(*o*) Joint Stock Banks Act, 1844 (7 & 8 Vict. c. 113), s. 45; but see Lindley on Companies, 6th ed., pp. 1342, 1343. As to chartered banking companies formed under this Act being required to register under the Companies Act, 1862 (25 & 26 Vict. c. 89); and as to the shareholders therein, see *ibid.*, pp. 155, 177.

(*p*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285; and p. 37, *ante*.

or the Companies Act, 1862 (*q*), or the Companies (Consolidation) Act, 1908 (*r*).

SECT. 1.
Classifica-
tion.
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SECT. 2.—*Special Provisions as to Banking Companies in the Act of 1908.*

1056. No company, association, or partnership consisting of more than ten persons may be formed for the purpose of carrying on the business of banking, unless it is registered as a company under the Act of 1908 or is formed in pursuance of some other Act of Parliament, or of letters patent (*s*). When incorporation necessary.

1057. Every company (*t*), being a limited banking company, must, before it commences business, and also on the first Monday in February and the first Tuesday in August (*a*) in every year during which it carries on business, make a statement in the statutory form, or as near thereto as circumstances will admit. A copy of the statement must be put up in a conspicuous place in the company's registered office, and in every branch office or place where its business is carried on. Every member and creditor is entitled to a copy of the statement, on payment of a sum not exceeding 6*d.* (*b*). Statement before commencing business.

1058. Where an application is made to the Board of Trade to appoint one or more inspectors to investigate a company's affairs and to report thereon, the application may, in the case of a banking company having a share capital, be made by members holding not less than one-third of the shares issued (*c*). Board of Trade inspectors.

1059. The provisions of the Act of 1908 relating to the audit of accounts apply to registered banking companies (*d*). Where, however, a banking company registered after August 15th, 1879, has branch banks beyond the limits of Europe, it is sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in the United Kingdom (*e*). In such a case the balance-sheet must be signed by the secretary or manager (if any) and by all the directors or, where there are more than three, by at least three of them (*f*). Books of branch banks outside Europe.

(*q*) 25 & 26 Vict. c. 89.

(*r*) 8 Edw. 7, c. 69; and see title BANKERS AND BANKING, Vol. I., p. 581.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4]; see p. 44, *ante*.

(*t*) For the definition of a company, see *ibid.*, s. 285; and p. 36, *ante*. A savings bank company is not necessarily a "banking" company (*Re District Savings Bank, Ltd., Ex parte Cox* (1861), 10 W. R. 138). As the relation between a banking company and its customer is that of debtor and creditor, such a company has essentially a power to borrow; see title BANKERS AND BANKING, Vol. I., pp. 584, 585.

(*a*) The first Monday in August is a Bank Holiday in England (Bank Holidays Act, 1871 (34 & 35 Vict. c. 17), s. 1, and schedule).

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 108, and Sched. I, Form C. For the penalties in case of default, see *ibid.*, s. 108 (4).

(*c*) *Ibid.*, s. 109 (1); and see p. 270, *ante*.

(*d*) *Ibid.*, ss. 112, 113; see p. 267, *ante*.

(*e*) *Ibid.*, s. 113 (5) [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 7].

(*f*) *Ibid.* [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 8].

SECT. 2.
Special
Provisions
as to
Banking
Companies
in the
Act of 1908.

Note issue.

1060. A bank of issue (*g*), registered under the Act of 1908 as a limited company, is not entitled to limited liability in respect of its notes in respect of which its members are liable in the same manner as if it had been registered as unlimited (*h*); and it may place upon its notes a statement to that effect (*i*). Where in a winding up the general assets—that is to say, the funds available for payment of the general creditor, as well as the note-holder—are insufficient to satisfy the claims of both the note-holders and the general creditors, then the members, after satisfying the remaining demands of the note-holders, are liable to contribute towards payment of the debts of the general creditors a sum equal to the amount received by the note-holders out of the general assets (*j*).

Registration
of old bank-
ing company.

1061. Where a banking company which was in existence on August 7th, 1862, proposes to register as a limited company, it must give at least thirty days' notice of its intention to every person who has a banking account with the company, either by delivery of the notice to him, or by posting it to him at, or delivering it at, his last known address. In case of omission to give notice, the certificate of registration with limited liability has no operation as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects the account down to the time at which notice is given (*k*).

Winding up
of trustee
saving banks.

1062. Any trustee savings bank certified under the Trustees Savings Bank Act, 1863 (*l*), may be wound up as an unregistered company (*m*). The petition may be presented by the National Debt Commissioners, or by a commissioner appointed under the Trustee Savings Banks Act, 1887, as well as by any person authorised under the other provisions of the Act of 1908 to present a petition for winding up a company (*n*).

SECT. 3.—*Returns under the Bank Charter Act, 1844.*

Returns by
banking
companies.

1063. Bankers, whether companies or not, when not affected by the legislation of 1862 and subsequent years, have to make certain

(*g*) As to banks having the right to issue notes, see title BANKERS AND BANKING, Vol. I., pp. 571, 572.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 251 (1) [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 6]. S. 6 of the Act of 1879 was in similar terms, except that it applied to banks of issue, registered as limited companies either before or after the passing of that Act.

(*i*) *Ibid.*, s. 251 (3) [Companies Act, 1879 (42 & 43 Vict. c. 76), s. 6]. The Act of 1879 applied to banks of issue whenever registered as limited companies.

Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 256 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 188]. The other requirements of *ibid.*, Part VII., must also be complied with; see p. 39, *ante*.

(*l*) 26 & 27 Vict. c. 87.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 267 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 199]; Trustee Savings Banks Act, 1887 (50 & 51 Vict. c. 47), s. 3. As to trustee savings banks, see title BANKERS AND BANKING, Vol. I., pp. 576–579. As to the winding up of unregistered companies, see p. 672, *post*.

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (vi.) [Trustee Savings Banks Act, 1887 (50 & 51 Vict. c. 47), s. 3].

yearly returns to the Commissioners of Inland Revenue (o). These returns need not be made by a banking company to which the provisions of the Act of 1908 are applicable, which has duly forwarded to the registrar the requisite list and summary (p) together with a statement of the names of the several places where it carries on business (q).

SECT. 3.
Returns
under the
Bank
Charter Act,
1844.

SECT. 4.—*Contracts for Sale of Shares in Joint Stock Banking Companies.*

1064. Every contract for the sale or transfer, or purporting to be for the sale or transfer, of any share, stock, or other interest transferable by deed or written instrument, in any joint stock banking company in the United Kingdom constituted under or regulated by any Act of Parliament, royal charter, or letters patent (except shares or stock in the Bank of England or Bank of Ireland), is null and void, unless it identifies the share, stock, or interest by reference to its distinctive number on the company's register or books at the time when the contract is made. Where there is no register by distinguishing numbers, the contract must specify the person registered as proprietor in the books of the company at the date of the contract. Every person, whether principal, broker, or agent, who wilfully inserts in the contract any false entry as to the number, or any name other than that of the registered proprietor, is guilty of a misdemeanour (r).

Contracts for
sale of bank
shares.

The custom of stock exchanges to disregard these provisions is unreasonable, and does not bind a principal unless he is shown to be acquainted with it at the time he employed the broker, and to have assented to it, or unless he is precluded from denying his knowledge and assent (s). Consequently, a principal who, through his broker, has made a contract for sale, which is unenforceable by reason of the broker's non-compliance with the statute, is entitled, where he is not bound by the custom, to recover from the broker the damages which he has sustained thereby (t). Similarly, where a broker who is instructed to buy shares for his principal, enters into such a contract, and pays for the shares, he is not entitled to be

Custom
of stock
exchange.

(o) See Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 21; and title BANKERS AND BANKING, Vol. I., p. 582.

(p) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 26; and see p. 263, *ante*.

(q) Revenue, Friendly Societies, and National Debt Act, 1882 (45 & 46 Vict. c. 72), s. 11 (1). Where the list and summary have been furnished, with the addition above mentioned (which facts may be proved by the registrar's certificate), the company becomes entitled to the privileges of the Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11); see title BANKERS AND BANKING, Vol. I., pp. 644 *et seq.* As to banks of issue making weekly returns as to notes in circulation, see Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 18; and title BANKERS AND BANKING, Vol. I., p. 573.

(r) Banking Companies' (Shares) Act, 1867 (30 & 31 Vict. c. 29), ss. 1, 3. This Act is commonly called Leeman's Act. Joint stock banking companies are also bound to show their list of shareholders to any registered shareholder during business hours, from 10 a.m. to 4 p.m. (*ibid.*, s. 2).

(s) See the cases cited in note (t), *infra*, and notes (u) and (w), p. 616, *post*; and title AGENCY, Vol. I., p. 182.

(t) *Neilson v. James* (1882), 9 Q. B. D. 546, C. A.;
v. City of Glasgow Bank (1879), 4 App. Cas. 624.

SECT. 4.
Contracts
for Sale of
Shares in
Joint Stock
Banking
Companies.

indemnified by his principal (*u*), unless the principal is bound by the custom (*w*). If a transfer made in pursuance of such a contract is accepted by a broker for a purchaser under an authority to do so, the transferor of the shares is entitled to be indemnified by the purchaser against all loss and liability in respect of the shares (*x*).

Part VI.—Insurance Companies.

SECT. 1.—*In General.*

Usual kinds
of businesses.

1065. Insurance business (*a*) requires the possession of a large amount of capital, or the facilities for procuring it, and is generally carried on by corporations or partnerships (*b*). The ordinary kinds of insurance were, until lately, that on human life, called life insurance, that against loss or damage by fire, called fire insurance, and that against loss or damage by sea, called marine insurance; but to these may now be added insurance against accident (*c*) or disease, called accident insurance; insurance against loss by insolvency or dishonesty, called guarantee insurance (*d*); and insurance against liability for damages by reason of accidents to workmen and servants, called employers' liability insurance (*e*).

SECT. 2.—*Classification.*

Mode of
classification.

1066. An insurance company, until comparatively recent times, generally undertook some one particular line of insurance business, such as life, fire, or marine insurance. This system has for the most part now gone out of fashion, and many insurance companies have within recent years obtained extensions of their powers so as to be able to carry on more than one kind of insurance business. A classification of existing companies based on the kind of business they carry on, such as life insurance companies, fire insurance companies, and so on, is an unsatisfactory classification, and none

(*u*) *Perry v. Barnett* (1885), 15 Q. B. D. 388, C. A.

(*w*) *Seymour v. Bridge* (1885), 14 Q. B. D. 460.

(*x*) *Loring v. Davis* (1886), 32 Ch. D. 625.

(*a*) See title INSURANCE.

(*b*) As to marine insurance, and risks undertaken by underwriters at Lloyd's, see title INSURANCE. As to corporations other than the two named in the Act being forbidden for the purpose of marine insurance, see stat. (1719) 6 Geo. 1, c. 18; and as to the repeal of the monopoly there given, see stat. (1824) 5 Geo. 4, c. 114, both now repealed.

(*c*) As to the Railway Passengers Assurance Company, see Railway Passengers Assurance Company's Act, 1864 (27 & 28 Vict. c. cxxv.); *For v. Railway Passengers Assurance Co.* (1885), 54 L. J. (Q. B.) 505, C. A.; *Isitt v. Railway Passengers Assurance Co.* (1889), 22 Q. B. D. 504.

(*d*) See title GUARANTEE.

(*e*) Insurances are also sometimes effected against females having issue, either generally or within a limited time (called non-issue insurances), or against one person dying before another person (a branch of life insurance). It is said that insurances have been effected against the reversal of a decision of a judge (*Seaton v. Burnand*, [1900] A. C. 135, per Lord HALSBURY, L.C., at p.

the less so because it has to some extent been adopted by the Assurance Companies Act, 1909 (*f*). From a legal point of view insurance companies are best classified by having regard to the different modes in which they have been formed or constituted, although the special legislation with reference to certain kinds of companies must be separately dealt with.

SECT. 2.
Classifica-
tion.
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The classification of assurance companies is nearly, but not quite, the same as that already given with reference to companies generally (*g*), and it differs in some respects from that which is applicable to banking companies (*h*). The following classification of insurance companies is according to the different means by which they are constituted, or privileged, or governed:—

Classification
by con-
stitution.

(1) Companies incorporated by registration in pursuance of general statutes, such as the Act of 1908 (*i*).

(*f*) 9 Edw. 7, c. 49.

(*g*) See p. 13, *ante*.

(*h*) See title BANKERS AND BANKING, Vol. I., pp. 570—583; and p. 612, *ante*.

(*i*) The Joint Stock Companies Act, 1844 (7 & 8 Vict. c. 110), made compulsory the registration of certain companies formed after the commencement of the Act (see p. 643, *post*), including (1) every assurance company or association for the purpose of assurance or insurance upon lives, or against any contingency involving the duration of human life, or against the risk of loss or damage by fire or storm or other casualty, or for granting or purchasing annuities on lives; (2) every institution enrolled under any statute relating to friendly societies, and which made assurances on lives, or against any contingency involving the duration of human life to an amount for one life or for any one person exceeding £200, whether such company, association, or institution was a joint stock company or a mutual assurance society or both (*ibid.* s. 2). The first or provisional registration under the Act of 1844 did not incorporate the company, and a deed of settlement had to be executed, and further requirements complied with, before the company was completely registered and could obtain a certificate of incorporation (see p. 675, *post*). By the same Act, existing joint stock companies, within the meaning of that expression in the Act, whether incorporated by statute or charter, or privileged by letters patent, or established by deed of settlement or other instrument, or by virtue of any other authority, or in any other way, were required (under penalties) to register within a limited time, and facilities were given for obtaining complete registration of these existing companies other than assurance companies (*ibid.*, ss. 58, 59); and see *Ridley v. Plymouth Grinding and Baking Co.* (1848), 2 Exch. 711; *R. v. Whitmarsh* (1850), 14 Q. B. 803. Insurance companies were excepted from the operation of the Limited Liability Act, 1855 (18 & 19 Vict. c. 133), and the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47) (see p. 27, *ante*), but the provision disabling companies completely registered under the Act of 1844, which had not registered under the Act of 1856, from suing or paying dividends, and subjecting its officers to penalties, did not apply to companies formed for the purpose of insurance (see Joint Stock Companies Act, 1857 (20 & 21 Vict. c. 14); and p. 28, *ante*; *London and Provincial Provident Society v. Ashton* (1862), 12 C. B. (N. S.) 709). The Companies Act, 1862 (25 & 26 Vict. c. 89), by s. 209, required every insurance company completely registered under the Act of 1844 to register itself, within a limited time, as a company under the Act of 1862. As to the effect of such registration, see *Ramsay's Case* (1876), 3 Ch. D. 388, C. A.; but failure to register did not make the company illegal, although it disabled it from suing or paying dividends and subjected officers of the company to penalties (Companies Act, 1862 (25 & 26 Vict. c. 89), s. 210). Ss. 209 and 210 of the Act of 1862 are repealed and not re-enacted by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), presumably because there are no insurance companies under the Act of 1844 which have not re-registered under the Act of 1862.

SECT. 2.
Classifica-
tion.
—

(2) Companies incorporated by special Act and, to some extent at least, governed by that Act.

(3) Companies incorporated by royal charter (*k*).

(4) *Quasi*-corporations, or privileged companies, comprising unincorporated companies on which certain privileges incident to corporations created by royal charter and certain other powers have been conferred by letters patent or by special statute (*l*).

(5) Unincorporated and unprivileged companies which are large partnerships generally formed by deeds of settlement (*m*).

(6) Friendly societies carrying on insurance business (*n*).

(7) Industrial assurance companies (*o*).

Classification
by offices.

Another classification, which is rather of offices than companies, is as follows: (1) proprietary offices, being joint stock partnerships the partners of which take all the profits; (2) offices in which the shareholders take all the profits except the sums paid, by way of bonus or rebate, to policy-holders who are not partners; (3) mutual insurance offices, where the policy-holders are the only proprietors, and the whole body insures each of its members for their protection and not its profit (*p*); (4) Government insurance offices (*q*) to encourage providence and thrift (*r*).

SECT. 3.—*Special Provisions in the Act of 1908.*

What is an
insurance
company.

1067. For the purposes of the Act of 1908, a company that carries on the business of insurance in common with any other business or businesses is deemed to be an insurance company (*s*).

Statutory
statement.

1068. Every insurance company must before it commences business, and also on the first Monday in February and the first Tuesday in August, in every year during which it carries on business, make a statement in the statutory form, or as near thereto as circumstances will admit, a copy of which must be put up in a conspicuous place in its registered office, and in every branch office or place where its business is carried on. A copy must also be

(*k*) The charters of insurance companies have generally been granted in pursuance of some special statute; see *Elve v. Boyton*, [1891] 1 Ch. 501, C. A.; and title CORPORATIONS, Vol. VIII., p. 316; and p. 744, *post*.

(*l*) See p. 751, *post*.

(*m*) As to the limitation on the number of members, see p. 44, *ante*.

(*n*) See title FRIENDLY SOCIETIES, and p. 625, *post*.

(*o*) See p. 625, *post*.

(*p*) These are not companies. As to such offices, see title INSURANCE.

(*q*) The premium in the case of a mutual society may consist of the liability to contribute to the losses of other members of the society (*Lion Insurance Association v. Tucker* (1883), 12 Q. B. D. 176, 187, C. A.; *Great Britain 100 A1 Steamship Insurance Association v. Wyllie* (1889), 22 Q. B. D. 710, 722, C. A.; *Ocean Iron Steamship Insurance Association v. Leslie* (1888), cited 22 Q. B. D. 710, 722; and see *Re European Assurance Society, Grain's Case* (1875), 1 Ch. D. 307, 315, 321, C. A.; *Bath's Case* (1879), 11 Ch. D. 386). As to friendly societies for mutual insurance, see title FRIENDLY SOCIETIES.

(*r*) See Porter's *Laws of Insurance*, 5th ed., pp. 400, 401.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 108 (5) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 3]. As to the registration of existing companies, see p. 61, *ante*; as to the formation of new companies, see p. 64, *ante*. As to the modifications made by the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), see pp. 620 *et seq.*, *post*.

supplied on request to every member and creditor on payment of a sum not exceeding 6*d.* (i).

1069. As regards, at any rate, the liability of contributories in a winding up, nothing in the Act of 1908 invalidates any provision contained in any policy of insurance by which the liability of individual members on the policy is restricted, or by which the funds of the company are alone made liable in respect of the policy (a).

1070. In a reconstruction the compensation or part of the compensation receivable by the transferor company may consist of policies or other like interests in the transferee company (b).

SECT. 3.
Special
Provisions
in the Act
of 1908.

Limit of
liability by
policy.

Reconstruc-
tion.

SECT. 4.—*Assignments of and Conflicting Claims under Life Policies.*

1071. An assignment of a policy of life assurance does not confer on the assignee a right to sue for the amount of the policy until a written notice of the date and purport of the assignment has been given to the assurance company at its principal place of business, or one of such principal places, in England or Scotland or Ireland. The date of receipt of the notice regulates the priority of all claims, and a payment *bonâ fide* made by the company before the date on which the notice is received is valid against the assignee (c). The insurance company must, on the written request of the person giving the notice, or his executors or administrators, and on payment of 5*s.*, give a written acknowledgment of receipt; and every such acknowledgment, if signed by a person who is *de facto* or *de jure* the manager, secretary, treasurer, or other principal officer of the company, is conclusive evidence of the receipt of the notice by the company (d).

Assignment
of life policy.

A company may require evidence to show that the claims of a mortgagee by assignment have been satisfied before it pays over the amount of the insurance to a subsequent incumbrancer (e).

1072. Where in the opinion of the board of directors of a life assurance company (f) no sufficient discharge can otherwise be

into court.

(i) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 108 (1)—(3) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 44]. For the penalty in case of default, see *ibid.*, s. 108 (4). For the annual statements to be made under the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), see p. 631, *post*.

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123 (1) (vi.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38 (6)]. As to the liability of contributories for the expenses of winding up, see *Lethbridge v. Adams, Ex parte International Life Assurance Society (Liquidator)* (1872), L. R. 13 Eq. 547; *Re Accidental Death Insurance Co.* (1878), 7 Ch. D. 568.

(b) *Ibid.*, s. 192 (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161]; see p. 586, *ante*.

(c) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 3; *Spencer v. Clark* (1878), 9 Ch. D. 137; *Newman v. Newman* (1885), 28 Ch. D. 674; and see titles CHOSSES IN ACTION, Vol. IV., p. 395; INSURANCE.

(d) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 6; and see title INSURANCE.

(e) *Re Haycock's Policy* (1876), 1 Ch. D. 611.

(f) This does not include a society registered under the Friendly Societies Act (Life Assurance Companies (Payment into Court) Act, 1896 (59 & 60 Vict.

SECT. 4.
Assign-
ments of
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Policies.

obtained, the company may, subject to rules of court (*g*), pay into the High Court, or, when its head office is within the jurisdiction of the Chancery Court of the County Palatine of Lancaster, either into that court or into the High Court, any moneys payable under a life policy (*h*).

SECT. 5.—*The Assurance Companies Act, 1909, and the Acts which it Consolidates and Extends.*

SUB-SECT. 1.—*Preliminary.*

Life
Assurance
Companies
Acts, 1870—
1872.

1073. After the Companies Act, 1862, came into force there were passed three statutes relating only to life assurance companies, called the Life Assurance Companies Act, 1870 (*i*), the Life Assurance Companies Act, 1871 (*j*), and the Life Assurance Companies Act, 1872 (*k*). Many of the provisions of these statutes (*a*) relating to such matters as deposits to be made, separate funds, annual statements and actuarial reports, amalgamation and transfers, winding up, and reduction of contracts are re-enacted with more or less modification in the Assurance Companies Act, 1909 (*b*), and extended *sub modo* to some other kinds of assurance companies.

Employers'
Liability
Insurance
Companies
Act, 1907.

1074. In 1907 the provisions of the Life Assurance Companies Acts, 1870 to 1872, were applied to every company, whether established before or after August 28th, 1907, carrying on within the United Kingdom the business of insuring employers against liability to pay compensation or damages to workmen in their

c. 8, ss. 2, 3); as to costs of payment into court, see *Re Power's Policies*, [1899] 1 I. R. 6, 11, C. A.

(*g*) See R. S. C., Ord. 54c.

(*h*) Life Assurance Companies (Payment into Court) Act, 1896 (59 & 60 Vict. c. 8), s. 3. No payment in under the Act of 1896 can be made, without leave of the judge, where the company is party to an action as to the policy or policy moneys (R. S. C., Ord. 54c, r. 3). As to the contents of the affidavit on paying in, see *ibid.*, r. 1. No costs or expenses incidental to the payment into court are to be deducted (*ibid.*, r. 2). Notice of the payment in must be given to the parties interested (*ibid.*, r. 4). The application for payment out is by summons, unless the amount exceeds £1,000, when it is by petition (*ibid.*, r. 5). The applicant's address for service must be named in the petition or summons (*ibid.*, r. 6). As to service of the application for payment out, see *ibid.*, r. 7. And see title **INSURANCE**. Payment in may be made where the policy has been lost (*Harrison v. Alliance Assurance Co.*, [1903] 1 K. B. 184, C. A.). As to the law before the Act of 1896, see *Re Webb's Policy* (1866), L. R. 2 Eq. 456.

(*i*) 33 & 34 Vict. c. 61.

(*j*) 34 & 35 Vict. c. 58. This Act contained only two amending enactments, the first of which has since been repealed.

(*k*) 35 & 36 Vict. c. 41.

(*a*) Having regard to the short portion of their statutory life which now remains, these provisions are sufficiently referred to in the following notes.

(*b*) 9 Edw. 7, c. 49. This Act comes into operation on July 1st, 1910 (*ibid.*, s. 38 (2)), except s. 36, referring to collecting societies and industrial assurance companies, which came into operation on December 3rd, 1909 (*ibid.*), and as from that date repeals the Life Assurance Companies Acts, 1870, 1871, and 1872 (33 & 34 Vict. c. 61; 34 & 35 Vict. c. 58; 35 & 36 Vict. c. 41), the Employers' Liability Insurance Companies Act, 1907 (7 Edw. 7, c. 46), and s. 7 of the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22) (see p. 625, *post*), although nothing in the repeal is to affect any investigation made, or any statement, abstract, or other document deposited under any enactment repealed, but every such investigation is to be deemed to have been made, and every such document prepared and deposited, under the Act of 1909 (*ibid.*, s. 37).

employment, but subject to such necessary modifications and adaptations as might be made therein by Order in Council (c). The Act of 1907, which remains in force until July 1st, 1910, does not apply (1) to any company which carries on employers' liability insurance business as incidental only to the business of marine insurance by issuing marine policies covering such liability as well as marine adventure; or (2) to an association of employers which satisfies the Board of Trade that it is carrying on business wholly or mainly for the purpose of the mutual insurance of its members, either against liability to pay compensation or damages to workmen, or against that liability and against any other risk incident to their trade; or (3) to a member of Lloyd's or any other association of underwriters approved by the Board of Trade, provided that he complies with certain statutory requirements. Nor do the provisions of the Life Assurance Companies Acts, 1870 to 1872, as to deposits, apply to employers' liability insurance or companies which commenced to carry on that class of business within the United Kingdom before August 28th, 1907 (d).

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The
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Companies
Act, 1909.

SUB-SECT. 2.—*Companies to which the Act of 1909 applies.*

1075. The term "assurance company," as used in the Act of 1909, which comes into force on July 1st, 1910, applies, with certain exceptions (e), to all persons (f) or bodies of persons, whether corporate or unincorporate, carrying on within the United Kingdom assurance (g) business of all or any of the following classes:—

Meaning of
"assurance
company."

(1) Life assurance business—that is to say, the issue of, or the undertaking of liability under, policies of assurance upon human life (h), or the granting of annuities upon human life (i).

(c) Employers' Liability Insurance Companies Act, 1907 (7 Edw. 7, c. 46), s. 1. By an Order in Council made on November 2nd, 1907, called the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, Statutory Rules and Orders, 1907 (No. 838), p. 323, the provisions of the Life Assurance Companies Acts, 1870 to 1872, were adopted in the form and manner set forth in the schedule to the order.

(d) Employers' Liability Insurance Companies Act, 1907 (7 Edw. 7, c. 46), s. 1.

(e) For the exceptions see p. 623, *post*.

(f) When a single person carries on any assurance business referred to in the Act, the provisions as to companies apply to him.

(g) A company registered under the Companies Acts (including the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69)), which transacts assurance business of any such class as mentioned above in any part of the world is, for the purposes of this provision, deemed to be a company transacting such business within the United Kingdom (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), ss. 1, 29). As to foreign companies carrying on business in the United Kingdom, see p. 756, *post*.

(h) The term "policy on human life" means in this connection any instrument by which the payment of money is assured on death (except death by accident only), or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life; and where the company grants annuities upon human life, "policy" includes the instrument evidencing the contract to pay such an annuity, and "policy-holder" includes annuitant (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 30 (a), (b); compare Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 2; and see *Re Sovereign Life Assurance Co.* (1889), 42 Ch. D. 540).

(i) A similar definition is contained in the Life Assurance Companies Act,

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(2) Fire insurance business—that is to say, the issue of, or the undertaking of liability under, policies of insurance against loss by or incidental to fire (*j*).

(3) Accident insurance business—that is to say, the issue of, or the undertaking of liability under, policies of insurance upon the happening of personal accidents, whether fatal or not, disease, or sickness, or any class of personal accidents, disease, or sickness (*k*).

(4) Employers' liability insurance business—that is to say, the issue of, or the undertaking of liability under, policies insuring employers against liability to pay compensation or damages to workmen in their employment (*l*). Employers' liability insurance business, however, carried on outside the United Kingdom is not to be treated as part of the business carried on by the company for the purposes of the Act (*m*). Nor does the Act apply (1) where the company is an association of employers which satisfies the Board of Trade that it is carrying on or is about to carry on business wholly or mainly for the mutual insurance of its members against liability to workmen employed by them, either alone or in conjunction with insurance against any other risk incident to their trade (*n*); or (2) where the company carries on the employers' liability insurance business as incidental only to the business of marine insurance by issuing marine policies, or policies in the form of marine policies covering liability to pay compensation

1870 (33 & 34 Vict. c. 61), s. 2, but that Act only applies where the policy or annuity is granted in the United Kingdom. The term "Annuities on human life" does not include superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade, or employment, or of the dependants of such persons (*ibid.*, s. 29); and see *Nelson & Co. v. Board of Trade* (1901), 84 L. T. 565. As to what is granting annuities on human life, see *Nelson & Co. v. Board of Trade*, *supra*; *Newbold Friendly Society v. Barlow*, [1893] 2 Q. B. 128, and p. 621, *ante*.

(*j*) A policy is not to be deemed to be a policy of fire assurance by reason only that loss by fire is one of the various risks covered by the policy (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 28 (3)). Fire insurance companies are not within any of the Acts consolidated by the Act of 1909.

(*k*) The term "policy" here includes any policy under which there is for the time being an existing liability already accrued or under which a liability may accrue, and where a sum is due, or a weekly or other periodical payment is payable under any policy, the term "policy-holder" includes the person to whom the sum is due, or the weekly or other periodical payment is payable (*ibid.*, s. 32 (*f*), (*g*)). Companies carrying on this class of business are not within any of the Acts consolidated by the Act of 1909.

(*l*) The Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, contains a somewhat similar description of the business required to bring a company within that Act.

(*m*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 33 (*i*). The term "policy" here includes any policy under which there is for the time being an existing liability already accrued or under which any liability may accrue, and where any sum is due or a weekly payment is payable under any policy, the term "policy-holder" includes the person to whom the sum is due or the weekly payment payable (*ibid.*, s. 33 (*g*), (*h*)); compare the definition in the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907.

(*n*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 33 (*a*).

or damages to workmen as well as losses incident to marine adventure (o).

(5) Bond investment business—that is to say, the business of issuing bonds or endowment certificates—by which the company, in return for subscriptions payable at periodical intervals of two months or less, contracts to pay the bond-holder a sum at a future date, and not being life assurance business as above defined (p).

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Act, 1909.

1076. The Act of 1909 applies to assurance companies as defined above, subject as respects any class of assurance business to the special provisions of the Act relating to business of that class (q). It does not, however, apply to assurance business of any class other than one of the classes above specified (r), except where it is expressly made applicable.

Application
of the Act
of 1909.

The Act does not apply to a member of Lloyd's, or of any other association of underwriters (s) approved by the Board of Trade which carries on assurance business of any class, provided that he complies with the requirements of the Act applicable to business of that class (t).

(o) *Ibid.*, s. 33 (b). There is a similar provision as regards existing companies of the same class (see p. 620, *ante*).

(p) The legislation is new so far as bond investment companies are concerned (see report of Board of Trade Departmental Committee). Where a company carries on bond investment business it must not give the holder of any policy issued after December 3rd, 1909, any advantage dependent on lot or chance, but this provision is not to be construed as in any wise prejudicing any question as to the application to any such transaction, whether in respect of a policy issued before or after that date, of the law relating to lotteries (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 34 (e)). The term "policy" in this connection includes any bond, certificate, receipt, or other instrument evidencing the contract with the company, and the term "policy-holder" means the person who for the time being is the legal holder of such instrument (*ibid.*, s. 34 (a)).

(q) *Ibid.*, s. 1. As to life assurance business, see *ibid.*, s. 30; as to fire insurance business, *ibid.*, s. 31; as to accident insurance business, *ibid.*, s. 32; as to employers' liability insurance business, *ibid.*, s. 33; and as to bond investment business, *ibid.*, s. 34. Where a company carries on life assurance business, any business carried on by it, which under a special Act relating to the company is to be treated as life assurance business, is to continue to be so treated, and not deemed to be other business or a separate class of business (*ibid.*, s. 30 (g)).

(r) *Ibid.*, s. 28 (3).

(s) "The term underwriter" includes any person named in a policy or other contract of insurance as liable to pay or contribute towards the payment of the sum secured by such policy or contract (*ibid.*, s. 29).

(t) *Ibid.*, s. 28 (2). The requirements of the Act are contained in *ibid.*, Sched. VIII. Similar provisions, as regards employers' liability insurance business, were made applicable under the Employers' Liability Insurance Companies Act, 1907 (7 Edw. 7, c. 46), and the Order in Council made thereunder. Under Sched. VIII. every underwriter carrying on life, fire, accident, employers' liability, or bond investment business must deposit £2,000 in respect of each class of business carried on, to be available solely to meet claims in respect of such business, and must make an annual statement to the Board of Trade of the extent and character of each business carried on. In the case of fire or accident business the underwriter may, in lieu of making the above deposit, pay all premiums received in respect of fire and accident insurance or re-insurance business carried on, either alone or in conjunction with any other insurance business for which special requirements are not laid down in Sched. VIII., into a trust fund in accordance with a trust deed approved by the Board, and in such case he must also furnish security in the form of either a deposit or a guarantee, which must never be less in amount than the aggregate of the

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Act, 1909.

Audit of
accounts.

SUB-SECT. 3.—*Audit of Assurance Companies' Accounts.*

1077. Where the accounts of an assurance company are not subject to audit in accordance with the provisions of the Act of 1908 (a), or the Companies Clauses Consolidation Act, 1845 (b), relating to audit, the accounts of the company must be audited annually in such manner as the Board of Trade may prescribe. The regulations to be made for the purpose may apply to any such company the provisions of the Act of 1908 relating to audit, subject to such adaptations and modifications as may appear necessary or expedient (c).

SUB-SECT. 4.—*Special Requirements in respect of Unregistered Companies.*

Copies of
deed of
settlement

1078. Every assurance company which is not registered under the Companies Acts (d) must cause a sufficient number of copies of its deed of settlement, or other instrument constituting it, to be printed, and must, on the application of any shareholder or policy-holder (e), furnish to him one of such copies on payment of a sum not exceeding 1s. (f).

Address
book.

1079. Every assurance company which is not registered under the Companies Acts (d), or which has not incorporated in its deed of settlement s. 10 of the Companies Clauses Consolidation Act,

premiums received or receivable in the last preceding year in connection with such fire and accident and other non-marine business, for which special requirements are not laid down in Sched. VIII. This security is available solely to meet claims in connection with such fire and accident business and other non-marine business, and the accounts of the underwriter must be audited annually by an accountant approved by the committee of the association. In the case of employers' liability insurance business, where the weekly payment to any workman during the incapacity of the workman has continued for more than six months, the liability must, before the expiration of twelve months from the commencement of the incapacity, be redeemed by the payment into the county court by the underwriters of a lump sum (to be ascertained in accordance with paragraph 17 of Sched. I. to the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58)). Such lump sum is to be invested or applied (unless the court for special reason sees fit to direct otherwise) in the purchase of an annuity or otherwise, in such manner that the duration of the benefit thereof may, as far as possible, correspond with the probable duration of the incapacity (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 33). See, further, title INSURANCE.

The Act of 1909 does not affect the National Debt Commissioners or the Postmaster-General, acting under the authorities vested in them respectively by the Government Annuities Acts, 1829 to 1888, and the Post Office Savings Bank Acts, 1861 to 1908 (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 28; and see Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 25); see title REVENUE.

(a) 8 Edw. 7, c. 69, ss. 112—114; see p. 267, *ante*.

(b) 8 & 9 Vict. c. 16, ss. 101—108; see p. 721, *post*.

(c) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 9.

(d) The term "Companies Acts" includes the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and any enactment repealed by that Act (*ibid.*, s. 286, and Sched. VI., Part I.).

(e) The term "policy-holder" means the person who for the time being is the legal holder of the policy for securing the contract with the assurance company (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 29).

(f) *Ibid.*, s. 11. This is a mere re-enactment of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 13, which was applied to employers' liability insurance companies by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, Statutory Rules and Order, 1907, p. 323.

1845 (g), must keep a "Shareholder's Address Book," in accordance with the provisions of that section, and must, on the application of any shareholder or policy-holder of the company, furnish to him a copy of such book, on payment of a sum not exceeding 6d. for every hundred words required to be copied (h).

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SUB-SECT. 5.—*Special Provisions as to Friendly Societies and Trade Unions.*

1080. The Act of 1909 does not apply to persons or bodies of persons who are registered under the Acts relating to friendly societies or trade unions (i), and these registered bodies are therefore exempt from its provisions. Unregistered trade unions or friendly societies carrying on any assurance business to which the Act relates are, however, subject to its provisions (j). On the application of any unregistered trade union originally established more than twenty years before July 1st, 1910, the Board of Trade may extend to the trade union the exemption conferred by the Act of 1909 on registered trade unions. On the application of an unregistered friendly society, the Board may also extend to the society the exemption conferred on registered friendly societies, if it appears to the Board, after consulting the Chief Registrar of Friendly Societies, that the society is one to which it is inexpedient that the provisions of the Act should apply (k).

Friendly
societies
and trade
unions.

SUB-SECT. 6.—*Special Provisions as to Collecting Societies and Industrial Assurance Companies.*

1081. A collecting society is a friendly society or branch, whether registered or unregistered, which receives contributions or premiums by means of collectors at a greater distance than ten miles from the registered office or principal place of business of the society. An industrial assurance company is a person or body of persons, whether corporate or unincorporate, granting assurances on any one life for a less sum than £20, which similarly receives contributions or premiums, but at less periodical intervals than two months (l).

Definitions.

1082. Amongst the purposes for which collecting societies and industrial assurance companies may issue policies of assurance are

Purposes of
such societies.

(g) 8 & 9 Vict. c. 16; see p. 690, *post*.

(h) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 10. This is a mere re-enactment of provisions now applying to life assurance companies and employers' liability companies.

(i) *Ibid.*, s. 1; see titles FRIENDLY SOCIETIES; TRADE AND TRADE UNIONS.

(j) See p. 621, *ante*.

(k) The provision in the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 7, that the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), or the Acts amending it, should not apply or be deemed to have applied to trade unions registered or to be registered under the Trade Union Act, 1871 (34 & 35 Vict. c. 31), is repealed by the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 35; see *ibid.*, s. 37, and Sched. IX.

(l) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 36 (5); Collecting Societies and Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), s. 1. As to these societies and companies generally, see title INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.

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Act, 1909.Insurance
interest under
part policies.

included insuring money to be paid for the funeral expenses of a parent, grandparent, grandchild, brother, or sister (*m*).

No policy effected before December 3rd, 1909, with a collecting society or industrial assurance company is to be void by reason only that the person effecting the policy had not, at the time when it was effected, an insurable interest in the life of the person insured, or that the name of the person interested, or for whose benefit or on whose account the policy was effected, was not inserted in the policy, or that the insurance was not one authorised by the Acts relating to friendly societies, if the policy was effected by or on account of a person who had at the time a *bonâ fide* expectation that he would incur expenses in connection with the death or funeral of the assured, and if the sum assured is not unreasonable for the purpose of covering those expenses. Any such policy enures for the benefit of the person for whose benefit it was effected, or his assigns (*n*).

Future *ultra vires* policies.

Any collecting society or industrial insurance company which, after December 3rd, 1909, issues policies of insurance which are not within its legal powers will be held to have made default in complying with the requirements of the Act of 1909 (*o*).

Converting
collecting
society into a
limited
company.

1083. The committee of management or other governing body of a collecting society having more than 100,000 members may petition the court to make an order for the conversion of the society into a mutual company under the Act of 1908 (*p*). The court may make such an order if, after hearing the committee of management or other governing body, and other persons whom the court considers entitled to be heard on the petition, it is satisfied, on a poll being taken, that 55 per cent. at least of the members of the society over sixteen years of age agree to the conversion. The court may also give such directions as it thinks fit for settling a proper memorandum and articles of association of the company.

Before any such petition is presented to the court, notice of intention to present the petition must be published in the *London Gazette*, and in such newspapers as the court may direct (*q*).

(*m*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 36 (1). These provisions as to collecting societies and industrial assurance companies came into operation on December 3rd, 1909; see *ibid.*, s. 38 (2).

(*n*) *Ibid.*, s. 36 (2).

(*o*) *Ibid.*, s. 36 (3). The provisions of the Act with respect to such default apply to collecting societies, industrial insurance companies, and their officers, in like manner as they apply to assurance companies and their officers (*ibid.*); see p. 642, *post*.

(*p*) This is without prejudice to the powers conferred by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 71 (1), by which a registered friendly society may by special resolution determine to convert itself into a company under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); see *Blythe v. Birtley*, [1910] 1 Ch. 228, C. A.; *McGlade v. Royal London Mutual Insurance Society* (1910), 26 T. L. R. 471, C. A.; and title FRIENDLY SOCIETIES.

(*q*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 36 (4), applying Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 71 (3). Where the society is registered as a company, the registration of the society, if any, as a friendly society becomes void, and must be cancelled by the Chief Registrar; but the registration of the society as a company does not affect any right or claim subsisting against the society, or any penalty incurred by it, and for the purpose

SUB-SECT. 7.—*Special Provisions as to Foreign Companies.*

1084. Every assurance company which is constituted outside, but carries on assurance business within, the United Kingdom, whether incorporated or not, is required to file certain documents and particulars with the registrar, including the names of persons within the kingdom who may accept service of process on the company (*r*).

A company registered under the Companies Acts, which transacts assurance business in any part of the world, is not a foreign company (*s*).

SUB-SECT. 8.—*Deposits to be made by Assurance Companies.*

1085. Every assurance company must, with certain exceptions (*t*), deposit and keep deposited with the Paymaster-General, for and on behalf of the Supreme Court, the sum of £20,000 (*a*).

The Paymaster-General must not accept a deposit except on a

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Amount of
deposit.

of enforcing any such right, claim, or penalty, the society may be sued and proceeded against in the same manner as if it had not been registered as a company; and every such right or claim, or the liability to any such penalty, has priority, as against the property of the company, over all other rights or claims against or liabilities of the company (Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 71 (3)). A society may be restrained from converting itself into a company with objects more extensive than, and widely differing from, its existing objects (*Blythe v. Birtley*, [1910] 1 Ch. 228, C. A.). But if the society once obtains its certificate of incorporation under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), the court cannot go behind the certificate (*McGlade v. Royal London Mutual Insurance Society* (1910), 26 T. L. R. 471, C. A.).

(*r*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 19, applying Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 274; see p. 756, *post*.

(*s*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 1.

(*t*) See p. 629, *post*.

(*a*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 2 (1). The section applies to an assurance company registered or having its head office in Ireland, subject to the modifications that references to the Supreme Court are construed as references to the Supreme Court of Judicature in Ireland, and references to the Paymaster-General are construed as references to the Accountant-General of the last-mentioned court (*ibid.*, s. 2 (7)). The provision as to the deposit by subscribers of the memorandum is a re-enactment of the existing law as to life assurance companies; see Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), s. 1, applied to employers' liability insurance companies by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907. The Board of Trade may make rules with respect to the payment and investment of, or dealing with, the payment of the interest on, and the withdrawal and transfer of deposits (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 2 (6)). Presumably, life assurance and employers' liability insurance companies which have made the required deposits in respect of the particular business which they may be carrying on on July 1st, 1910, will not be required to deposit a further sum of £20,000 in respect of that particular business, unless the money has been repaid to them; but, having regard to ss. 1, 2 (3) of the Act of 1909, the deposit seems to be required in respect of each class of business, whenever the company was formed, if it has not paid it, or even was not required to pay it, before the Act of 1909 comes into force.

The existing law, as applicable to life insurance companies and employers' liability companies, was embodied in the provisions of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 3, which were applied by Order in Council (*supra*) to the latter companies. As to the rights of the policy-holders against the fund in winding up, see *Re Nelson & Co.* (1906), 22 T. L. R. 406.

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warrant of the Board of Trade (b). He is to invest any sum or sums deposited in such of the securities usually accepted by the court for the investment of funds placed under its administration as the company may select, and the interest on any such securities is to be paid to the company (c).

Different
classes of
business.

1086. Where a company carries on or intends to carry on assurance business of more than one class, a separate sum of £20,000 must be deposited and kept deposited as respects each class of business (d). It is not, however, necessary for the company to make or keep a deposit in respect of fire or accident insurance business where the company has made a deposit in respect of any other class of assurance business. Where a company, having made a deposit in respect of fire or accident insurance business, commences to carry on life assurance business or employers' liability insurance business, it may transfer the deposit so made to the account of that other business, and, after such transfer, the deposit is to be treated as if it had been made in respect of such other business (e).

Separate
assurance
fund.

A deposit, made in respect of any class of business in respect of which a separate assurance fund is required to be kept, is deemed to form part of that fund, and all interest accruing due on any such deposit, or the securities in which it is for the time being invested, must be carried by the company to that fund (f).

Deposit for
proposed
company.

1087. Where an assurance company is in the course of being registered, the deposit may be made by the subscribers of its memorandum of association, or any of them, in the name of the proposed company, and, on the incorporation of the company, the deposit is deemed to have been made by and to be part of the assets of the company. The registrar is not to issue the company's certificate of incorporation until the deposit has been made (g).

Life
assurance
company's

1088. Where a company carries on life assurance business, the obligation to deposit and keep deposited the £20,000 applies notwithstanding that the company has previously made and withdrawn its deposit, or been exempted from making any deposit under any enactment repealed by the Act of 1909 (h).

(b) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 2 (5).

(c) *Ibid.*, s. 2 (2).

(d) *Ibid.*, s. 2 (4).

(e) *Ibid.*, ss. 31 (d), 32 (c).

(f) *Ibid.*, s. 2 (4). As to separate assurance funds, see p. 629, *post*.

(g) *Ibid.*, s. 2 (3). A change of investment may be obtained before the company is registered (*Re Blue Ribbon Life, Accident, Mutual and Industrial Assurance Co.* (1889), 6 T. L. R. 6). Compare Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), s. 1, which was applied to employers' liability insurance companies by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907.

(h) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 30 (c). Under the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 3, the deposit required by that Act to be made was returned to the company when the life assurance fund, accumulated out of premiums, amounted to £40,000; see *Re Scottish Life Assurance Co.*, [1887] W. N. 64. As to the return of the deposit under that Act, see also *Re Wool Industries Employers' Insurance Association, Ltd.*,

1089. The provisions of the Act of 1909 relating to deposits do not apply to the fire (*i*), accident (*k*), employers' liability (*l*), or bond investment business (*m*) carried on by a company, if the company commenced to carry on that business within the United Kingdom, in the case of employers' liability business before August 28th, 1907, and in the case of the other businesses before December 3rd, 1909.

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Where a company carries on fire insurance business, the provisions of the Act of 1909 relating to deposits do not apply with respect to that business, where the company is an association of owners or occupiers of buildings or other property, and satisfies the Board of Trade that it is carrying on or is about to carry on business wholly or mainly for the purpose of the mutual insurance of its members against damage by fire caused to the houses or other property owned or occupied by them (*n*).

Mutual fire
insurance
companies.

1090. Where a company carries on employers' liability insurance business, as soon as the employers' liability fund, set apart and secured for the satisfaction of the claims of policy-holders of that class, amounts to £40,000, the Paymaster-General must, if the company has made a deposit in respect of any other class of assurance business, return to the company the money deposited in respect of its employers' liability insurance business, and it is no longer necessary for the company to keep any sum deposited in respect of that business, so long as the sum deposited in respect of any other class of assurance business is kept deposited (*o*). A similar provision applies to a company carrying on bond investment business, as soon as the bond investment fund set apart and secured for the satisfaction of the claims of the policy-holders of that class amounts to £40,000 (*p*).

Return of
deposit.

SUB-SECT. 9.—*Separate Funds.*

1091. Where an assurance company transacts other business besides that of assurance, or transacts more than one class of assurance business, a separate account must be kept of all receipts in respect of the assurance business, or of each class of assurance business. The receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, must be carried to and form a separate assurance fund with an appropriate name,

Separate
accounts of
receipts.

[1899] W. N. 259; and for cases where the company has amalgamated with or transferred its business to another company, see *Ex parte Scottish Economic Life Assurance Society* (1890), 45 Ch. D. 220; *Re Popular Life Assurance Co., Ltd.*, [1909] 1 Ch. 80; *Re Life and Health Assurance Association, Ltd.*, [1910] 1 Ch. 458.

(*i*) Assurance Companies Act, 1909 (9 Edw. 7, c. 69), s. 31 (*b*).

(*k*) *Ibid.*, s. 32 (*b*).

(*l*) *Ibid.*, s. 33 (*d*).

(*m*) *Ibid.*, s. 34 (*b*).

(*n*) *Ibid.*, s. 31 (*c*).

(*o*) *Ibid.*, s. 33 (*e*); and see *Re Colonial Mutual Life Assurance Society* (1882), 21 Ch. D. 537; *Re Scottish Life Assurance Co.*, [1887] W. N. 64; and *Re Life and Health Assurance Association, Ltd.*, *supra*.

(*p*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 34 (*c*).

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although investments of any such fund need not be kept separate from the investments of any other fund. A fund of any particular class is as absolutely the security of the policy-holders of that class as though it belonged to a company carrying on no other business than assurance business of that class. With certain exceptions (q), it is not liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and must not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable (r).

The above provisions do not apply to fire or accident insurance business (s).

Life
assurance
business.

1092. Where a company carries on life assurance business, any business carried on by it which, by the provisions of any special Act relating to the company, is to be treated as life assurance business is to continue to be so treated, and not deemed to be other business or a separate class of business (t).

In the case of a company carrying on life assurance business, and established before August 9th, 1870, by the terms of whose deed of settlement the whole of the profits of all the business carried on by the company are paid exclusively to the life policy-holders, and on the face of whose life policies the liability of the life assurance fund in respect of the other business distinctly appears, the provisions of the Act of 1909 requiring the separation of funds, and exempting the life assurance fund from liability for contracts to which it would not have been liable had the business of the company been only that of life assurance, do not apply (a).

(q) Nothing in the Act of 1909, providing that the life assurance fund is not to be liable for any contracts for which it would not have been liable had the business of the company been only that of life assurance, affects the liability of that fund, in the case of a company established before August 9th, 1870, for contracts entered into by the company before that date (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 30 (e); see *ibid.*, s. 3; and compare Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 4).

(r) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 3. There is a similar provision as to life assurance companies in s. 4 of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), but that section apparently only applied in the case of a company established after August 9th, 1870, and does not apply to any contracts made by an existing company, by the terms of whose deed of settlement the whole of the profits of all the business area are paid exclusively to the life policy-holders, and on the face of which contracts the liability of the amount distinctly appears. But by s. 2 of the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), s. 4 of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), was declared applicable to every company established before 1870, although the Acts of 1870 and 1872 are not to diminish the liability of the life assurance fund for any contracts of the company entered into before August 9th, 1870. As to what is a separate sum capable of being carried to a separate fund, see *Re Nelson & Co.*, [1905] 1 Ch. 551. For a form of scheme to carry out s. 4 of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), see *Re British Widows' Assurance Co.*, [1905] 2 Ch. 40, C. A. In the case of employers' liability insurance companies carrying on other businesses, there is a similar provision; see Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907.

(s) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), ss. 31 (e), 32 (d).

(t) *Ibid.*, s. 30 (g).

(a) *Ibid.*, s. 30 (f); compare Life Assurance Companies Act, 1870 (33 & 34

SUB-SECT. 10.—*Annual and other Statements and Actuarial Reports.*

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Companies
Act, 1909.Annual
accounts.
Quinquennial
valuation and
actuarial
report.

1093. Every assurance company must, at the expiration of each financial year (*b*) of the company, prepare in the prescribed form—(1) a revenue account for the year (*c*); (2) a profit and loss account (*d*), except where the company carries on assurance business of one class only and no other business; and (3) a balance-sheet (*e*).

Every assurance company must, once in every five years or at such shorter intervals as may be prescribed by the instrument constituting the company, or by its regulations or bye-laws (and also whenever at any other time an investigation into the financial condition of the company is made with a view to the distribution of profits, or the results of which are made public), cause an investigation to be made into its financial condition, including a valuation of its liabilities by an actuary (*f*). An abstract of the actuary's (*g*) report must be made in the prescribed form.

In the case of a mutual company, however, which carries on life assurance business, and whose profits are allocated to members wholly or mainly by annual abatements of premium, the abstract of the actuary's report on the financial condition of the company may be made and returned at intervals not exceeding five years. Where, however, such return is not made annually it must include particulars as to the rates of abatement of premiums applicable to

Vict. c. 61), s. 4, as amended by Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), s. 2; and the similar provisions as to employers' liability insurance companies in the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907.

(*b*) "Financial year" means each period of twelve months at the end of which the balance of the accounts of the assurance company is struck, or, if no such balance is struck, then the calendar year (*ibid.*, s. 29). As to the meaning of the expression in the existing Acts relating to life assurance companies, see Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 2, which by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, was applied to employers' liability insurance companies.

(*c*) For the form or forms applicable to the class or classes of business carried on by the company, see Assurance Companies Act, 1909 (9 Edw. 7, c. 49), Sched. I.

(*d*) For the form, see *ibid.*, Sched. II.

(*e*) *Ibid.*, s. 4. For the form, see *ibid.*, Sched. III. Somewhat similar provisions as regards life assurance companies are contained in ss. 5 and 6 of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), and similar statements are required by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, in the case of employers' liability insurance companies. Any assurance company to which the provisions of the Life Assurance Companies Acts, 1870 to 1872, as to the annual statements apply with or without modifications, and which complies with those provisions, need not make the statement required of insurance companies by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 108 (6); see p. 618, *ante*.

(*f*) The term "actuary" means an actuary possessing such qualifications as may be prescribed by rules to be made by the Board of Trade (*ibid.*, s. 29).

(*g*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 5. For the form or forms applicable, see *ibid.*, Sched. IV. The provisions of the section are, however, modified in the cases of accident and employers' liability insurance companies by ss. 32 (a) and 33 (c); see p. 632, *post*. Under the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 7, the investigation and abstract are only required once in every ten years, or at such shorter intervals as are prescribed by its instrument of constitution or regulation, where a life assurance company has been established before August 9th, 1870.

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Statements
as to business
generally
applicable.

Accounts etc.
to be
deposited
with Board
of Trade.

different classes or series of assurances allowed in each year during the period which has elapsed since the previous return (*h*).

1094. Every assurance company, with certain exceptions (*i*), must prepare a statement of its assurance business at the date to which its accounts are made up for the purposes of any such investigation in the prescribed form (*j*). If the investigation is made annually by any company, it may prepare such a statement at any time, so that it is made at least once in every five years (*k*).

1095. Every account, balance-sheet, abstract, or statement required by the Act of 1909 to be made must be printed, and four copies thereof, one of which must be signed by the chairman (*l*) and two directors of the company and by its principal officer, and, if the company has a managing director, by him also, must be deposited at the Board of Trade within six months after the close of the period to which it relates. The Board may extend the period for deposit by any period not exceeding three months (*m*).

(*h*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 30 (*h*).

(*i*) Namely, (1) a company carrying on fire insurance business (*ibid.*, s. 31 (*a*)); (2) a company carrying on accident insurance business; but the company must annually prepare a statement of its accident insurance business in the form in *ibid.*, Sched. IV., applicable to accident insurance business, and the statement must be printed, signed, and deposited at the Board of Trade in accordance with *ibid.*, s. 7 (*ibid.*, s. 32 (*a*)); see *infra*; (3) a company carrying on employers' liability insurance business, which must annually prepare a statement of its employers' liability insurance business in the form in *ibid.*, Sched. IV., and applicable to employers' liability insurance business, and must cause an investigation of its estimated liabilities to be made by an actuary so far as may be necessary to enable the provisions of that form to be complied with; and the statement must be printed, signed and deposited at the Board of Trade in accordance with *ibid.*, s. 7 (*ibid.*, s. 33 (*c*)); see *infra*. Under the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, schedule, r. 8, an annual statement of liabilities is required. Where a company carries on bond investment business, the first statement of the bond investment business of the company must be deposited at the Board of Trade on or before June 30th, 1911 (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 34 (*d*)).

(*j*) For the form or forms applicable, see Assurance Companies Act, 1909 (9 Edw. 7, c. 49), Sched. V.

(*k*) *Ibid.*, s. 6. In the case of life assurance companies the Act of 1870 requires the statement of business to be made within nine months after the date to which accounts are made up for the purposes of the investigation (Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 8); see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 108; and p. 618 *ante*.

(*l*) The term "chairman" means the person for the time being presiding over the board of directors or other governing body of the assurance company (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 29); and compare Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 2, applied to employers' liability insurance companies by the Order in Council of 1907.

(*m*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 7 (1). The Act of 1870, as amended, contains a somewhat similar provision as regards life assurance companies (Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 10; Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), s. 3). There is a similar provision as to employers' liability assurance companies in the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907. Where an assurance company registered under the Companies

There must also be deposited with every revenue account and balance-sheet of a company any report on the affairs of the company submitted to the shareholders or policy-holders of the company in respect of the financial year to which the account and balance-sheet relates (n).

The Board must consider the accounts, balance-sheets, abstracts, and statements deposited with it, and if any such account, balance-sheet, abstract, or statement appears to the Board to be inaccurate or incomplete in any respect, the Board is to communicate with the company with a view to the correction of any such inaccuracies and the supply of deficiencies (o).

A printed copy of the last-deposited accounts, balance-sheet, abstract, or statement must, on the application of any shareholder or policy-holder of the company, be forwarded to him by the company by post or otherwise (p).

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Board of
Trade
supervision.

Sending
copies of
documents to
shareholders.

SUB-SECT. 11.—*Amalgamation and Transfer of Companies.*

1096. Apart from statute law, the position of a company which amalgamates with another by agreement is analogous to that of a man who enters into partnership with another; the two companies do not become jointly liable to their respective separate creditors, and neither becomes liable for the debts of the other (q).

General
effect of
amalgama-
tion.

1097. The enactment as to transfer of a life assurance company's business (r), for which the provision stated below is substituted, did not give power to an assurance company to transfer its business to another company. Where independently of the enactment there was such a power the enactment only contemplated the whole assurance business being transferred, without any reduction being made in existing policies, or any new contracts being made with

Transfer of
business
of life
assurance
company.

Acts in any year deposits its accounts and balance-sheet in accordance with s. 7 of the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), the company may, at the same time, send to the registrar a copy of such accounts and balance-sheet; and, where such copy is so sent, it is unnecessary for the company to send to the registrar a statement in the form of a balance-sheet as required by s. 26 (3) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and the copy of the accounts and balance-sheet so sent is to be dealt with in all respects as if it was a statement sent in accordance with that sub-section (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 7 (4)).

(n) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 7 (3).

(o) *Ibid.*, s. 8. A similar provision in the case of life assurance is contained in the Act of 1870 (Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 11), which has been applied to employers' liability companies by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907.

(p) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 7 (2).

(q) Lindley on Companies, 6th ed., p. 368; and see titles CONTRACT, Vol. VII., p. 507; PARTNERSHIP. As to the meaning of "amalgamation," see *Re Empire Assurance Corporation, Ex parte Bagshaw* (1867), L. R. 4 Eq. 341, 347; *New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. Peacock*, [1894] 1 Q. B. 622, 632, C. A.; *Wall v. London and Northern Assets Corporation*, [1898] 2 Ch. 469, C. A.; *Re South African Supply and Cold Storage Co., Wild v. Same Co.*, [1904] 2 Ch. 268. An arrangement between two or more insurance companies as to re-insuring is not amalgamation (*Re Norwich Equitable Fire Assurance Society, Royal Insurance Co.'s Claim* (1887), 57 L. T. 241).

(r) Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 14.

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Rights of
 policy-
 holders.

Where court's
 sanction
 required.

the holders of policies (s). Insurance companies registered with unlimited liability generally grant policies and annuities on the condition that only the assets of the company are to be liable in respect of the same (a). Such a contract does not give the policyholder or annuitant a specific charge or lien on the assets, or a preferential right to be paid as against other creditors (b). A policyholder may, however, even before his claim has become payable, obtain an injunction to prevent the funds from being misapplied, as, for instance, under an amalgamation and transfer which is contrary to the transferring company's deed of settlement (c). Subject to this, and to the statutory provision mentioned below in the case of insurance companies to which it relates, a transfer in pursuance of the powers given by an insurance company's instrument of constitution is valid, so as to free the transferor company from the claims of policy-holders and annuitants (d).

1098. No assurance company can amalgamate with another, or transfer its business to another, unless the amalgamation or transfer is sanctioned by the court in accordance with the Act of 1909 (e),

(s) *Re Sovereign Life Assurance Co.* (1889), 42 Ch. D. 540.

(a) As to the validity of such contracts limiting liability, see *Halket v. Merchant Traders' Insurance Association* (1849), 13 Q. B. 960; *Hallett v. Dowdall* (1852), 18 Q. B. 2, Ex. Ch.; *Alexander v. Worman* (1860), 6 H. & N. 100; *Taft v. Harrison* (1853), 10 Hare, 489. As to incorporated companies, see *Re Athenæum Life Assurance Co., Ex parte Prince of Wales Life etc. Co.* (1853), 3 De G. & J. 660, C. A.; *Halket v. Merchant Traders' Insurance Association*, *supra*; *Evans v. Coventry* (1857), 8 De G. M. & G. 835, C. A. Nothing in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), invalidates any provision in a policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract (*ibid.*, s. 123 (1) (vi.)).

(b) *Re Sovereign Life Assurance Co.*, [1892] 3 Ch. 279, C. A.

(c) *Kearns v. Leaf* (1864), 1 Hem. & M. 681; *Re State Fire Insurance Co.* (1863), 1 Hem. & M. 457. As to the return of the deposit, see *Re Life and Health Assurance Association*, [1910] 1 Ch. 458.

(d) *Hort's Case* (1875), 1 Ch. D. 307, C. A.; *Cocker's Case* (1876), 3 Ch. D. 1, C. A.; *Dowse's Case* (1876), 3 Ch. D. 384, C. A. As regards the effect of amalgamation or transfer on the rights of general creditors, whose rights are not limited to any particular fund, see title CONTRACT, Vol. VII., p. 507; and as to insurance companies in particular, see *Re India and London Life Assurance Co.* (1872), 7 Ch. App. 651; *Re Smith, Knight & Co., Ex parte Gibson* (1869), 4 Ch. App. 662; *Re National Provincial Life Assurance Society* (1870), L. R. 9 Eq. 306. S. 7 of the Life Assurance Companies Act, 1872 (36 & 37 Vict. c. 41), provides that where a company, either before or after August 6th, 1872, has transferred its business to or been amalgamated with another company, no policyholder in the first-mentioned company who pays to the other company the premiums accruing on his policy is by any such payment after August 6th, 1872, or by reason of any other act done after that date, to be deemed to have abandoned any claim against the first-mentioned company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorised; as to where the transferor office is discharged by the policyholder accepting the new office, see *Re National Provincial Life Assurance Society*, *supra*; *Re International Life Assurance Society and Hercules Insurance Co., Ex parte Blood* (1870), L. R. 9 Eq. 316. In the case of an employers' liability insurance company, which either before or after November 2nd, 1907, has so transferred or been amalgamated, a similar provision applies, but these provisions are not re-enacted in the Assurance Companies Act, 1909 (9 Edw. 7, c. 49).

(e) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 13 (4); and as to

except where the only classes of assurance business carried on by both of the companies are fire insurance business or accident insurance business, or fire insurance business and accident insurance business (*f*).

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to application
for sanction.

1099. Where it is intended to amalgamate two or more assurance companies, or to transfer the assurance business of any class from one assurance company to another company, before application is made to the court to sanction the proposed arrangement the following requirements must be complied with: (1) notice of the intention to make the application must be published in the *London Gazette*; (2) a statement of the nature of the amalgamation or transfer, as the case may be, together with an abstract containing the material facts embodied in the agreement or deed under which the amalgamation or transfer is proposed to be effected, and copies of the actuarial or other reports upon which the agreement or deed is founded, including a report by an independent actuary, must, unless the court otherwise directs, be transmitted to each policy-holder of each company in the prescribed manner (*g*). It is not, however, necessary to transmit such statement and other documents to policy-holders other than life, endowment, sinking fund, or bond investment policy-holders, or, in the case of a transfer, to such policy-holders if the business transferred is not life assurance business or bond investment business (*h*); and (3) the agreement or deed under which the amalgamation or transfer is effected must be open for the inspection of the policy-holders and shareholders, at the offices of the companies, for a period of fifteen days after the publication of the notice in the *London Gazette* (*i*).

1100. The directors of any one or more of the companies intending to amalgamate, or to effect a transfer, may apply to the court by petition to sanction the proposed arrangement, and the court may sanction it (*j*), unless, in the case of a company which carries on life assurance business, the life policy-holders representing

Petition.

life assurance companies, see *Re Briton Life Association*, [1887] W. N. 122; and *Re Argus Life Assurance Co.* (1888), 39 Ch. D. 571. For form of order sanctioning a transfer and scheme of arrangement, see *Re New Era Assurance Corporation* (1909), 53 Sol. Jo. 743.

(*f*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), ss. 31 (*f*), 32 (*e*).

(*g*) That is, the manner prescribed by s. 136 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); see p. 678, *post*.

(*h*) The notice required by the section must be given to each policy-holder before the petition is heard (*Re Briton Life Association*, *supra*, where the petition was ordered to stand over, so that colonial policy-holders might be served. But notices need not be served on holders of policies coming into existence between the dates of the petition and the hearing (*Re Universal Life Assurance Society* (1901), 18 T. L. R. 198).

(*i*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 13 (3). A similar provision as to life assurance companies is contained in s. 14 of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), and this section has been applied, with modifications, to employers' liability insurance companies by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, schedule, r. 14.

(*j*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 13 (1), (2). Compare Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 14.

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The
Assurance
Companies
Act, 1909.

Documents to
 be deposited
 with Board
 of Trade.

one-tenth or more of the total amount assured in the company dissent from the amalgamation or transfer (*k*).

Where an amalgamation takes place between any assurance companies, or where any assurance business of one such company is transferred to another company, the combined company or the purchasing company, as the case may be, must, within ten days from the date of the completion of the amalgamation or transfer, deposit with the Board of Trade (1) certified copies of statements of the assets and liabilities of the companies concerned in such amalgamation or transfer, together with a statement of the nature and terms of the amalgamation or transfer; (2) a certified copy of the agreement or deed under which the amalgamation or transfer is effected; (3) certified copies of the actuarial or other reports upon which that agreement or deed is founded; and (4) a declaration, under the hand of the chairman and the principal officer of each company, that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is therein fully set forth, and that no other payments beyond those set forth have been made, or are to be made, either in money, policies, bonds, valuable securities, or other property by or with knowledge of any parties to the amalgamation or transfer (*l*).

SUB-SECT. 12.—*Winding up.*

Order.

1101. The court (*m*) may order the winding up of an assurance company in accordance with the Act of 1908 (*n*). The provisions of that Act (*o*) apply accordingly, subject to the following modifications: (1) that the company may be ordered to be wound up on the petition of ten or more policy-holders owning policies of an aggregate value of not less than £10,000; and (2) that such a petition must not be presented except by the leave of the court, which leave is not to be granted until a *prima facie* case has been established to the satisfaction of the court, and until security for costs for such amount as the court thinks reasonable has been given (*p*).

(*k*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 30 (*d*).

(*l*) *Ibid.*, s. 14. This is a re-enactment of s. 15 of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), which only applies to life assurance companies, but has been applied to employers' liability assurance companies by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907. It is not clear whether the date of the "completion of the amalgamation or transfer" is when the arrangement has been agreed upon or when it is sanctioned by the court. As to payment out of the deposit, see p. 629, *ante*.

(*m*) "Court" means the High Court of Justice in England, except in the case of an assurance company registered or having its head office in Ireland, when it means the High Court of Justice in Ireland, and except in the case of an assurance company registered or having its head office in Scotland, when it means, in the provisions of the Act other than those relating to deposits, the Court of Session in either division thereof (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 29).

(*n*) *Ibid.*, s. 15.

(*o*) See pp. 391 *et seq.*, *ante*.

(*p*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 15. The owner of an investment bond is, it seems, a policy-holder within the meaning of this section (*Re British Equitable Bond and Mortgage Corporation*, [1910] 1 Ch. 574). The Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), contains a somewhat similar provision as regards life assurance companies, but it is confined to the case where the company is insolvent (*ibid.*, s. 21). This was, in substance, applied to employers' liability insurance companies by the Employers' Liability

Continuing default in compliance with the requirements of the Act of 1909 is a ground for winding up the company (q).

1102. Where an insurance company is being wound up by or subject to the supervision of the court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding up must be estimated in the prescribed manner (r).

1103. An annuity is to be valued according to the tables used by the company which granted the annuity at the time of granting it, and, where such tables cannot be ascertained or adopted to the satisfaction of the court, then according to such rate of interest and table of mortality as the court directs. The value of a life policy is to be the difference between the present value of the reversion in the sum assured according to the contingency upon which it is payable, including any bonus or addition made before the commencement of the winding up, and the present value of the future annual premiums. In calculating such present values interest is to be assessed at such rate, and the rate of mortality according to such tables, as the court may direct. The premium to be calculated is to be such premium as, according to the said rate of interest and rate of mortality, is sufficient to provide for the risk incurred by the office in issuing the policy, exclusive of any addition thereto for office expenses and other charges (s).

1104. As regards fire policies, the value of a current policy is to be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid (t).

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The
Assurance
Companies
Act, 1909.

Estimating
value of
policy.

Valuation of
life policies
and annuities.

Valuation of
fire policies

Insurance Companies (Adaptation of Enactments) Order, 1907. There is no need to show a *prima facie* case of insolvency where the company is in voluntary liquidation (*Re British Alliance Assurance Corporation* (1878), 9 Ch. D. 635). The court has jurisdiction under the section in the case of an unregistered company (*Re Great Britain Mutual Life Assurance Society* (1880), 16 Ch. D. 246, C. A.); compare *Re Bank of London and National Provincial Insurance Association* (1871), 6 Ch. App. 421; and see p. 651, *post*. As to the test of insolvency before the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), see *Re European Life Assurance Society* (1869), L. R. 9 Eq. 122.

(q) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 15.

(r) That is, the manner made applicable to policies and liabilities of that class by *ibid.*, Sched. VI. (*ibid.*, s. 17 (1)). This is, in substance, an extension of the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), s. 5, to the other assurance companies affected by the Act of 1909. S. 5 of the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), has by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, been applied, with modifications, to employers' liability insurance companies. The rules in Sched. VI., and also in Sched. VII., to the Act of 1909, are of the same effect, and may be repealed, altered, or amended, as if they were rules made in pursuance of s. 238 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and rules may be made under that section for the purpose of carrying into effect the provisions of the Act of 1909 with respect to the winding up of assurance companies (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 17 (2)).

(s) *Ibid.*, Sched. VI., r. (A). This is a re-enactment of Sched. I. to the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41).

(t) Assurance Companies Act, 1909 (9 Edw. 7, c. 49, Sched. VI., r. (B)).

SECT. 8.

**The
Assurance
Companies
Act, 1909.**

Valuation of
accident
policies.

1105. As regards accident policies, the present value of a periodical payment is, in the case of total permanent incapacity, to be such an amount as would, if invested in the purchase of a life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity equal to 75 per cent. of the annual value of the periodical payment, and, in any other case, such proportion of such amount as may, under the circumstances of the case, be proper. The value of a current policy is to be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid (a).

Valuation in
case of
employers'
liability
policies.

1106. As regards employers' liability policies, the present value of a weekly payment, in respect of total permanent incapacity, is to be such an amount as would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to 75 per cent. of the annual value of the weekly payment, and, in any other case, such proportion of such amount as may, in the circumstances of the case, be proper. The value of a current policy is to be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, together with, in the case of a policy under which any weekly payment is payable, the present value of that weekly payment (b).

Bonds and
certificates.

1107. As regards bonds or certificates, the value of a policy or certificate is to be the difference between the present value of the sum assured, according to the date at which it is payable, including any bonus or addition made before the commencement of the winding up, and the present value of the future annual premiums. In calculating such present values interest is to be assumed at such rate as the court may direct. The premium to be calculated is to be such premium as, according to the said rate of interest, is sufficient to provide for the sum assured by the policy or certificate, exclusive of any addition for office expenses and other charges (c).

Proofs on
policies.

1108. A proof in respect of a policy may be made although the premium has not been paid, provided that the winding up commenced before the expiration of the days of grace (d), or if it has not fallen due (e).

Contribu-
tories.

1109. Shareholders may sometimes be liable as contributories before policy-holders who are also members (f), though the latter

(a) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), Sched. VI., r. (C).

(b) *Ibid.*, Sched. VI., r. (D); compare the existing rules under the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907.

(c) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), Sched. VI., r. (E).

(d) *Re Albert Life Assurance Co.*, *Cook's Policy* (1870), L. R. 9 Eq. 703.

(e) *Re English and Irish Church and University Assurance Society* (1862), 1 Hem. & M. 79; and as to proofs by policy-holders and annuitants, see *Craig's Executors' Case* (1870), L. R. 9 Eq. 706, 719, 720; *Lancaster's Case* (1871), L. R. 14 Eq. 72, n.; *Holdich's Case* (1872), L. R. 14 Eq. 72; *Re Northern Counties of England Fire Insurance Co.*, *Macfarlane's Claim* (1880), 17 Ch. D. 337.

(f) *Re Albion Life Assurance Society* (1880), 16 Ch. D. 83, C. A.

are also under some liability as contributories (*g*). In the case of mutual assurance societies, the members are often under their constitution not personally liable in respect of the policies issued (*h*). A mutual insurance policy on a ship will not impose liability as a contributory unless properly stamped (*i*).

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1110. Where an assurance company is being wound up by or subject to the supervision of the court, the liquidator is to ascertain the value of its liability to all persons appearing by its books to be entitled to or interested in policies granted by it and give them notice of such value in such manner as the court directs. Any person to whom notice is given is bound by the value so ascertained, unless he gives notice of his intention to dispute the value in the manner and within a time to be prescribed by a rule or order of the court (*k*).

Notice of
valuation to
policy-holders.

1111. Where policies are payable out of the company's funds, the costs of realising the funds are not thrown upon them, but are payable out of calls made on the shareholders, like other winding-up costs (*l*). Where a company is incorporated with a share capital, but with unlimited liability, and the liability to policy-holders and annuitants is limited by the contract with them, they are entitled to be paid *pari passu* with general creditors out of the assets, including uncalled capital. The other creditors are, however, entitled to payment not only out of the funds, but by calls beyond those made in respect of the nominal capital (*m*). The fact that a policy has become payable does not give the holder priority over policies which are not yet payable (*n*).

Funds out
of which
policy-holders
are payable.

(*g*) *Winstone's Case* (1879), 12 Ch. D. 239. An assignee of such a policy not put on the register before winding up was held not to be a contributory (*Sanders' Case* (1882), 20 Ch. D. 403).

(*h*) *Re Great Britain Mutual Life Assurance Society* (1880), 16 Ch. D. 246, C. A.

(*i*) *Smith's Case* (1869), 4 Ch. App. 611; *Blyth & Co.'s Case* (1872), L. R. 13 Eq. 529; compare *Re London Marine Insurance Association* (1869), L. R. 8 Eq. 176; *Re Teignmouth and General Mutual Shipping Association, Martin's Claim* (1872), L. R. 14 Eq. 148 (all cases on stat. (1795) 35 Geo. 3, c. 63, repealed by stat. (1867) 30 & 31 Vict. c. 23; see now Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 93).

(*k*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), Sched. VII. A similar provision as to life assurance companies is contained in the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), Sched. II. A similar provision was made by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, with reference to employers' liability insurance companies.

(*l*) *Re Professional Life Assurance Co.* (1867), 3 Ch. App. 167; *Re Accidental Death Insurance Co.* (1878), 7 Ch. D. 568; *Re Agriculturist Cattle Insurance Co., Ex parte Official Manager* (1874), 10 Ch. App. 1; *Re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. 352.

(*m*) *Re English and Irish Church and University Assurance Society* (1862), 1 Hem. & M. 79; *Re State Fire Insurance Co.* (1863), 1 De G. J. & Sm. 634, C. A.; *Re Professional Life Assurance Co., supra*; *Re International Life Assurance Society* (1876), 2 Ch. D. 476, C. A. As to the rights of claimants where the company is unincorporated, see *Re Great Britain Mutual Life Assurance Society, supra*.

(*n*) *Re International Life Assurance Society, McIver's Claim* (1870), 5 Ch. App. 424; *Lethbridge v. Adams, Ex parte International Life Assurance Society (Liquidator)* (1872), L. R. 13 Eq. 547.

SECT. 5.

The
Assurance
Companies
Act, 1909.Winding up
in case of
subsidiary
companies.

1112. Where the assurance business, or any part of the assurance business, of an assurance company has been transferred to another company, under an arrangement in pursuance of which the first-mentioned company (called the "subsidiary company"), or its creditors, has or have claims against the company to which such transfer was made (called the "principal company"), then, if the principal company is being wound up by or under the supervision of the court, the court is (subject as below mentioned) to order the subsidiary company to be wound up in conjunction with the principal company. The court may appoint the same person to be liquidator for the two companies and make provision with a view to the companies being wound up as if they were one company (*o*). The commencement of the winding up of the principal company is, save as otherwise ordered by the court, to be the commencement of the winding up of the subsidiary company (*p*).

In adjusting the rights and liabilities of the members of the several companies between themselves, the court is to have regard to the constitution of the companies, and to the arrangements entered into between them, in the same manner as it has regard to the rights and liabilities of different classes of contributories in the case of the winding up of a single company, or as near thereto as circumstances admit (*q*).

Where any company is alleged to be subsidiary, the court is not to direct it to be wound up unless the court is of opinion that it is subsidiary to the principal company, and that its winding up in conjunction with the principal company is just and equitable (*r*).

An application may be made in relation to the winding up of any subsidiary company in conjunction with a principal company by any creditor of, or person interested in, either company (*s*).

Where a company stands in the relation of a principal company to one company, and in the relation of a subsidiary company to some other company, or where there are several companies standing in the relation of subsidiary companies to one principal company, the court may deal with any number of the companies together or in separate groups, as it thinks most expedient, upon the principles above stated (*t*).

(*o*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 16 (1). Provisions similar to this and the other sub-sections of s. 16 are, as regards life assurance companies, contained in s. 4 of the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41); and have, by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, been applied to employers' liability insurance companies.

(*p*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 16 (2).

(*q*) *Ibid.*, s. 16 (3).

(*r*) *Ibid.*, s. 16 (4).

(*s*) *Ibid.*, s. 16 (5).

(*t*) *Ibid.*, s. 16 (6). S. 4 of the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), also provides that where any subsidiary company and principal company are being wound up by different branches of the court, the court to which appeals from such branches lie is to make an order directing in which branch the winding up of such companies is to be carried on.

SUB-SECT. 13.—*Reduction of Contracts.*

SECT. 5.

The
Assurance
Companies
Act, 1909.Reduction of
contracts.

1113. The court, in the case of an assurance company which has been proved to be unable to pay its debts, may, if it thinks fit, in place of making a winding-up order, reduce the amount of its contracts upon such terms and subject to such conditions as the court thinks just (*a*).

SUB-SECT. 14.—*Miscellaneous Provisions.*Alteration
of forms.

1114. The Board of Trade may, on the application or with the consent of an assurance company, alter the prescribed forms as respects that company, for the purpose of adapting them to the circumstances of that company (*b*).

Publication
of statements
as to capital.

1115. Where any notice, advertisement, or other official publication of an assurance company contains a statement of the amount of its authorised capital, the publication must also contain a statement of the amount of the capital which has been subscribed and the amount paid up (*c*).

Notices.

1116. Any notice required by the Act of 1909 to be sent to any policy-holder may be addressed and sent to the person to whom notices respecting the policy in question are usually sent, and any notice so addressed and sent is deemed and taken to be notice to the holder of the policy (*d*). Where, however, any person claiming to be interested in a policy has given to the company notice in writing of his interest, notice must also be sent to him at the address specified by him in his notice (*e*).

Board of
Trade's
annual
statement to
Parliament.

1117. The Board of Trade is to lay annually before Parliament the documents deposited with the Board during the preceding year, except reports on the affairs of assurance companies submitted to their shareholders or policy-holders, and may append to such documents any note of the Board thereon, and any correspondence in relation thereto (*f*).

(*a*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 18. There is a similar provision as to life assurance companies in the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 22, which was, by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, applied to employers' liability insurance companies. As to reducing contracts, see *Re Great Britain Mutual Life Assurance Society* (1880), 16 Ch. D. 246, C. A.; *Re Great Britain Mutual Life Assurance Society* (1882), 20 Ch. D. 352; *Re Nelson & Co.*, [1905] 1 Ch. 551.

(*b*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 22. For the prescribed forms, see *ibid.*, Schedules I.—V. This power previously existed in the case of life assurance companies and employers' liability insurance companies; see Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 9, and the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907.

(*c*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 12. Regard to this section must be had where prospectuses or advertisements are issued.

(*d*) *Ibid.*, s. 26. A similar provision previously applied to life assurance companies and employers' liability insurance companies; see Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 23, and Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907.

(*e*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 26.

(*f*) *Ibid.*, s. 27. Similar provisions already exist as regards life assurance

SECT. 5.

The
Assurance
Companies
Act, 1909.Custody and
inspection of
deposited
documents.

1118. The Board of Trade may direct any documents deposited with it under the Act of 1909 (*g*), or certified copies, to be kept by the registrar or by any other officer of the Board. Any such documents and copies are open to inspection, and copies may be procured by any person on payment of such fees as the Board directs (*h*).

A document is deemed to be deposited under the Act of 1909 with the Board of Trade if it is certified by the registrar, or by any person appointed in that behalf by the President of the Board, to be a document so deposited. A copy of any such document purporting to be certified by the registrar, or by any person so appointed, is to be received in evidence as if it were the original document, unless some variation between it and the original document is proved (*i*).

Penalties in
default.

1119. Any assurance company which makes default in complying with any of the requirements of the Act of 1909 is liable to a penalty not exceeding £100, or, in the case of a continuing default, to a penalty not exceeding £50 for every day during which the default continues. Every director, manager, or secretary, or other officer or agent of the company who is knowingly a party to the default is liable to a like penalty. If default continues for a period of three months after notice of default by the Board of Trade (published in one or more newspapers as the Board may, upon the application of one or more policy-holders or shareholders, direct), the default is a ground for the court to order the winding up of the company in accordance with the Act of 1908 (*k*).

Any person who signs an account, balance-sheet, abstract, statement, or other document required by the Act of 1909, which is false in any particular to his knowledge, is guilty of a misdemeanour, and liable on conviction on indictment to fine and imprisonment, or on summary conviction to a fine not exceeding £50 (*l*).

companies; see Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 24, as amended by Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), s. 3. These provisions were, by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, applied to employers' liability insurance companies.

(*g*) As to what documents are deposited, see p. 632, *ante*.

(*h*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 20; and see Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 18, as to life assurance companies. This section was, by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, applied to employers' liability insurance companies.

(*i*) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 21.

(*k*) *Ibid.*, s. 23; compare Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 18, which was, by the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, applied to employers' liability insurance companies. Every penalty imposed by the Act is to be recovered and applied in the same manner as penalties imposed by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), are recoverable and applicable (Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 25; see p. 317, *ante*).

(*l*) *Ibid.*, s. 24.

Part VII.—Companies registered under Repealed Statutes.

SECT. 1.—*Preliminary.*

1120. The legislature has from time to time varied in its views as to how, and under what conditions and restrictions, companies shall be incorporated or registered and carry on business. Companies lawfully formed and lawfully carrying on business are, however, to some extent allowed to continue in the same course. Where registration is enforced, time is given for compliance with new statutory requirements; and non-compliance is not, as a rule, such an offence as to make the non-complying company an illegal one (*m*).

SECT. 1. Preliminary.

Statutory recognition of existing companies

SECT. 2.—*Companies formed under the Act of 1844.*

1121. It is probable that no company registered only under the Companies Act, 1844 (*n*), now exists (*o*). The Act of 1844 gave some small privilege to existing companies (*p*), and some privileges as to registering with limited liability were in 1855 given to companies registered or registering under it (*q*). The Act of 1844 was, in 1856, for a time absolutely repealed, and companies under it were required to register under the Act of 1856 within a limited time (*r*). This repealing section was itself repealed, in 1857, by a curious enactment which left the Act of 1844 unrepealed as to companies under it which had not re-registered under the Act of 1856; but, although it rendered such companies incapable of suing in any court or of paying dividends, it provided that default in re-registering should not make the company an illegal one (*s*). A company so incapacitated, even though it was a legal entity, was not likely to refrain from registering itself under the Joint Stock Companies Acts, 1856, 1857. In fact, many companies formed under the Act of 1844 re-registered under the Acts of 1856, 1857 without changing the nature of their liability (*t*); and it is extremely probable that all existing companies formed under the Act of 1844 were so re-registered.

Companies under Act of 1844.

The Act of 1844 was finally repealed in 1862; but the repeal

(*m*) As to banking companies, see title BANKERS AND BANKING, Vol. I., p. 581; and p. 612, *ante*.

(*n*) 7 & 8 Vict. c. 110; see p. 25, *ante*.

(*o*) But companies originally registered under that Act, which have complied with the requirements of subsequent legislation, still exist, as, for instance, the Midland Railway Carriage and Wagon Co., Limited; see *Re Midland Railway Carriage and Wagon Co.* (1907), 23 T. L. R. 661.

(*p*) 7 & 8 Vict. c. 110, s. 58; see p. 26, *ante*.

(*q*) See Limited Liability Act, 1855 (18 & 19 Vict. c. 133); and p. 26, *ante*.

(*r*) Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), s. 107; see p. 27, *ante*.

(*s*) Joint Stock Companies Act, 1857 (20 & 21 Vict. c. 14), ss. 23, 24; see p. 28, *ante*.

(*t*) Thriving on Joint-Stock Companies, 4th ed., p. 280.

SECT. 2.
Companies
formed
under the
Act of 1844.

did not affect the incorporation of any company registered under that Act (*u*). The Act of 1862 applied to then existing companies, including companies formed under the Act of 1844 and re-registered under the Acts of 1856, 1857, in the same manner as it applied to companies registered but not formed under it, except as to the date which was to be regarded as the date of registration (*w*). Subsequent provisions of the Act of 1862 provided in effect that every company, except certain mutual companies, consisting of seven or more members, and duly constituted before 1862, might register under the Act, and, subject to certain restrictions, with limited liability (*x*). These provisions were practically identical with those contained in the Act of 1908 in regard to companies registering under Part VII. of that Act (*a*).

Application
of the Act
of 1908.

The Act of 1908 now applies to companies formed under the Act of 1844 and registered under the Joint Stock Companies Acts (*b*), or the Companies Act, 1862, in the same manner as it is declared to apply to companies registered but not formed under the Act of 1908 (*c*). Any company existing at the date when the Act of 1862 came into force, which might have registered under that Act, including companies formed under the Act of 1844, may register under the Act of 1908, and, subject to certain restrictions, with limited liability (*d*). A company registered as unlimited may register under the Act of 1908 as limited (*e*).

SECT. 3.—Companies formed under the Joint Stock Companies Acts.

Companies
formed under
the Joint
Stock Com-
panies Acts.

1122. As regards companies formed and registered under the Joint Stock Companies Acts (*f*), or any of them, the Act of 1862 was substituted for the Joint Stock Companies Acts, and applied to them in the same manner (as companies limited or unlimited as the case might be) as if they had been formed and registered under it (*g*). Table A to the Act of 1862 was not, however, to apply to them, and the date of original registration was still to be deemed the date of incorporation (*h*). Further, the power of altering regulations by special resolution, given by the Act of 1862, extended to altering any provisions contained in Table B to the Joint Stock Companies Act, 1856, and, in the case of an unlimited company, extended to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding the regulations were

(*u*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205, and Sched. III.

(*w*) *Ibid.*, s. 177.

(*x*) See *ibid.*, Part VII., ss. 179—198; and Thring on Joint-Stock Companies, 4th ed., p. 156.

(*a*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 196. As to the provisions of Part VII. of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), see pp. 39—44, 61, 62, *ante*.

(*b*) See note (*f*), *infra*.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 246.

(*d*) *Ibid.*, s. 249. As to the conditions in regard to and effect of such registration, see p. 63, *ante*.

(*e*) *Ibid.*, s. 57, see p. 63, *ante*.

(*f*) For the definition, see p. 37, *ante*.

Companies Act, 1862 (25 & 26 Vict. c. 89), s. 176.
Thring on Joint-Stock Companies, 4th ed., 155.

contained in the memorandum of association (i). Doubts were, nevertheless, at one time raised as to whether these companies were not required to re-register under the Act of 1862 (k).

The Act of 1862 provided for registration under it of then existing companies consisting of seven or more members, as has already been mentioned in regard to companies formed under the Act of 1844 (l). The Act of 1862 also empowered existing joint stock companies, as defined by the Act (m), with unlimited liability, to re-register under it with limited liability (n). The Companies Act, 1879, also enabled any company registered before or after August 15th, 1879, to re-register under the Companies Acts, 1862—1879, as a limited company (o).

The Act of 1908 applies to companies formed and registered under the Joint Stock Companies Acts (p), in the same manner, in the case of a company limited by shares, as if it had been formed and registered under the Act of 1908 as a company limited by shares; in the case of a company limited by guarantee, as if it had been formed and registered under that Act as a company limited by guarantee; and in the case of a company other than a limited company, as if it had been formed and registered under the Act of 1908 as an unlimited company, except that reference, express or implied, to the date of registration is to be construed as a reference to the date at which the company was registered under the Joint Stock Companies Acts (q).

Any company registered under the Joint Stock Companies Acts may register under the Act of 1908, and, subject to certain restrictions, with limited liability (r). A company registered as unlimited may also register under the Act of 1908 as limited (s).

SECT. 3.
Companies
formed
under the
Joint Stock
Companies
Acts.

Application
of the Act
of 1908.

SECT. 4.—Companies registered under the Act of 1862.

1123. The Act of 1908, which repeals the Act of 1862 (t), without, however, affecting the incorporation of any company under that Act or Table A in Sched. I. thereto (a), applies to companies formed and registered, or registered though not formed, under that Act, in the same manner as it applies to companies formed under the Joint Stock Companies Acts (b). Such companies cannot,

Companies
registered
under the
Companies
Act, 1862.

(r) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 176.

(k) *Re Torquay Bath Co.* (1863), 32 Beav. 581; *Bowes v. Hope Mutual Life Insurance and Honesty Guarantee Society* (1846), 11 Jur. (N. S.) 643, 11. L.; and *Re London Indiarubber Co.* (1866), 1 Ch. App. 329, cited in *Thring on Joint-Stock Companies*, 4th ed., p. 278. See also *Re Bank of London and National Provincial Insurance Association* (1871), 6 Ch. App. 421.

(l) See p. 26, *ante*.

(m) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 181.

(n) *Ibid.*, ss. 179, 180, 183. As to the effect of re-registration, see *ibid.*, s. 196; and p. 63, *ante*.

(o) Companies Act, 1879 (42 & 43 Vict. c. 76), s. 4.

(p) For the definition, see p. 37, *ante*.

Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 245, 285.

Ibid., s. 249; see p. 39, *ante*.

Ibid., s. 57 (1); see p. 63, *ante*.

25 & 26 Vict. c. 89.

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286 (1).

(b) *Ibid.*, s. 246; see p. 37, *ante*.

SECT. 4.
Companies
registered
under the
Act of
1862.
—

however, register under Part VII. of the Act of 1908 (c), though, if unlimited, they may register as limited under that Act (d).

Part VIII.—Unregistered Companies.

SECT. 1.—*In General.*

Application
of Act of
1908.

1124. The Act of 1908 (c), like the statutes which it replaces, provides for the incorporation of companies by registration (f). Companies, associations, societies, and some partnerships which are not registered under the Act or any Act which it replaces, are for the most part unregistered companies. The Act of 1908 only deals with unregistered companies (1) by prohibiting their existence where they are formed for certain purposes, with more than a specified number of members, and are not registered under the Act or formed in some other way pointed out by the Act itself (g); and (2) by providing for the winding up of an "unregistered company" as defined in the Act (h).

As regards some of the companies which are not registered or incorporated under the Act of 1908, or under any Act which it replaces, special statutory provisions have been made. Some of them are further subject not only to special enactments, but also to customs or usages which for the most part have to be proved by those who allege that the company is not subject to the ordinary law of partnership (i). Many companies have, without being registered or incorporated, obtained certain privileges generally attaching only to companies incorporated by royal charter, and these are known as "quasi-corporations" or "privileged companies" (k). Companies incorporated by or in pursuance of an Act of Parliament are not registered under the Act of 1908 or any Act which it replaces (l), nor are companies incorporated by royal charter (m) or limited partnerships (n) or City companies (o). Banking companies (p) and insurance companies (q) may or may not be registered under the Act of 1908 or some Act which it replaces. The companies which are governed to some extent by custom or

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 249 (1); see p. 63, *ante*.

(d) *Ibid.*, s. 57 (1); see p. 63, *ante*.

(e) 8 Edw. 7, c. 69.

(f) See p. 64, *ante*.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1; and see pp. 44–46, *ante*.

(h) See note (u), p. 647, *post*; and see p. 394, *ante*.

(i) See p. 654, *post*.

(k) See p. 751, *post*.

(l) As to statutory companies formed for public purposes, see p. 674, *post*; and title RAILWAYS AND CANALS.

(m) See p. 744, *post*.

(n) See title PARTNERSHIP.

(o) See p. 746, *post*.

(p) See p. 612, *ante*; and title BANKERS AND BANKING, Vol. I., p. 567 *et seq.*

(q) See p. 616, *ante*; and title INSURANCE.

usage and by special legislation are cost-book companies (r) and companies within the Stannaries jurisdiction, some of which only are cost-book companies (s). SECT. 1.
In General.

SECT. 2.—*Winding up.*

1125. Subject to the provisions of Part VIII. of the Act of 1908 (t), an unregistered company (u) may be wound up by the court under the Act, and all the provisions of the Act with respect to winding up apply, with the exceptions and additions stated Compulsory winding up.

(r) See p. 654, *post*.

(s) See p. 659, *post*.

(t) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 267—273. The provisions of Part VIII. of the Act with respect to unregistered companies are to be in addition to, and not in restriction of, any other provisions in the Act with respect to winding up companies by the court, and the court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under the Act; but an unregistered company is not, except in the event of its being wound up, to be deemed to be a company under the Act, and then only to the extent provided by Part VIII. thereof (*ibid.*, s. 273 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 204]). As to staying and restraining proceedings after the presentation of a winding-up petition, see *Rudow v. Great Britain Mutual Life Assurance Society* (1881), 17 17 Ch. D. 600, 612, C. A.

Nothing in Part VIII. of the Act affects the operation of any enactment providing for any partnership, association, or company being wound up, or being wound up as a company or as an unregistered company, under any enactment repealed by the Act of 1908, except that references in any such first-mentioned enactment to any such repealed enactment are to be read as references to the corresponding provision (if any) of the Act of 1908 (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (2).

(u) For the purposes of Part VIII. of the Act of 1908 the term “unregistered company” includes any partnership, association, or company consisting of more than seven members, any trustee savings bank certified under the Trustees Savings Banks Act, 1863 (26 & 27 Vict. c. 87), and any limited partnership (see Limited Partnerships Act, 1907 (7 Edw. 7, c. 24)); but not a railway company incorporated by Act of Parliament (except in so far as is provided by the Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), ss. 30—33, repealed by s. 10 of the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), and the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), s. 4, which provides that where a warrant has been granted for the abandonment of the whole railway of any railway company, the court may order such company to be wound up as if it were an unregistered company within the meaning of the section and any acts amending them); or a company registered under the Joint Stock Companies Acts (see p. 37, *ante*) or under the Companies Act, 1862, or under the Act of 1908 (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 267 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 199]). In the case of a limited partnership the provisions of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), with respect to winding up apply with such modifications (if any) as are provided by rules made by the Lord Chancellor with the concurrence of the President of the Board of Trade, and with the substitution of general partners for directors (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (vii.)). By the Limited Partnership (Winding-up) Rules, 1909 (March 29th, 1909), the provisions of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and the provisions of the Companies (Winding-up) Rules, 1909, so far as applicable to the proceedings in a winding up by the court are to apply to the winding up by the court of limited partnerships, subject to the many modifications made by the Limited Partnership (Winding-up) Rules; see title PARTNERSHIP.

SECT. 2.
Winding up.

Insurance
companies.

Number of
members
required.

Examples of
winding up.

below (x). No unregistered company is, however, to be wound up under the Act of 1908 voluntarily or subject to supervision (a).

There are special powers given to the court as to winding up insurance companies (b).

1126. The court cannot wind up an unregistered company unless it consists of at least eight members (c); it is sufficient if eight persons admit that they are members and that the association is insolvent (d). The word "members," as used above, means existing members; and does not include the representatives of deceased members or the trustees of bankrupt members, or past members (e); but a person may be a member of a company without being a shareholder (f). A partnership, association, or company consisting of less than eight members, and which cannot be wound up as an unregistered company under the Act of 1908, may be wound up in an ordinary action (g).

1127. The following may be wound up as unregistered companies:—A partnership of more than seven persons, not illegal, formed for trading purposes (h); a company unregistered at the date of the presentation of the petition, though afterwards registered under the Act of 1908 (i); a dock company incorporated by special Act, although it has power to make and work a branch railway for the purposes of its docks (k); a company incorporated by a royal charter (l); a company provisionally, but not completely, registered under the Companies Act, 1844 (m); a friendly and provident

(x) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) [Companies Act, 1862 (25 & 26 Vict. c. 82), s. 199]. This Act makes all the provisions of Part IV. applicable except as expressly excepted (*Rudow v. Great Britain Mutual Society* (1881), 17 Ch. D. 600, 612, C. A.).

(a) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (ii.).

(b) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), ss. 15–18; see p. 636. *ante*. And continued non-compliance with the requirements of the Act of 1909 may be a ground for winding up the company (*ibid.*, s. 23).

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 267; *Re Bolton Benefit Loan Society, Coop v. Booth* (1879), 12 Ch. D. 679.

(d) *Re South of France Pottery Works Syndicate* (1877), 36 L. T. 651. As to foreign unregistered companies not consisting of more than seven members, see *Re New York and Continental Line* (1909), 54 Sol. Jo. 117.

(e) *Re Bolton Benefit Loan Society, Coop v. Booth, supra*; *Re Bowling and Welby's Contract*, [1895] 1 Ch. 663, C. A.

(f) *Re South London Fish Market Co.* (1888), 39 Ch. D. 324, 335, C. A.; compare *Winstone's Case* (1879), 12 Ch. D. 239.

(g) *Re Bolton Benefit Loan Society, Coop v. Booth, supra*; and see *Jones v. Charlemont (Lord)* (1848), 16 Sim. 271; *Clements v. Bowes* (1852), 17 Sim. 167, 175; *Ward v. Sittingbourne and Sheerness Rail. Co.* (1874), 9 Ch. App. 488; *Re Lead Co.'s Workmen's Fund Society, Lowes v. Smelting Down Lead with Pit and Sea Coal (Governor and Co.)*, [1904] 2 Ch. 196.

(h) *Re Adansonia Fibre Co., Miles' Claim* (1874), 9 Oh. App. 635; *Re Royal Victoria Palace Theatre Syndicate* (1873), 29 L. T. 663; affirmed (1874) 30 L. T. 3, C. A.

(i) *Re Hercules Insurance Co.* (1871), L. R. 11 Eq. 321.

(k) *Re Exmouth Docks Co.* (1873), L. R. 17 Eq. 181.

(l) *Re Oriental Bank Corporation* (1885), 54 L. J. (OH.) 481, C. A.; *Re English, Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, 405, C. A.

(m) 7 & 8 Vict. c. 110; *Re Bank of London and National Provincial Insurance Association* (1871), 6 Ch. App. 421; compare *Womersley v. Merritt* (1867), L. R. 4 Eq. 695.

SECT. 2.
Winding up
—
Examples of
winding up.

society (n); an unincorporated building society (o); a mutual marine insurance association (p), but not if it consists of more than twenty members and was formed since 1862 (q); savings banks (r); a foreign or colonial company having a branch office and assets in this country (s), although a foreign liquidation is pending (t), but not if it only carries on business in England by means of agents (a); a prescriptive corporation regulated by statute (b); a railway company incorporated by special Act, where a warrant for the abandonment of the whole of its railway has been obtained (c); a tramway company

(n) *Re Alfreton District Friendly and Provident Society* (1863), 7 L. T. 817; *Re Lead Co.'s Workmen's Fund Society*, *Lowes v. Smelting Down Lead with Pit and Sea Coal (Governor and Co.)*, [1904] 2 Ch. 196.

(o) See title BUILDING SOCIETIES, Vol. III., p. 398.

(p) *Andrews' and Alexander's Case* (1869), L. R. 8 Eq. 176.

(q) *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, C. A.; *Re Arthur Average Association for British, Foreign and Colonial Ships*, *Ex parte Hargrove & Co.* (1875), 10 Ch. App. 542 (such an association being illegal).

(r) Trustee Savings Banks Act, 1887 (50 & 51 Vict. c. 47), s. 3; *Davies' Case* (1890), 45 Ch. D. 537.

(s) *Re Commercial Bank of India* (1868), L. R. 6 Eq. 517; *Re Matheson Brothers, Ltd.* (1884), 27 Ch. D. 225; *Re Commercial Bank of South Australia* (1886), 33 Ch. D. 174; *Re Mercantile Bank of Australia*, [1892] 2 Ch. 204; *Re Federal Bank of Australia* (1893), 62 L. J. (CH.) 561, C. A.; *Re Union Bank of Calcutta*, *Ex parte Watson* (1850), 3 De G. & Sm. 253; *Re Syria Ottoman Rail. Co.* (1904), 20 T. L. R. 217.

(t) *Re English, Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, 394, C. A.; *North Australian Territory Co. v. Goldsborough, Mort & Co.* (1889), 61 L. T. 716; compare *Re Australian Joint Stock Bank*, [1897] W. N. 48; *Re Queensland National Bank*, [1893] W. N. 128. Where there are liquidations both here and abroad, one is the principal and the other the ancillary liquidation; where an order is made to wind up a foreign company, the English courts assume that the principal liquidation will take place abroad, and confine the liquidator's powers to the English assets; but where a company registered in England, but with a branch office and the bulk of its business abroad, is being wound up voluntarily in this country, a subsequent compulsory winding up abroad is regarded as ancillary to the winding up here (*Re Federal Bank of Australia*, *supra*; *North Australian Territory Co. v. Goldsborough, Mort & Co.*, *supra*; see *Re English, Scottish and Australian Chartered Bank*, *supra*).

(a) *Re Lloyd Generale Italiano* (1885), 29 Ch. D. 219.

(b) *Re Faversham Free Fishermen (Company or Fraternity)* (1887), 36 Ch. D. 329, 335, C. A.

(c) Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), as amended by the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 31, and the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), s. 4. Under the last-mentioned Act the petition may be presented by the company or any person who can present a petition to wind up a company under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). See before that Act *Re North Kent Railway Extension Rail. Co.* (1869), L. R. 8 Eq. 356; and see *Kincaid's Case* (1870), L. R. 11 Eq. 192; *Re Skipton and Wharf Dale Rail. Co.* (1869), 20 L. T. 359; and see title RAILWAYS AND CANALS. The court having jurisdiction to wind up a railway company under the Abandonment of Railways Acts, 1850 and 1869 (13 & 14 Vict. c. 13; 32 & 33 Vict. c. 114), and the Acts amending them, is the High Court in England or Ireland, according as the railway was authorised to be made in England or Ireland, and the special provisions of those Acts apply to the winding up, with the substitution of references to the Act of 1908 for references to the Companies Acts, 1862 and 1867. Subject to general rules, and to orders of transfer, made under the Judicature Act, 1873 (36 & 37 Vict. c. 66), the jurisdiction of the High Court in England under this provision is to be exercised by the Chancery Division of that court (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (v)).

SMOT. 2. incorporated by special Act (*d*); an incorporated canal company (*e*);
Winding up an incorporated waterworks company (*f*); an incorporated ferry company (*g*); an incorporated telegraph company (*h*); a company which has been dissolved under its deed of settlement, the assets being transferred to another company (*i*).

An abortive company, which was not in fact formed, cannot be wound up as an unregistered company (*j*), nor can a company which is not a trading company, such as a literary institution (*k*), or an ordinary club (*l*).

How winding-up jurisdiction fixed.

1128. For the purpose of determining the court having winding up jurisdiction, an unregistered company is deemed to be registered in that part of the United Kingdom where its principal place of business is situate, or, if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business; and the principal place of business situate in that part of the United Kingdom in which proceedings are being instituted is, for all the purposes of the winding up, deemed to be the registered office of the company (*m*).

Petition to wind up trustee savings bank.

1129. A petition for winding up a trustee savings bank may be presented by the National Debt Commissioners, or by a commissioner appointed under the Trustee Savings Banks Act, 1887 (*n*), as well as by any person authorised under the other provisions of the Act of 1908 to present a petition for winding up a company (*o*).

Ground for winding up unregistered company.

1130. An unregistered company may be wound up by the court—
 (1) If the company is dissolved, or has ceased to carry on

(*d*) *Re Brentford and Isleworth Tramways Co.* (1884), 26 Ch. D. 527; *Re Port-stewart Tramway Co., Ex parte O'Neill*, [1896] 1 I. R. 265; *Murshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, 52, O. A. The fact that a receiver has been appointed at the instance of a debenture-holder does not preclude him from petitioning (*Re Portsmouth Borough (Kingsion, Frutton and Southsea) Tramways Co.*, [1892] 2 Ch. 362, overruling *Re Herne Bay Waterworks Co.* (1878), 10 Ch. D. 42, 47).

(*e*) *Re Basinistoke Canal (Proprietors)* (1886), 14 W. R. 956; *Re Wey and Arun Junction Canal Co.* (1867), L. R. 4 Eq. 197; even if it is necessary to apply to Parliament for a sale (*Re Bradford Navigation Co.* (1870), L. R. 10 Eq. 331; affirmed (1870), 5 Ch. App. 600).

(*f*) *Re Barton-upon-Humber and District Water Co.* (1889), 42 Ch. D. 585; *Re St. Neots Water Co.* (1906), 22 T. L. R. 478.

(*g*) *Re Isle of Wight Ferry Co.* (1865), 2 Hem. & M. 597.

(*h*) *Re Electric Telegraph of Ireland* (1856), 22 Beay. 471.

(*i*) *Re Family Endowment Society* (1870), 5 Ch. App. 118.

(*j*) *Re Imperial Anglo-German Bank* (1872), 26 L. T. 229, O. A.

(*k*) *Re Bristol Athenaeum* (1889), 43 Ch. D. 236; see *Re Russell Institution, Figgins v. Baghino*, [1898] 2 Ch. 72, 79; *Re Jones, Clegg v. Ellison*, [1898] 2 Ch. 83, 91.

(*l*) *Re St. James's Club* (1852), 2 De G. M. & G. 383; and see title CLUBS, Vol. IV., p. 437.

(*m*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (i.) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 199]. As to foreign companies, see *Re Lloyd Grimaldi Italiano* (1885), 29 Ch. D. 219. As to railway companies, see note (*c*), p. 649, ante.

(*n*) 50 & 51 Vict. c. 47.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (vi.); see p. 398, ante.

business, or is carrying on business only for the purpose of winding up its affairs (p).

SECT. 2
Winding up.

(2) If the company is unable to pay its debts.

(3) If the court is of opinion that it is just and equitable that the company should be wound up (q).

(4) In the case of an assurance company, if it fails to comply with certain statutory requirements (r).

1131. An unregistered company is deemed to be unable to pay its debts—

When
company
is deemed
unable to
pay debts.

(1) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding £50 then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary or some director, manager, or principal officer of the company, or by otherwise serving in such manner as the court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has, for three weeks after the service of the demand, neglected to pay the sum, or to secure or compound for it to the satisfaction of the creditor;

(2) If any action or other proceeding has been instituted against any member for any debt or demand due, or claimed to be due, from the company, or from him in his character of member, and, notice in writing of the institution of the action or proceeding having been served on the company in one of the modes above mentioned, the company has not within ten days after service of the notice paid, secured, or compounded for the debt or demand, or procured the action or proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against the action or proceeding, and against all costs, damages, and expenses to be incurred by him by reason of the same;

(3) If execution or other process issued on a judgment, decree, or order obtained in any court in favour of a creditor against the company, or any member thereof as such, or any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied;

(4) If it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts (s);

1132. In the event of the winding up of an unregistered company, every person is deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or contribute to the payment of the costs and expenses of winding up (a).

Contribu-
tories in
winding up.

(p) See *Re Family Endowment Society* (1870), 5 Ch. App. 118, 129.

(q) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (iii). [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 199].

(r) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 23; see also p. 637, ante.

(s) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268 (1) (iv). [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 199].

(a) See *Andrews' and Alexander's Case* (1869), L. R. 8 Eq. 176, 196; *Re Professional Life Assurance Co.* (1867), 3 Ch. App. 167, 174; *Re Agriculturist Cattle Insurance Co., Ex parte Official Manager* (1874), 10 Ch. App. 1.

SECT. 2.
Winding up.

Who are
liable as con-
tributories.

and every contributory is liable to contribute to the assets of the company all sums due from him in respect of any such liability (b).

The liability to contribution is a liability to contribute in the character of a partner or member (c). A person who is merely a debtor to the company is not a contributory (d); nor is an officer of the company who is liable to make compensation in respect of a misfeasance (e). A partner in an unregistered company, liable to make good a representation as to the amount of capital subscribed, is, however, a contributory (f); and a person who is really a partner or shareholder can, in certain cases, be made liable as a contributory even though the shares are held in another person's name (g). A mutual insurance policy on a ship must, to impose liability as a contributory, be properly stamped (h).

In the absence of special provision, a past member of an unregistered corporation is not liable as a contributory (i). In the case of an unregistered company within the Stannaries, a past member is not liable to contribute to the assets of the company if he has ceased to be a member for two years or more either before the mine ceased to be worked or before the date of the winding-up order (k).

In the event of the death, bankruptcy, or insolvency, of any contributory, or marriage of any female contributory, the provisions of the Act of 1908 with respect to the personal representatives, heirs, and devisees of deceased contributories, to the trustees of bankrupt or insolvent contributories, and to the liabilities of husbands and wives respectively, apply (l).

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 269, (1) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 200]; and see *Lethbridge v. Adams, Ex parte International Life Assurance Society (Liquidator)* (1872), L. R. 13 Eq. 547. The liability of the contributory is in the nature of a specialty debt (*Re Muggeridge, Muggeridge v. Sharp*, (1870) L. R. 10 Eq. 443).

(c) *Re European Society Arbitration Acts, Ex parte British Nation Life Assurance Association* (1878), 8 Ch. D. 679, 708, C. A.

(d) *Lee and Moor's Case* (1868), L. R. 5 Eq. 368 (mortgagee of a ship who had guaranteed contributions for mutual insurance); compare *Re Hoylake Rail. Co., Ex parte Littledale* (1874), 9 Ch. App. 257 (transferor of shares on which calls were in arrear).

(e) *Davies' Case* (1890), 45 Ch. D. 537; *Bute's (Marquis) Case*, [1892] 2 Ch. 100.

(f) *Moore and De la Torre's Case* (1874), L. R. 18 Eq. 661.

(g) *Re Wheal Emily Mining Co., Cox's Case* (1863), 4 De G. J. & Sm. 53, C. A.; compare *King's Case* (1871), 6 Ch. App. 196, where such a person was held not liable.

(h) *Smith's Case* (1869), 4 Ch. App. 611; *Blyth & Co.'s Case* (1872), L. R. 13 Eq. 529; compare *Andrews' and Alexander's Case* (1869), L. R. 8 Eq. 176; *Re Teignmouth and General Mutual Shipping Association, Martin's Claim* (1872), L. R. 14 Eq. 148; and see p. 487, ante.

(i) *Re Sheffield and South Yorkshire Permanent Building Society* (1889), 22 Q. B. D. 470. It would seem that, under the general law, a past member of an unincorporated association might be liable for debts incurred while he was a member (*ibid.*, at p. 476), and as all the provisions of Part IV. of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), with the exceptions mentioned in Part VIII., apply (*ibid.*, s. 268 (1); *Rudow v. Great Britain Mutual Life Assurance Society* (1881), 17 Ch. D. 600, 612, C. A.), it would seem that past members of an unregistered company are subject to s. 123 of the Act of 1908 (see p. 488, ante), except in so far as s. 269 (1) (see *supra*), is inconsistent therewith.

(k) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 269 (1) [Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 25].

(l) *Ibid.*, s. 269 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 200]; see

1133. In the case of a mutual insurance association, where there are no shares, the costs of winding up are to be borne by the members paying and receiving *pro rata* according to the amounts paid or received by them respectively (*m*). In the case of an insurance company where the policy-holders are only secured by the assets of the company, including the liability of members to the extent of the nominal amount of their shares, the costs of selling any particular asset are payable out of the proceeds of sale; but all other costs, including costs of getting in calls on the shares, must be borne by the shareholders beyond the amount of their shares (*n*).

SECT. 2.
Winding up.

Costs of winding up mutual insurance company with no shares.

1134. The provisions of the Act of 1908 with respect to staying and restraining actions and proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order extend in the case of an unregistered company, where the application to stay or restrain is by a creditor, to actions and proceedings against any contributory of the company (*o*).

Staying and restraining proceedings.

Where an order has been made for winding up an unregistered company, no action or proceeding can be proceeded with or commenced against any contributory of the company in his capacity as such (*p*), in respect of any debt of the company, except by leave of the court, and subject to such terms as the court may impose (*q*).

1135. If an unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the court may by the winding-up order, or by any subsequent order, direct that all or any part of the property belonging to the company, or to trustees on its behalf, is to vest in the liquidator by his official name. The liquidator may, after giving such indemnity (if any) as the court may direct, bring or defend in his official name any action or other legal proceedings relating to the property or necessary for the purposes of effectually winding up the company and recovering its property (*r*).

Vesting order of property.

A vesting order under the above provision can be made on an

pp. 489—492, *ante*. The liquidator of an unregistered company can, where a contributory becomes bankrupt, prove in the bankruptcy for any sum due to the company as a separate debt in competition with the separate creditors (*Re Adams, Ex parte Ball* (1874), 10 Ch. App. 48).

(*m*) *Andrews' and Alexander's Case* (1869), L. R. 8 Eq. 176.

(*n*) *Re Professional Life Assurance Co.* (1867), 3 Ch. App. 167; *Re Agriculturist Cattle Insurance Co., Ex parte Official Manager* (1874), 10 Ch. App. 1; *Lethbridge v. Adams, Ex parte International Life Assurance Society (Liquidator)* (1872), L. R. 13 Eq. 547.

(*o*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 270 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 201]; see p. 533, *ante*; *Graham v. Edge* (1888), 20 Q. B. D. 538, 633, (an action against liquidators of an unregistered company).

(*p*) *Re South of France Pottery Works Syndicate* (1877), 37 L. T. 260.

(*q*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 271 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 202]; *Gray v. Raper* (1866), L. R. 1 O. P. 694; see p. 533, *ante*.

(*r*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 272 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 203].

SECT. 2. *ex parte* motion (s). A general power of sale will not be given (t).
Winding up. A vesting order only vests the property in the liquidators in their official capacity, so that they are not liable personally to burdens thereon, such as a rentcharge (a). Where land is vested in several liquidators and an order has been made that the powers may be exercised by any two of them, any two can enter into a valid contract of sale, but all must join in the conveyance of the legal estate (b).

SECT. 3.—Cost-Book Companies.

companies.

1136. A cost-book company is a partnership generally, if not universally, as to mines, mining, or quarrying, which is formed on the cost-book principle, and whose conditions, so far as they are not regulated by statute, or by the ordinary law of partnership or by custom, are stated in a cost-book (c).

Cost-book principle.

1137. The cost-book principle (d) is a voluntary commercial usage (e) in the nature of an ordinary partnership (f) applicable to the working of mines by an association of adventurers (g). Subject to statutory provisions and to special agreement, the system to which that principle is applicable has the following characteristics: (1) The management of the mine is under the control of the adventurers as a body (ruling by a majority according to their interests and not their voices), or of their specially appointed deputy; (2) each adventurer's powers and duties are commensurate with the quantum of his interest; (3) the transactions of the company are for cash, unless where a necessity arises from circumstances or usage otherwise requires; (4) accounts are to be paid, calls made, and dividends declared at short intervals; (5) a perfect register of the adventurers must be kept (h); (6) an adventurer may relinquish his shares in the undertaking (i). The custom may be varied either by written rules or by agreement, either express, or implied from a course of practice (k).

(s) *Re Albert Life Assurance Co.* (1869), 18 W. R. 91. The motion should be in the name of the company, not that of the liquidator (*Re Britannia Permanent Benefit Building Society*, [1890] W. N. 170).

(t) *Re Britannia Permanent Benefit Building Society*, *supra*.

(a) *Graham v. Edge* (1888), 20 Q. B. D. 683, C. A.

(b) *Re Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23, C. A.

(c) Tapping's *Readwin Prize Essay on the Cost-book*, 2nd ed. (1854), p. 2. According to Tapping the principle or system may be adopted for other mercantile pursuits besides mining (*ibid.*, p. 7).

(d) See the statutory recognition of this expression in Joint Stock Companies Act, 1844 (7 & 8 Vict. c. 110), s. 63, and Joint Stock Companies Winding-up Amendment Act, 1849 (12 & 13 Vict. c. 108), s. 1. As regards the stannaries, the term "company" includes any persons or partnership body working a mine in the stannaries of Devon and Cornwall (Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 2).

(e) As to the usage or habit being general—without reference to place or territorial limits—or connected with any particular locality, compare Tapping's *Essay*, 2nd ed., p. 4, and Lindley on Companies, 6th ed., p. 132.

(f) *Re Frank Mills Mining Co.* (1883), 23 Ch. D. 52, 55, C. A.

(g) As to adventurers, see p. 656, *post*.

(h) Tapping's *Essay*, 2nd ed., pp. 2, 3.

(i) *Ibid.*, p. 28; see p. 666, *post*.

(k) *Re Frank Mills Mining Co.*, *supra*, at pp. 56, 58; *Re Bodmin United Mines Co.* (1857), 23 Beav. 370, 379.

PART VIII.—UNREGISTERED COMPANIES.

Those who allege that a cost-book mining company is governed by local custom which excludes the ordinary law of partnership (l) must prove it; but the only provision of the Partnership Act, 1890, which applies to cost-book mining companies is that which points out how a partner's shares in the assets of the concern are to be applied in payment of his separate debts (m).

SECT. 3.
**Cost-Book
Companies.**

1138. The cost-book principle has been most generally adopted in Cornwall and Devonshire and in the High Peak and Wirksworth districts of Derbyshire (n).

Adoption
of cost-book
principle.

1139. The cost-book is comprised in one or more volumes, and must contain (1) all the rules and conditions of the company; (2) its accounts, receipts and payments; (3) a record of all its material transactions—especially as to the sale, mortgage, relinquishment and forfeiture of shares, and the meetings of the company (o).

Contents of
cost-book.

The rules and conditions are resolved upon at a meeting of the adventurers, and must be signed by all of them, and should state that the company is to be conducted on the cost-book principle (p).

Amendments or alterations in the rules and conditions can only be made by the adventurers in special general meeting; any departure from the strict letter of existing rules and conditions can only be made with the consent of all the adventurers (q).

Amendment
of rules and
regulations.

(l) *Re Frank Mills Mining Co.* (1883), 23 Ch. D. 52, C. A.; *Re Great Cambrian Mining and Quarrying Co., Hawkins' Case* (1856), 2 K. & J. 253; *Re Bodmin United Mines Co.* (1857), 23 Beav. 370; *Clarke and Chapman v. Hart* (1853), 6 H. L. Cas. 633; Lindley on Companies, 6th ed., pp. 131, 132.

(m) Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 1, 23; *Re Pennant and Craigweir Consolidated Lead Mining Co., Ex parte Fenn* (1853), 22 L. J. (CH.) 692, C. A. (lead mining company in Wales); *Ricketts v. Bennett* (1847), 4 C. B. 686 (mining company in Cornwall); *Kilbricken Case* (undated), Tapping's Essay, 2nd ed., p. 7 (a mining company in Ireland); and *Arundell v. Atwell* (1853), referred to in Tapping's Essay, 2nd ed., p. 7 (mining companies in Devonshire and Derbyshire).

(n) The customs of the High Peak district are now embodied in the High Peak Mining Customs and Mineral Courts Act, 1851 (14 & 15 Vict. c. 94); see *Wake v. Hall* (1883), 8 App. Cas. 195; Tapping's Treatise on the Act. As to the courts exercising jurisdiction in the High Peak district, see title COURTS, Vol. IX., p. 140. The customs of the Wirksworth district are now embodied in the Derbyshire Mining Customs and Mineral Courts Act, 1852 (15 & 16 Vict. c. clxiii.); see Tapping's Treatise on the Act. As to the courts exercising jurisdiction in the Wirksworth district, see title COURTS, Vol. IX., p. 141. There are now very few cost-book mining companies in existence. For the statutory provisions applying to mining companies in the stannaries, see p. 662, *post*.

(o) Tapping's Essay, 2nd ed., p. 15.

(p) *Ibid.*, p. 16. As regards the stannaries, the term "cost-book" includes all books and papers relating to the business of a mine which are for the time being kept by a purser, or which, according to the custom of the stannaries, or the directions of the company, ought to be kept by him (Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 2; Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 2).

(q) Tapping's Essay, 2nd ed., pp. 16, 17; *Moore v. Hammond* (1827), 6 B. & C. 456. As to evidence of usage in the construction of cost-books, see Tapping's Essay, 2nd ed., pp. 17—21; *Tippet v. Johns and Treleaven* (prior to 1850), *ibid.*, p. 187; *Re Pennant and Craigweir Consolidated Lead Mining Co., Ex parte Fenn*, (1853), 22 L. J. (CH.) 692, C. A.; *Re Frank Mills Mining Co.* (1883), 23

SECT. 3.
Cost-Book
Companies.
Adventurers.

1140. The partners in the mine, or members of the company, are generally known as the adventurers (*r*), and, subject to the Act of 1908 (*s*), there is no limit to the number of adventurers forming the company (*a*). The register of adventurers must be so kept that the question who are adventurers may be answered, not only by the register, but by the handwriting of the adventurer or by documents in the company's possession (*b*).

Shares.

As early as 1840 there is one instance, at any rate, of a cost-book mining company having a fixed nominal pecuniary capital divided into shares of a fixed amount (*c*), as in the case of a modern company limited by shares. Even where this is not the case, the undertaking, as contrasted with the nominal capital, is owned by the adventurers in shares without reference to value (*d*). The rules may provide for an increase of capital by the issue of further shares (*e*).

Grant of
mine.

The mine or interest therein is generally granted to the trustees, or the purser of the mine, or to one or more of the adventurers, but not expressly to be held in trust for the adventurers, although they are liable in equity to indemnify the persons taking the grant in respect of all liabilities under it (*f*).

Relinquish-
ment of
shares.

1141. Subject to statutory requirements, any adventurer may, at any rate if there is a rule or condition enabling him to do so, relinquish his shares and interest in the company at any time by giving notice to the secretary or purser, and on paying his proportion of the debts and costs incurred for works or continuation of

Ch. D. 52, C. A.; and as to evidence of usage generally, see title CUSTOM AND USAGES, Vol. X., pp. 270 *et seq.* The observations of KNIGHT-BRUCE, L.J., in *Re Pennant and Craigweir Consolidated Lead Mining Co., Ex parte Fenn* (1853), 22 L. J. (CH.) 692, C. A., must now be read in connection with *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144. As to the alteration of regulations in stannaries companies, see p. 664, *post*.

(*r*) As to part adventurers, in-adventurers, and out-adventurers, see Tapping's Essay, 2nd ed., p. 13.

(*s*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1; see p. 44, *ante*.

(*a*) As to the peculiarities of numbers of shares in Cornwall, see Tapping's Essay, 2nd ed., pp. 11, 24—26.

(*b*) Tapping's Essay, 2nd ed., p. 3. This work was published in 1854, and even then shares in a cost-book company had a distinctive number, the company had a share register, and adventurers could adopt rules, conditions, and bye-laws in accordance with forms, based on deeds of settlement of other companies, which were nearly as explicit as the memoranda and articles of association of companies, limited by shares, formed since 1862.

(*c*) *Tredwen v. Bourne* (1840), 6 M. & W. 461.

(*d*) Tapping's Essay, 2nd ed., pp. 11, 24, 26. "The shares in these adventures are often so fractional and intricate that a stranger, though a tolerable arithmetician, would be greatly at a loss to divide and appropriate the doles or shares with that precision which is familiar to many illiterate tanners, who can cast a piece of ground and assign the proportions of a parcel of copper or tin ore with the utmost accuracy by the help of twenty shillings, pebbles or buttons" (*ibid.*, p. 11; Pryce's Mineralogia Cornubiensis, p. 173).

(*e*) Tapping's Essay, 2nd ed., p. 27.

(*f*) *Ibid.*, p. 21; *Re German Mining Co., Ex parte Chippendale* (1853), 4 De G. M. & G. 19, C. A.; *Hardoon v. Belilios*, [1901] A. C. 118, P. C. As to registering lease in the case of stannaries companies, see p. 667, *post*.

SECT. 3.
Cost-Book
Companies.

works determined on. He is thereupon entitled to valuation and payment of his fair proportion of the value of the undertaking (*g*), which should be valued as a going concern, the solvency of the other adventurers being taken into account (*h*). According to the custom of Cornwall, his proportion of the value is payable within two years; it can be proved for in the winding up of the company, and, if the assets are exhausted in the payment of debts, must be paid by the continuing adventurers (*i*). The retiring adventurer may or may not, according to agreement or practice, have to pay up arrears on his shares (*k*), and, if the company is insolvent, must pay his share of the deficiency (*l*).

1142. Apart from statute, an adventurer has the implied power of transferring his shares to anyone, without the consent of his co-adventurers, and thus ridding himself of future liability as between himself and his co-adventurers (*m*). As between the adventurers *inter se* and also as between the adventurers and third persons, the substitution, on request, by the purser of the transferee's name for that of the transferor in the cost-book is sufficient proof of ownership (*n*). The transfer must, however, at any rate in Cornwall, be registered in the cost-book in order that the transferee may have the status and liability of a co-adventurer, and he must sign the cost-book either by himself or his attorney (*o*). In the case of companies in the stannaries, transfers are subject to certain statutory provisions (*p*). Transfer of shares.

1143. The right of the company to forfeit the shares of an adventurer who fails to pay his calls or share of working expenses, or to perform his other obligations, is not necessarily an incident of the cost-book system (*q*). Forfeiture of shares.

(*g*) Tapping's Essay, 2nd ed., pp. 28, 29; *Northey v. Johnson* (1852), 19 L. T. (o. s.) 104; *Re Pennant and Craigweir Consolidated Lead Mining Co., Ex parte Fenn* (1853), 22 L. J. (CH.) 692, C. A.; *Re Wheal Lovell Mining Co., Ex parte Wyl'd* (1849), 13 Jur. 133; *Re Prosper United Mining Co., Ex parte Palmer* (1872), 7 Ch. App. 286; *Re Frank Mills Mining Co.* (1883), 23 Ch. D. 52, 55, C. A. As to relinquishments in the case of stannaries companies, see p. 666, *post*.

(*h*) *Re Frank Mills Mining Co., supra*.

(*i*) *Re Prosper United Mining Co., Ex parte Palmer, supra*, where costs of trying the issue as to the custom were ordered to be paid by the company.

(*k*) *Re Bodmin United Mines Co.* (1857), 23 Beav. 370.

(*l*) *Re Frank Mills Mining Co., supra*.

(*m*) Tapping's Essay, 2nd ed., pp. 7, 29, 30, 33; *Northey v. Johnson, supra*; Lindley on Companies, 6th ed., p. 133.

(*n*) Tapping's Essays, 2nd ed., p. 30; as to the document usually executed, see *ibid.*, pp. 30, 31; Lindley on Companies, 6th ed., p. 135. The stamp duty on the request is 6d., and executing or acting on a request not duly stamped is subjected to a penalty (Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 110, and schedule).

(*o*) Tapping's Essay, 2nd ed., p. 36; see *Curling v. Flight* (1846), 5 Hare, 242. As to parol transfers, see *Walker v. Bartlett* (1856), 18 C. B. 845.

(*p*) See p. 665, *post*.

(*q*) *Clarke and Chapman v. Hart* (1858), 6 H. L. Cas. 633. As to forfeiture in the case of stannaries companies, see p. 664, *post*. In the Derbyshire High Peak district the custom of forfeiture has been adopted by the High Peak Mining Customs and Mineral Courts Act, 1851 (14 & 15 Vict. c. 94), Sched. I., art. 20, by which, if any person who has shares in

SECT. 3.

Cost-Book Companies.**Dealings on credit.**

1144. The adventurers have authority, in the absence of proof as to a limit, to bind each other by dealings on credit, for the purpose of working the mine, which are necessary and usual in the management of mines (*r*). There is, however, no implied authority to pledge the credit of the general body for moneys borrowed, even for the purposes of the concern, although the adventurer contracting the loan has the general management of the mine (*s*). Each adventurer is liable for all the debts of the company contracted with its authority, and any attempts to limit the liability, where the company is not a limited company, are as futile as in the case of other partnerships (*t*). A person who is not actually the owner of shares may become liable for the company's debts by representing that he is an owner, or by such interference in the concerns of the company as to lead creditors to suppose that he is an adventurer (*a*).

Contracts.

1145. The directors, managers, or other agents of a cost-book mining company have power to enter into contracts binding the adventurers, (1) under the express provisions of the rules or conditions (*b*); or (2) pursuant to the assent of the adventurers, shown by interference or adoption (*c*); or (3) under the implied authority possessed by mine-owners to do what it is usual to do in the management of mining companies (*d*).

Purser and captain.

1146. The principal manager of the mine is called the purser. He keeps the accounts and the register, and receives and pays all moneys (*e*). In large mines there is an officer called "the captain

a mine refuses to join his partners or the owners of the other shares in working the mine, or to pay his proportion of the working expenses, for the space of six days after demand by the party complaining, or his agent, he is to forfeit his part or share to his partners, who are entitled to recover the same against him in an action of title in the Small Barmote Court. As to the Small Barmote Courts of High Peak, see title COURTS, Vol. IX., p. 140. There is a similar provision, with reference to shareholders in mines in the district within Wirksworth and its liberties, except that the period is twenty-one days (Derbyshire Mining Customs and Mineral Courts Act, 1852 (15 & 16 Vict. c. clxiii.), Sched. I, art. 21). As to the courts in this case, see title COURTS, Vol. IX., p. 141. As to the alternative remedy, by the company instructing a creditor to sue the defaulter, see Tapping's Essay, 2nd ed., p. 43. The fact of ownership of shares imposes an obligation to creditors (*ibid.*, p. 47).

(*r*) Tapping's Essay, 2nd ed., p. 45; *Tredwen v. Bourne* (1840), 6 M. & W. 461; *Hawken v. Bourne* (1841), 8 M. & W. 703; *Dickinson v. Valpy* (1829), 10 B. & C. 128; *Bourne v. Freeth* (1829), 9 B. & C. 632.

(*s*) *Ricketts v. Bennett* (1847), 4 C. B. 686; *Hawken v. Bourne*, *supra*; *Burmeister v. Norris* (1841), 6 Exch. 796.

(*t*) *Walburn v. Ingilby* (1833), 1 My. & K. 61, 76; Tapping's Essay, 2nd ed., pp. 50—54; *Hawken v. Bourne* (1841), 8 M. & W. 703. As to past debts, see Lindley on Companies, 6th ed., p. 365.

(*a*) See title PARTNERSHIP; *Dickinson v. Valpy*, *supra*; *Vice v. Anson* (*Lady*) (1827), 7 B. & C. 409; *Tredwen v. Bourne*, *supra*; *Harrison v. Heathorn* (1843), 6 Man. & G. 81; *Ellis v. Schmoeck* (1829), 5 Bing. 521.

(*b*) Tapping's Essay, 2nd ed., p. 54.

(*c*) *Ibid.*; and see title PARTNERSHIP.

(*d*) *Ibid.*, pp. 55—63; *Dickinson v. Valpy*, *supra*; compare *Tredwen v. Bourne*, *supra*; *Hawken v. Bourne*, *supra*; and see title PARTNERSHIP.

(*e*) Tapping's Essay, 2nd ed., p. 12. As to the book-keeper, see *Curling v.*

of the mine," whose duty it is to superintend the mining works above and below ground (*f*).

SECT. 3.
Cost-Book
Companies.

SECT. 4.—*Mining Companies in the Stannaries.*

SUB-SECT. 1.—*In General.*

1147. Some companies formed for mining purposes in the stannaries have, for a long period, been formed and worked on the cost-book principle (*g*). The prohibition in the Act of 1908 against the formation of any company consisting of more than twenty persons, unless it is registered as a company under the Act, or is formed in pursuance of some other Act, or of letters patent, does not apply to any company engaged in working mines within the stannaries and subject to the jurisdiction of the court exercising the stannaries jurisdiction (*a*). Stannaries companies.

SUB-SECT. 2.—*Court exercising the Stannaries Jurisdiction.*

1148. There existed from the earliest times a personage, who was an officer of the Crown, appointed to govern districts producing tin under colour of the rights formerly assumed by the Crown over such parts of the kingdom as royal demesnes. He was called the *custos stannariarum*, or Lord Warden of the Stannaries, and appointed a Vice-Warden. The Duke of Cornwall also appointed an officer of his own, called the *seneschallus* or steward, to protect his own interests within the Duchy of Cornwall (*b*). Stannaries jurisdiction.

On January 1st, 1897, the Court of the Vice-warden of the Stannaries ceased to exist (except as to then pending proceedings). The jurisdiction and powers of the court and its officers have been transferred to the county courts of Cornwall (*c*), and the procedure is regulated by County Court Rules made under the Act of 1896 (*d*).

Flight (1848), 2 Ph. 613. As regards the stannaries, the term "purser" means the purser for the time being of a company, and if there is no purser, then the secretary for the time being, or, if there is no secretary, then the principal agent for the time being of a company (Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 2; Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 2).

(*f*) Tapping's Essay, 2nd ed., pp. 12, 84, 85. Under the captains are "bottom captains," who look after the labourers below, and a "grass captain" or "dresser," who looks after the ore above ground (*ibid.*, at p. 12).

(*g*) See p. 654, *ante*.

(*a*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1.

(*b*) Batten's Stannaries Act, 1869, pp. 1, 2; and see Carew's Survey of Cornwall; Smirke's edition of the case of *Vice v. Thomas* (1842); and the Book of Procedure in the Court of the Vice-Warden of the Stannaries (referred to *ibid.*, pp. 1—3); and title COURTS, Vol. IX., p. 204.

(*c*) Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45), ss. 1, 6; see title COUNTY COURTS, Vol. VIII., pp. 686, 687. In the Act of 1908, the expression "the court exercising the stannaries jurisdiction," when used in relation to any proceedings, means the county court in which the jurisdiction formerly exercised by the Court of the Vice-warden of the Stannaries, in respect of those proceedings, is for the time being vested (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285).

(*d*) See title COUNTY COURTS, Vol. VIII., p. 687.

SECT. 4.
Mining
Companies
in the
Stannaries.

References in any unrepealed enactment to mines subject to the jurisdiction of the court of the vice-warden, or within his cognisance, are to be construed as applying to mines which would have been subject to the jurisdiction of that court if it had not been abolished (e).

Jurisdiction
of the
Stannaries

1149. The original equitable jurisdiction, before 1836 lawfully exercised by the vice-warden, was by statute declared to be exercisable by him. The statute also declared that he might exercise and enjoy the same power and authority in all matters relating to the working, managing, conducting, or carrying on any mine worked for any lead, copper, or other metal or metallic mineral within the county of Cornwall, or to the searching for, working, smelting, or purifying the same within that county, in as full and ample a manner as if the matters related to any tin, or tin ore, or tin mine, or mine working for tin within the same county (f).

In the case of a company subject to the stannaries jurisdiction, the court exercising the stannaries jurisdiction (g) can exercise the jurisdiction and powers which the court of the vice-warden possessed by custom, usage, or statute in the case of unincorporated companies, but only so far as is consistent with the provisions of the Act of 1908, and with the constitution of companies as prescribed or required by that Act. For the purpose of giving fuller effect to

(e) Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45), s. 3. The legislature has dealt with the stannaries in the following statutes, all of which are now affected by *ibid.*, s. 5, as stated below, namely: The "Act against divers Incroachments and Oppressions in the Stannaries Courts" (1640) (16 Car. 1, c. 15), repealed; Stannaries Act, 1836 (6 & 7 Will. 4, c. 106), repealed, except ss. 4, 6, and 7; Stannaries Act, 1839 (2 & 3 Vict. c. 58), repealed; "An Act to enable the Council of His Royal Highness Albert Edward, Prince of Wales, to sell and exchange lands and enfranchise copyholds, parcel of the possessions of the Duchy of Cornwall, to purchase other lands, and for other purposes" (7 & 8 Vict. c. 65), s. 40 of which is repealed (and see s. 4 of the Act of 1896); Assessionable Manors Award Act, 1848 (11 & 12 Vict. c. 83), ss. 7—11 and 31 of which are repealed; Stannaries Act, 1855 (18 & 19 Vict. c. 32), repealed, except ss. 1 and 31; Companies Act, 1862 (25 & 26 Vict. c. 89), parts of which were repealed by the Act of 1896, and the unrepealed provisions of which, relating to companies in the stannaries, were repealed and re-enacted by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); Stannaries Act, 1869 (32 & 33 Vict. c. 19), ss. 27—33 and 38—44 of which were repealed by the Act of 1896, and ss. 25, 26 and 34 of which were repealed by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286, and Sched. VI., Part I.; Stannaries Act, 1887 (50 & 51 Vict. c. 43), ss. 8, 28, 30, 32, and 33 of which were repealed by the Act of 1896, and ss. 9, 10, 13 (2), and 31 of which were repealed by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286, and Sched. VI., Part I.; Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), and other statutory provisions repealed and re-enacted by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286, and Sched. VI., Part I.

(f) Stannaries Act, 1836 (6 & 7 Will. 4, c. 106), s. 4. As to the powers of the vice-warden formerly exercised by the steward of any of the stannaries, see *ibid.*, s. 5; and as to the common law jurisdiction as to lead, copper, metal and metallic mineral mine, *ibid.*, s. 6. See Stannaries Act, 1855 (18 & 19 Vict. c. 32), ss. 1, 31; and title MINES, MINERALS AND QUARRIES.

(g) Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45).

that jurisdiction, all process issuing out of the court, and all orders, rules, demands, notices, warrants, and summonses required or authorised by the practice of the court to be served on any company, whether registered or not, or on any member or contributory or on any officer, agent, director, or manager, may be served in any part of England without any special order of the judge for that purpose, or by a special order may be served in any part of the British Islands, on such terms and conditions as the court may think fit. No service of process out of the limits of the stannaries in any suit or plaint on the common law side of the court, can, however, be effected without the special order of the judge. All decrees, orders, and judgments of the court may be enforced in the same manner in which decrees, orders, and judgments of the Court of the Vice-warden of the Stannaries could, before its abolition, have been by law enforced, whether within or beyond the stannaries (*h*).

SECT. 4.
Mining
Companies
in the
Stannaries.

Service of
process.

1150. Besides the jurisdiction over disputes between a company and its members, or creditors, or servants (*i*), and the winding-up jurisdiction (*j*), in the event of any dispute arising between any two or more mining companies (*k*), or between any mining company and His Royal Highness the Prince of Wales and Duke of Cornwall, or any person having any estate or interest in the mine worked by or leased to the company, the judge of the court may, on the application of any party to the dispute, order the matter in dispute to be tried before himself, or before an arbitrator agreed on by the parties, or an officer of the court, and the Arbitration Act, 1889 (*l*), applies to any such reference (*m*).

Jurisdiction
over disputes.

1151. If any inspection of the register of members required by the Act of 1908 is refused, the judge of the court exercising the stannaries jurisdiction may, in the case of companies subject to that jurisdiction, by order compel an immediate inspection of the register (*n*). He has also power to rectify the register (*o*), to order inspection of copies of instruments creating a

Inspection
and rectifica-
tion of
register of
members.

(*h*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 280.

(*i*) Nothing in the Stannaries Act, 1869, takes away or abridges any right or remedy of any creditor of a company existing at the passing of that Act (Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 45; repealed by the Statute Law Revision (No. 2) Act, 1893 (56 & 57 Vict. c. 54)), or excludes the right of any shareholder of a company, miner, creditor, or other customary suitor of the court to resort to all or any of the remedies previously used and enjoyed, and then still subsisting, by custom or statute, in the court as constituted by law unless such right is expressly abrogated by the Act (*ibid.*, s. 46).

(*j*) As to the winding-up jurisdiction, see p. 672, *post*.

(*k*) The expression "mining company" here means any person or body of persons engaged in or formed for working mines within the stannaries (Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45), s. 4 (2)).

(*l*) 52 & 53 Vict. c. 49; see title ARBITRATION, Vol. I., pp. 492, 493.

(*m*) Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45), s. 4 (2).

(*n*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 30 (3).

(*o*) *Ibid.*, s. 32. But the High Court has concurrent jurisdiction (*Re Penha's and Lomax Consolidated Silver Lead Mining Co.* (1867), 2 Ch. App. 398).

SECT. 4.
Mining
Companies
in the
Stannaries.

mortgage or charge requiring registration, and of the register of mortgages (*p*).

Judicial notice is to be taken of the signature of the registrar of the court exercising the stannaries jurisdiction, and of the official seal or stamp of the court (*q*).

SUB-SECT. 3.—*Companies within the Stannaries Jurisdiction.*

(i.) *Constitution of the Company.*

Stannaries
companies
generally.

1152. Companies working mines within the stannaries jurisdiction (*r*) are either (1) companies formed on the cost-book principle (*s*), or (2) ordinary partnerships (*t*), or (3) companies formed and registered under the Companies (Consolidation) Act, 1908, or the enactments which it replaces (*a*).

Consolidation
and
registration.

1153. As regards companies constituted on the cost-book principle, there are special statutory provisions (*b*) with reference to the cost-book. As regards the constitution of other companies within the stannaries, the ordinary law of companies applies, except as regards the prohibition as to members (*c*). All companies having any rules or regulations touching the management of the company or conduct of the business of any mine must file a true copy of them at the office of the registrar of the court exercising the stannaries jurisdiction without payment of any fee. The rules or regulations are subject to the inspection of all applicants at reasonable times; and, if any company neglects to file them, any shareholder or creditor may apply for an order of the court to file them forthwith, which order is to be enforced by the process of the court (*d*).

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 101.

(*q*) *Ibid.*, s. 225. As to the power to make rules of procedure, see *ibid.*, ss. 237, 238.

(*r*) As regards the provisions of the Stannaries Act, 1869 (32 & 33 Vict. c. 19), the term "company" includes any person or partnership body working a mine in the stannaries of Devon and Cornwall (*ibid.*, s. 2); but the Act of 1869 extends only to mines within the stannaries, and subject to the jurisdiction of the court exercising the former jurisdiction of the vice-warden, and does not extend to companies registered under any of the Joint Stock Companies Acts except where such companies are expressly mentioned or necessarily implied (*ibid.*, s. 3). As regards the Stannaries Act, 1887 (50 & 51 Vict. c. 43), the term "company" means any persons or partnership body, joint stock company, company constituted under the Companies Act, 1862 (25 & 26 Vict. c. 89), or any statutory modification thereof, and whether corporate or unincorporate, and whether limited or unlimited, engaged in or formed for working mines within the stannaries of Cornwall and Devon (Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 2). In the Act of 1908 "company within the stannaries" means a company engaged in or formed for working mines within the stannaries (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285).

(*s*) See p. 654, *ante*.

(*t*) See title PARTNERSHIP.

(*a*) See p. 33, *ante*.

(*b*) See pp. 663 *et seq.*, *post*.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1; see p. 45, *ante*.

(*d*) Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 9; and County Court Rules. Ord. 50, r. 35.

The Board of Trade may require the office of the registrar of the court exercising, in respect of the winding up of companies, the stannaries jurisdiction to be one of the offices for the registration of companies within that jurisdiction (*e*).

SECT. 4.
Mining
Companies
in the
Stannaries.

Any company formed after November 2nd, 1862, and whether before or after April 1st, 1909, which is a company within the stannaries may, subject to certain conditions and exceptions, register under the Act of 1908 as an unlimited company, or as a company limited by shares, or as a company limited by guarantee, and the registration is not invalid because it takes place with a view to the company being wound up (*f*).

(ii.) *Meetings and Proceedings.*

1154. Except as otherwise provided by the Act of 1869, or by the regulations of a company, a resolution passed at a meeting by a majority in value of the shareholders present in person or represented by proxy is binding on all the shareholders. An ordinary meeting is not, however, authorised to transact any business which an ordinary meeting could not transact before June 24th, 1869, except as provided by the Act of that year (*g*).

Resolutions of
shareholders.

1155. A notice to be served by a company for any purpose of the Stannaries Act, 1869, on a shareholder must be served personally, or by prepaid letter to him at his address as entered in the cost-book, in which case the notice is taken as served when the letter was put into the post. In proving such service it is sufficient to prove that the letter was properly addressed, prepaid, and put into the post, and the time when it was put in (*h*).

Notices.

Where anything is by statute required to be done by a company at a meeting with special notice, the notice must be served on the shareholders not less than seven clear days before the day of the meeting, specifying the place, day, and hour, and the business to be transacted, or as much as is required to be done with special notice (*i*).

1156. A special resolution is one which is passed at a meeting with special notice, and confirmed at a subsequent meeting with special notice, held not less than fourteen days and not more than one month after the first meeting (*k*).

Special
resolution.

1157. The purser of every cost-book mine must convene an ordinary meeting of the shareholders at least once every sixteen weeks, for the transaction of its ordinary business. At each meeting the cost-book, containing the accounts and other entries required by the Stannaries Act, 1887, with a list showing the

Meetings.

(*e*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 243 (4).

(*f*) *Ibid.*, s. 249; and see pp. 39, 61, *ante*. As to registering the contract of co-partnership or cost-book regulations, see *ibid.*, s. 253; as to the provisions thereof applying after registration, see *ibid.*, s. 263.

(*g*) Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 4.

(*h*) *Ibid.*, s. 8.

(*i*) *Ibid.*, s. 5.

(*k*) *Ibid.*, s. 6.

SECT. 4.
Mining
Companies
in the
Stannaries.

name and address of every shareholder from whom any call is in arrear, and the amount of his unpaid calls, must be laid before the meeting, and be open to inspection by any shareholder present. Any purser failing to convene or hold such meeting, or to produce the cost-book, or to permit it to be inspected, is to forfeit for every default a sum not exceeding £10, recoverable summarily on the complaint of any shareholder in the company, before any two or more justices (*l*).

(iii.) *Alteration of Rules and Regulations.*

Alteration of
 regulations.

1158. A company, as defined by the Stannaries Act, 1869 (*m*), and whether it is or is not a cost-book company, may, by special resolution passed by not less than three-fourths in value of the shareholders present in person or represented by proxy at the meeting held for the purpose of confirming the resolution to be made special, from time to time alter the regulations for the time being by custom or otherwise governing the company, and make new or additional regulations. A company cannot, however, make regulations inconsistent with the provisions of the Stannaries Act, 1869, or abrogate any special regulations existing on June 24th, 1869, for its management, and a company existing at that date cannot make any special regulation enabling it to borrow money (*n*).

(iv.) *Calls and Forfeiture of Shares.*

Power to
 make calls.

1159. A call may be made at any meeting of a company with special notice (*a*), for the purpose of defraying the whole or any portion of the estimated expenses to be incurred at any time within three months after the date of the meeting (*b*). When making a call, the company may direct that discount, not exceeding 5 per cent., shall be allowed on payment of the call, at or within the time appointed, and that interest at £5 per cent. per annum shall be charged on all amounts remaining unpaid after one month from the time appointed (*c*).

Liability for
 calls.

1160. The amount for the time being unpaid of any call is a debt due from the shareholder to the company; and if at the time appointed for the payment of the call he fails to pay the amount, the company may sue him in the name of the purser (*d*).

Forfeiture for
 non-payment.

The company may also serve a notice on a shareholder failing to pay a call requiring him to pay it, with or without interest and expenses, and stating that in the event of non-payment his share will be liable to be forfeited (*e*). If the requisitions of the notice are not complied with, the company may forfeit the share by a

(*l*) Stannaries Act, 1887 (50 & 51 Vict. c. 48), s. 25.

(*m*) See Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 2; see note (*r*), p. 662 *ante*.

(*n*) Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 7.

(*a*) *Ibid.*, s. 10.

(*b*) *Ibid.*, s. 11.

(*c*) *Ibid.*, s. 12.

(*d*) *Ibid.*, s. 13.

(*e*) *Ibid.* s. 16.

resolution to that effect passed at a meeting with special notice (*f*). Any share so forfeited must be carried to an account called "The Account of Forfeited Shares," and may be disposed of in such manner as the company thinks fit, any shareholder being allowed to purchase it if sold (*g*).

SECT. 4.
Mining
Companies
in the
Stannaries.

Purchase of
forfeited
share.

A statutory declaration by the purser that the call was made and notice given, and that default in payment was made, and that the forfeiture was made by resolution, is sufficient evidence of the facts stated as against all persons entitled to the share. This declaration and the receipt of the purser for the price of the share sold constitute a good title to the share, and the purchaser is to be entered in the cost-book as a shareholder in respect of it. He is thereupon deemed the holder of it, discharged, as against the company, from all calls due prior to such purchase. He is not bound to see to the application of the purchase-money, and his title is not affected by any irregularity in the proceedings in reference to the sale (*h*). Even if there have been irregularities in the forfeiture, partners in a cost-book company cannot, after lying by for more than six years, claim to set aside the forfeiture (*i*). A shareholder whose share has been forfeited is nevertheless liable to pay all calls, interest, and expenses due at the time of forfeiture (*k*).

(v.) *Transfer of Shares.*

1161. A company is not bound to recognise a transfer of a share until all calls made in respect of it, with interest and expenses, have been paid (*l*); nor is it bound to recognise the transfer of a fractional part of a share (*m*).

Transfer of
shares.

A transfer of shares made for the purpose of getting rid of the further liability of a shareholder, as such, for a nominal or no consideration, or to a person without any apparent pecuniary ability to pay the reasonable expenses of working a mine, or to a person in the menial or domestic service of the transferor, is presumed to be a fraudulent transfer, and need not be recognised by the company, or by the court on the winding up of the company, whether the company be registered or unregistered (*n*). If, however, the company treats the pauper transferee as a shareholder, and forfeits his shares, the transferor's name cannot, in a winding up more than two years after the transfer, be placed on the list of contributories (*o*).

When
fraudulent.

(*f*) Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 17.

(*g*) *Ibid.*, s. 18.

(*h*) *Ibid.*, s. 19.

(*i*) *Rule v. Jewell* (1881), 18 Ch. D. 660; and see *Clarke and Chapman v. Hart* (1858), 6 H. L. Cas. 633.

(*k*) Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 20. As to suing for calls, see *ibid.*, s. 13; and compare County Court Rules, Ord. 51, r. 5; and see title COUNTY COURTS, Vol. VIII, p. 687. As to bankruptcy petitions by pursers in respect of calls, see *Re Nance, Ex parte Ashmead*, [1893] 1 Q. B. 590, C. A.

(*l*) Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 14.

(*m*) *Ibid.*, s. 15.

(*n*) *Ibid.*, s. 35.

(*o*) *Chynoweth's Case* (1880), 15 Ch. D. 13, C. A. As to the liability of past members in winding up, see p. 673, *post*.

SECT. 4.

Mining
Companies
in the
Stannaries.Mode of
relinquishing
shares.

Valuation.

(vi.) *Relinquishment of Shares.*

1162. Every relinquishment of a share must be by notice in writing delivered to the purser. A company is not bound to recognise the relinquishment of a fractional part of a share (*p*).

A relinquishment has no effect if it is delivered within the six weeks immediately preceding the day on which a resolution to wind up the company is legally passed at a duly convened meeting of the company, or on which an order is made for winding up by or subject to the supervision of the court (*q*).

When a share in a company has been relinquished, any valuation of the materials and other assets of the company required to be made as between the relinquishing and the continuing shareholders must be made on the basis that all the continuing shareholders have also at the same time relinquished their shares (*r*).

(vii.) *Accounts.*

Audit.

Purser's
account.

1163. The accounts of the company may be audited at any meeting called with special notice (*a*).

The purser of every company must, once at least in every four months, enter in the cost-book accounts showing the company's actual financial position at the end of the financial month last preceding the time of entry, including a statement of all credits, debts, and liabilities, and distinguishing the amount of calls paid, and not paid, with lists of the shareholders for the time being, with their addresses, and all other accounts, documents, and things which he is for the time being required to enter therein by the custom of the stannaries, or by the directions of the company (*b*).

The purser of every cost-book mine in the stannaries must, once at least every sixteen weeks, enter in the cost-book accounts showing the actual financial position of the company at the end either of the financial month of such company last preceding the time of entry, or of the calendar month last preceding that time, including a statement of all credits, debts, and liabilities, and distinguishing in such accounts the amounts of calls paid and not paid, and also all other accounts, documents, and things that the purser is required to enter therein by the custom of the stannaries, or by the direction of the company, subject to a penalty in default not exceeding £20, to be recovered before any two or more justices (*c*).

(*p*) Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 22. As to dealings with relinquished shares, see p. 656. *ante*.

(*q*) Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 22. As to proof in a winding up by a shareholder who has relinquished, see *Re Prosper United Mining Co., Ex parte Palmer* (1872), 7 Ch. App. 286.

(*r*) Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 21. See *Re Frank Mills Mining Co.* (1883), 23 Ch. D. 52, O. A., where it was held that the valuation of the assets must be made on the footing of the company being a going concern, and that in estimating the amount due to or from the shareholder the solvency of the person who owed calls and of the continuing shareholders must be taken into consideration as at the date of the notice of relinquishment, and not at the date when the account was made out.

(*a*) Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 10.

(*b*) *Ibid.*, s. 9.

Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 23. The purser is also liable,

The accounts directed to be entered in the cost-book must, after having been laid before a meeting of the shareholders (*d*), be printed, and a copy must be sent to each shareholder and also to the lessors of the mine (*e*).

SECT. 4.
Mining
Companies
in the
Stannaries.

(viii.) *Registration of Documents.*

1164. A true copy of all leases, grants, and licences, giving the grantee the right to work mineral property within the stannaries, and also of all assignments and contracts for the sale of such leases, grants, and licences, must be filed by the lessee, grantee, licensee, assignee, or purchaser at the registrar's office within fourteen days from execution. Until it is filed, the lease, grant, licence, assignment, or contract is not enforceable (*f*).

Registration
of documents

Any mortgage, mortgage debenture, or other document whatever, by which power is given by any company to any persons to take possession of any mining effects of or on a mine must, in addition to any registration required by law in 1887, be registered within twenty-eight days from its date at the office of the registrar of the court exercising the stannaries jurisdiction, without payment of any fee. Unless so registered, it does not confer any priority over or title as against the claims of any persons whatever for work and labour done or services performed in or upon the mine, or for goods and materials supplied to any company by which the mine is carried on; but the registration does not affect any priority in respect of wages given by the Act of 1887. The register is subject to the inspection of all applicants at all reasonable times (*g*).

(ix.) *Sale of Mines and other Property.*

1165. A company may, by a special resolution to which three-fourths in value of the shareholders consent, either in writing or at a meeting, sell and dispose of the machinery and materials belonging to the company, with or without its legal or equitable interest in the leases or sett on which any mine belonging to the company is worked, as a going concern. The sale must be by public auction, and due notice must be given by public advertisement in some local newspaper, and in some public journal or newspaper specially relating to mining companies, for two successive weeks before the sale. The right of sale is without prejudice either (1) to the landlords, lessors, or others having any estate, charge on, or interest in the land in which the mine is situate;

Company's
power of sale.

in respect of every false statement or entry in, or any material particular omitted from, such accounts with his knowledge, to a penalty not exceeding £50, recoverable in the like manner; and the justices may award any portion of the penalty (not exceeding one moiety) to the prosecutor, if he is a shareholder or a person having a legal right to inspect the accounts; and if such false statement, entry, or material particular has been made or omitted with the knowledge of the manager of the mine, he is also liable to a like penalty, recoverable in like manner and with the like discretion as to the appointment thereof (Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 24).

(*d*) *Ibid.*, s. 25; see p. 663, *ante*.

(*e*) *Ibid.*, s. 26.

(*f*) *Ibid.*, s. 20.

Ibid., s. 19. As to priority of wages, see p. 671, *post*.

SECT. 4.
Mining
Companies
in the
Stannaries.

Injunction
restraining
sale.

or (2) to the creditors, and their customary lien on the saleable machinery and materials belonging to the company (*h*).

1166. The court has jurisdiction to grant injunctions restraining not only sales of machinery and other effects on mines, but also sales of setts where equity so requires. The jurisdiction may be exercised on the application of a shareholder (*i*).

(x.) *Amalgamation of Companies.*

Amalgama-
tion.

1167. When the limits of a mine join those of any other mine, the companies respectively working such mines may, with the consent in writing of the respective lessors, in all cases where such consent is by law or custom necessary, amalgamate and become one company, if each of the companies authorises the amalgamation by a special resolution to which two-thirds in value of its shareholders consent in writing (*k*). The resolution must be registered in the court, and does not take effect until registration. It must also be advertised in such manner as the court directs (*l*).

(xi.) *Rights of Miners.*

Posting Act
and rules.

1168. The Legislature (*m*) has made careful provision for the right of miners (*n*) employed in metalliferous mines and tin streaming works within the stannaries (*o*). With this view printed copies of the Stannaries Act, 1887, and of the rules and regulations for the time being in force in any mine, must be kept posted up in the smiths' shop and in the miners' dry or changing shed of every mine (*p*).

Restriction
on contracts
with miners.

1169. Any contract, expressed or implied, with the employers, or terms of hiring, which would in effect deprive miners of any right secured to them by the Stannaries Act, 1887, or impose any condition whatever in reference to the disposition of club or benefit funds, is, so far as such rights are affected, and in respect of any such condition, void and of no effect (*q*).

Supply of
tools.

1170. The tools, implements, and materials supplied to a miner by the company for the purposes of the mine must be supplied, as nearly as possible, at market price; and such prices and the quantities must be distinctly specified in the account delivered to the miners (*r*).

(*h*) Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 24.

(*i*) *Ibid.*, s. 36. As to the abolition of pursers' and creditors' suits, see County Court Rules, Ord. 51, r. 5.

(*k*) Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 27.

(*l*) *Ibid.*

(*m*) By the Stannaries Act, 1887 (50 & 51 Vict. c. 43).

(*n*) The term "miners" includes all artizans, labourers, and other persons working in and about a mine except the purser, secretary, agent, or manager (*ibid.*, s. 2).

(*o*) The Act of 1887 only applies to such mines and streaming works; see *ibid.*, s. 3.

(*p*) *Ibid.*, s. 35.

(*q*) *Ibid.*, s. 34.

(*r*) *Ibid.*, s. 16.

1171. The purser must pay all wages^(s) and subsist^(t) to the miners at the account house of the mine in current coins of the realm^(u), to enable an immediate division to be made amongst the individual miners entitled to receive them^(w).

SECT. 4.
Mining
Companies
in the
Stannaries.

When the amount of miners' wages depends on the quantity and quality of the minerals sent to the surface by them, such miners may, at their own cost, station a check-weigher at the place where the mineral is weighed to take an account of the weight. The check-weigher, or some other miner, may also be present when the sampler of the company samples the mineral. The sampler must divide the sample taken by him into three parts, retaining one part for the use of the company, giving another part to the check-weigher or miner for the miners, and depositing the remaining part with the purser for future use, if either the company or the miners require that it should be assayed. This remaining part must be sealed up in the presence of the check-weigher or miner, and retained by the company for assay, if required. The check-weigher or miner must not, however, interrupt or interfere in any way with the weighing or sampling of the mineral, or enter the assay office of the company, and his absence is not a reason for delaying the weighing and sampling^(a).

Check-
weigher.

1172. A company may retain in its hands, from the wages of any miner working at surface, seven days' wages only. Subject to this right, all surface miners must be paid once a fortnight, and the amount retained must be paid to the miner within seven days of his ceasing to be employed by the company^(b).

Deductions
from miners'
wages.

All wages becoming due to miners employed by contract underground must be paid within fourteen days from the expiration of the contract. At the end of twenty-eight days from the commencement of the contract, and also at the end of every subsequent fourteen days during its continuance, every such miner is entitled to subsist, namely, to a payment on account of his wages equal to the amount that the agent may estimate that the miner has earned in wages during the fourteen days for which payment is due. If the agent refuses or neglects to make any estimate, or makes an unreasonable one, the miner may forthwith apply to any two or more justices of the peace, who are to fix the amount of subsist, and make an order for immediate payment, subject to such directions as to costs as they may think fit. When a miner first enters employment, by contract, underground in a mine, he is entitled to seven days' subsist at the end of the first fortnight, and to a further seven days' subsist at the end of the second fortnight. On leaving any mine a miner is entitled to payment of all wages due to him, if employed by tut work (that is, piece-work) at the end of seven days from the termination of his employment, and if employed on tribute (that

Subsist.

(s) As to the meaning of "wages," see Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 2.

(t) As to the meaning of "subsist," see *ibid.*, s. 11; and *infra*.

(u) As defined by the Coinage Act, 1870 (33 & 34 Vict. c. 10); see title MONEY AND MONEY-LENDING.

(w) Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 12.

(a) *Ibid.*, s. 15.

(b) *Ibid.*, s. 11.

SECT. 4.
Mining
Companies
in the
Stannaries.

Deductions
 for club
 funds.

is, in proportion to the ore raised) at the end of seven days from the sampling and assaying of the ore raised by him, and in the case of copper at the end of seven days from the next ticketing day (c).

1173. Notwithstanding any custom or rule of law to the contrary, all moneys deducted in any mine from wages or otherwise contributed by the miners for the purposes of a mine club, or accident, or sick or benefit fund, is deemed, unless a majority of the miners by resolution decide otherwise, to belong to the miners, and not to the company. Such moneys, and any contributions added by the shareholders, must be placed to a separate account, the details of which, showing the receipts and payments, must be set out in the balance-sheet presented at each ordinary meeting. A copy of the account must be posted in the miners' dry or changing sheds, and in the account house (d).

The miners in any mine may appoint any two of their number to audit the mine club fund accounts, the appointment having effect for twelve months only. They may also by resolution of a majority appoint a committee of management of the fund; but if any portion of it is contributed by the company, the concurrence of the company is required in respect of the appointment (e). The committee may transfer the fund to any registered friendly society established for the whole or any part of the stannaries district (f). In the event of any money being deducted for the purpose of medical attendance, each miner is entitled to name a qualified medical practitioner, to whom the amount deducted from his wages must be paid for such attendance (g).

Notification
 of miners'
 claims.

1174. If a miner on leaving a mine leaves with or forwards to the manager of the mine a written memorandum of the wages which he claims to be then owing to him, and also of either his own name and address or the name and address of some person to act in his behalf, the manager must forthwith enter such name and address and claim in the books of the company (h). On the notification to the manager of the death of any miner to whom wages are due, the manager must forthwith enter in the books a memorandum stating the fact of the death and the amount of wages due or claimed (i).

Tin-
 streamers'
 rights.

1175. Where a miner contracts to work a tin stream at a fixed rate of tribute, on the terms of providing and fitting up at his own expense the necessary plant and machinery, he is in any case entitled to not less than one month's notice to quit, and to all such machinery and plant, and to all tin stuff, dressed ore, or leavings that may be in and about his works at the date of his leaving, and reasonable time must be allowed to him to remove the same (j).

(c) Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 11.

(d) *Ibid.*, s. 13 (1). As to the position of mine club moneys or funds in winding up, see p. 674, *post*.

(e) Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 14.

(f) *Ibid.*

(g) *Ibid.*, s. 13 (1).

(h) *Ibid.*, s. 5 (1).

Ibid., s. 5 (2).

Ibid., s. 17.

1176. Any dispute between a miner and the purser, manager, or agent of a mine, as to any money due to or claimed by the miner, may be heard and determined by a court of summary jurisdiction, which, for the purposes of the Stannaries Act, 1887, is deemed to be a court of civil jurisdiction. In a proceeding in relation to any such dispute the court may order payment of any sum which it may find to be due, and costs. The court cannot, however, except by consent, either exercise any jurisdiction where the amount claimed exceeds £25, or make an order for payment of any sum exceeding £25, exclusive of costs (*k*).

SECT. 4.
Mining
Companies
in the
Stannaries.

Determina-
tion of
disputes with
miners.

When orders for the payment of wages due in respect of work done at any mine have been made by any justices, and the amounts payable have not been discharged within the time allowed by law for that purpose, a distress may be levied on and sale made of any such mining effects, in or on such mine, as are by law liable to be distrained for rent (*l*).

Distress for
miners'
wages.

1177. Miners (*m*) employed wholly or in part in or about a mine (*n*), in respect of their wages (*o*) in relation to the mine, not exceeding an amount equal to three months' wages to each person, have a first charge upon all mining effects (*p*) in and about the mine belonging to the mine or to any company by whom the mine is worked, and upon all the company's money in the count-house, or in charge of the purser, agent, or secretary, or other person on its behalf, or at its bankers, and upon all its other assets in respect of the mine. This first charge has priority over all other claims for rents, royalties, dues, or otherwise by the lessors (*q*) of the mine, or by mortgagees (*r*), or judgment, execution, or other creditors of the company, or by any other persons whatever (*s*).

Priority of
miners'
wages.

A sheriff (*t*) in execution of any process against a company must, in the first instance, seize for the amount of the judgment debt and costs. On seizure he must require from the purser a full statement of the total sum due to the miners or their representatives for wages, including a fair estimate of wages earned and not yet

Duty of
sheriff.

(*k*) Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 18.

(*l*) *Ibid.*, s. 7. As to what may be taken by distress, see title DISTRESS Vol. XI., pp. 132 *et seq.*

(*m*) See Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 2; and p. 668, *ante*.

(*n*) As to the meaning of "mine," see *ibid.*, s. 3; and p. 668, *ante*.

(*o*) The term "wages" includes all earnings by miners arising from any description of piece or other work, or as tributers or otherwise (*ibid.*, s. 2).

(*p*) The term "mining effects" includes machinery, materials, goods, and chattels, and all ores and halvans, and all other personal property appertaining to a mine, or used or intended to be used for mining purposes (*ibid.*, s. 2).

(*q*) The term "lessors" means the lessor or grantor of any lease or grant of any mine, or licence to exercise mining rights and powers, and includes every person entitled under any such lease, grant, or licence, or any other instrument whatever, to receive the rents or dues payable in respect of any mine (*ibid.*, s. 2).

(*r*) The term "mortgagees" includes all holders of mortgage-debentures, mortgages, or other charges issued by any company (*ibid.*, s. 2).

(*s*) *Ibid.*, s. 4. But this charge is subject to the provisions of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 240, 241; see p. 673, *post*.

(*t*) The term "sheriff" includes any officer charged with the execution of a writ or other process (Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 2).

SECT. 4.
Mining
Companies
in the
Stannaries.

ascertained. He must thereupon enlarge his seizure so as to seize sufficient to satisfy, in addition, the moneys due for such wages. Out of the proceeds of sale he must, after payment of his own costs and expenses, but before paying the judgment debt and costs, pay the amount of such wages to the purser. The purser, whose receipt is a sufficient discharge to the sheriff, must distribute the amount received to the persons entitled (a).

(xii.) *Winding up.*

Where
winding-up
petition to be
presented.

1178. A petition to wind up a company, formed for working mines within the stannaries, which is not working mines or engaged in any other undertaking beyond the limits of the stannaries, and has not entered into a contract for such working or undertaking, must be presented to the court exercising the stannaries jurisdiction, whatever may be the amount of the capital of the company, and wherever the registered office of the company is situate (b). Any order of the Lord Chancellor excluding a county court from having winding-up jurisdiction, or attaching the whole or any part of its district to the High Court or any other county court, does not affect any jurisdiction or powers vested in any county court under or by virtue of the Stannaries Jurisdiction (Abolition) Act, 1896 (c).

Power of the
court.

1179. The court, in exercising the stannaries jurisdiction to wind up a company, has, for the purposes of that jurisdiction, all the powers of the High Court, and every prescribed officer of the court is to perform any duties which an officer of the High Court may discharge by order of the judge thereof or otherwise in relation to the winding up of a company (d).

For the purposes of Part IV. of the Act of 1908 (e), the court exercising the stannaries jurisdiction has, in addition to its ordinary powers, the same power of enforcing any orders made by it as the High Court has in relation to matters within its jurisdiction. For these purposes the jurisdiction of the judge of the court exercising the stannaries jurisdiction is deemed to be co-extensive in local limits with the jurisdiction of the High Court (f).

When several companies are in course of liquidation by or under the superintendence of the court exercising the stannaries jurisdiction and acting under that jurisdiction, and a contributory

(a) Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 6.

(b) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (4). As to transferring proceedings from the High Court to the Stannaries Court, see *Re New Terras Tin Mining Co.*, [1894] 2 Ch. 344; *Re Silver Valley Mines* (1891), 18 Ch. D. 472, C. A., disapproving *Re East Botallack Consolidated Mining Co.* (1864), 34 Beav. 82. See also *Re North Molton Mining Co.*, [1886] W. N. 78, where a voluntary liquidator was removed and another appointed by the High Court.

(c) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 131 (5). As to such order of the Lord Chancellor, see p. 659, *ante*.

(d) *Ibid.*, s. 131 (6). Proceedings for winding up are regulated by the statutory provisions and rules governing the winding up of companies in county courts (County Court Rules, Ord. 51, r. 6); see p. 546, *ante*.

(e) Which deals with winding up; see pp. 659 *et seq.*, *ante*.

(f) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 178 (2) [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 120].

of one of the companies is also a creditor claiming a debt against one of the other companies, the judge may direct the debt to be attached, and payment to the creditor suspended for a time certain as a security for payment of any calls that are or may become due from him to the company of which he is a contributory. The amount must be applied to such payment in due course; but the order of attachment is not to prejudice any claim which the company so indebted to the creditor may have against him by way of set-off, counter-claim, or otherwise, or any lawful claim of lien or specific charge on the debt in favour of any third person (g).

SECT. 4.
Mining
Companies
in the
Stannaries.

1180. In the case of an unregistered company within the stannaries being wound up, a past member is not liable to contribute to the assets if he has ceased to be a member for two years or more either before the mine ceased to be worked or before the date of the winding-up order (h).

Liability of
past members.

1181. The provisions of the Act of 1908 with respect to preferential payments (i) apply to companies within the stannaries, with the following modifications:—

Preferential
payments.

(1) In the case of a clerk or servant, the priority with respect to wages and salary is given to the extent of three months only, instead of four months, and does not extend to the principal agent, manager, purser, or secretary;

(2) All wages of a miner, artizan, or labourer employed in or about the mine, including all earnings by a miner arising from any description of piece or other work, or as a tributer or otherwise, but not exceeding an amount equal to three months' wages, are included amongst the payments which are under the Act to be made in priority to other debts;

(3) Wages of any miner, artizan, or labourer, unpaid at the commencement of the winding up, and all amounts, not exceeding in any individual case £100, due in respect of compensation payable to a miner or the dependants of a miner (j), the liability for which accrued before the commencement of the winding up, are, to the extent mentioned above, to be paid by the liquidator, forthwith, in priority to all costs, except (in the case of a winding up by the court) costs of and incidental to the making of the winding-up order, and to all claims by mortgagees, execution creditors, or any other persons, except the claims of clerks and servants in respect of their wages or salary. Subject to these exceptions, the court may by order charge, in favour of any person who is willing to advance the requisite amount or any part of it, the whole or any part of the assets of the company, in priority to all claims and to all existing mortgages or charges, with the payment of a sum sufficient to discharge the wages and amounts due in respect of compensation,

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 239 [Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 34].

(h) *Ibid.*, s. 269 (1) [Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 25]. As to transfers made fraudulently to escape liability, see p. 665, *ante*. As to the rights of a shareholder who has relinquished his share, see pp. 656, 666, *ante*.

(i) 8 Edw. 7, c. 49, s. 209; see p. 516, *ante*.

(j) This is subject to the provisions of s. 5 of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58); see p. 517, *ante*; and title MASTER AND SERVANT.

SECT. 4. with interest at a rate not exceeding 5 per cent. per annum. As soon as that sum has been advanced, the wages and amounts due in respect of compensation must be paid without delay, so far as the amount advanced extends, and in such order of payment as the court directs (*k*).

Contributions of workmen to certain funds.

1182. The contributions of the miners, artisans, or labourers, for the purpose of a mine club, or accident, or sick or benefit fund, are not to be applied in liquidation of the debts of the company or otherwise, but must be accounted for by the purser or any other person in possession of the fund to the liquidator. They are recoverable by him, and must be applied in accordance with the rules of the club. Where the company is being wound up voluntarily, the liquidator or any person claiming to be entitled to any such contributions or fund may apply to the court for directions, or to determine any question arising in the matter in the same manner as if the company were being wound up by the court (*l*).

Part IX.—Statutory Companies for Public Purposes (Companies Clauses Consolidation Acts).

SECT. 1.—*In General.*

SUB-SECT. 1.—*History and Objects of the Acts.*

History prior to 1845.

1183. Up to nearly the middle of the nineteenth century companies for executing such public works as bridges, roads, cuts, canals, reservoirs, aqueducts, waterworks, navigation, tunnels, archways, railways, piers, ports, harbours, ferries and docks, which could not be carried into execution without obtaining the authority of Parliament (*m*), were incorporated under special statutes, which empowered them to take lands and do things which they could not otherwise have lawfully done, and which regulated their capital, members, direction, management and proceedings. •

Companies Act, 1844.

The Companies Act, 1844 (*n*), did not, except as specially provided, apply (*o*) to companies for executing the above-mentioned works (*p*). One of its special provisions, however, was to the effect that if a company for executing such works deposited at the Houses of

(*k*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 240 [Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 26; Stannaries Act, 1887 (50 & 51 Vict. c. 43), ss. 2, 4, 9, 10].

(*l*) *Ibid.*, s. 241 [Stannaries Act, 1887 (50 & 51 Vict. c. 43), s. 13 (2)].

(*m*) See Companies Act, 1844 (7 & 8 Vict. c. 110), ss. 2, 25, afterwards repealed by Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205.

(*n*) 7 & 8 Vict. c. 110; see pp. 25 *et seq.*, *ante*.

(*o*) For the companies to which the Act applied, see pp. 25, 26, *ante*.

(*p*) 7 & 8 Vict. c. 110, s. 2.

SECT. 1.
In General.

Parliament, in compliance with the standing orders, the requisite documents, and also returned copies of them to the registration office, together with a certificate of the receipt of plans, sections, and books of reference, the Registrar of Joint Stock Companies would accept them instead of the deed of settlement required in other cases to obtain complete registration, and the company was entitled to complete registration (q). Even after complete registration such a company could not, before obtaining powers by special statute for executing such work, enter into certain contracts or do certain acts otherwise than conditionally. On obtaining the special statutory powers, the powers obtained by virtue of the Act of 1844, and all provisions of that Act applying to the company, ceased and determined except so far as was otherwise provided for by the special statute (r).

A statute which required companies for executing public works to obtain a special Act before they could avail themselves of many of the general provisions and powers of the general Act, and determined even then the powers exercisable when the special Act was obtained, was not of much use. Accordingly, in 1845 there was passed an Act called the Companies Clauses Consolidation Act, 1845 (s). The object of the legislature was to comprise in one general Act sundry provisions relating to the constitution and management of joint stock companies, usually introduced into special Acts of Parliament authorising the execution of undertakings of a public nature (t) by such companies, for the purpose of avoiding the necessity of repeating such provisions in each of the several special Acts relating to such undertakings, as well as for ensuring greater uniformity in the provisions themselves (u).

Companies
Clauses
Consolidation
Act, 1845.

(q) Companies Act, 1844 (7 & 8 Vict. c. 110), s. 9. As to the requisites for registration in ordinary cases, see p. 26, *ante*.

(r) *Ibid.*, s. 25.

(s) 8 & 9 Vict. c. 16; see s. 4. The Act of 1845 and the Acts amending it may be cited as the Companies Clauses Acts, 1845 to 1889.

(t) The fact that the companies are for the public benefit does not entitle them to the benefits of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61) (*A.-G. v. Margate Pier and Harbour (Company of Proprietors)*, [1900] 1 Ch. 749, 753, 754).

(u) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), preamble, repealed by the Statute Law Revision Act, 1891 (54 & 55 Vict. c. 67). This Act is one of a group of "Clauses Consolidation" Acts passed in that year, the others being the Companies Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 17); the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18); the Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 19); the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); and the Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33). In 1847 there was added to the statute book another group of Acts consolidating the common-form clauses of Acts relating to such matters as markets and fairs gasworks, bodies of commissioners, waterworks, harbours, docks and piers, towns improvement, cemeteries, and town police (10 & 11 Vict. cc. 14, 15, 16, 17, 27, 34, 65, and 89). The Companies Acts, 1856 (19 & 20 Vict. c. 47) and 1862 (25 & 26 Vict. c. 89), and the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), have followed the same models by allowing the tables therein respectively referred to to be adopted as standard forms of the regulations governing companies under those Acts respectively. As to the similarities of these Acts and the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), and the differences between them, see *Barton v. London and North Western Rail. Co.* (1889), 24 Q. B. D. 77, C. A.

SECT. 1.

In General.Application
of the Act.SUB-SECT. 2.—*Companies to which the Act of 1845 applies.*

1184. The Act of 1845 applies to every joint stock company which, by any special Act (a) passed after May 8th, 1845, is incorporated for the purpose of carrying on any undertaking and is incorporated with such special Act; and all the clauses and provisions of the Act of 1845, unless expressly varied or excepted by the special Act, apply, so far as applicable, to the company incorporated by the special Act, and to the undertaking (b) for carrying on which such company is incorporated. Such clauses and provisions, as well as the clauses and provisions of every other special Act incorporated with the Act of 1845, are, subject to the above exceptions, to form part of such Act and be construed together therewith as forming one Act (c).

Where it is desired to incorporate with special Acts some portion only of the provisions of the Act of 1845, it is sufficient for the purpose of making any such incorporation to enact in the special Act that the clauses and provisions of the Act of 1845, with respect to the matter so proposed to be incorporated (describing such matter as it is described in the Act of 1845 in the words introductory to the enactments with respect to such matter) (d), shall be incorporated with the special Act. All the clauses and provisions of the Act of 1845 with respect to the matter so incorporated, save so far as they are expressly varied or excepted by the special Act, thereupon form part of such Act, which is construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which the special Act relates (e).

SUB-SECT. 3.—*Definitions.*Statutory
definitions.

1185. The word "prescribed," as used in the Act of 1845 in reference to any matter therein stated, is construed to refer to such

(a) The expression "the special Act," as used in the Act of 1845, means any Act passed after May 8th, 1845, incorporating a joint stock company for the purpose of carrying on any undertaking, and with which the Act of 1845 is incorporated as above stated (Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 2).

(b) The expression "the undertaking" means the undertaking or works, of whatever nature, which by the special Act are authorised to be executed (*ibid.*). Moneys are provided for, and various ingredients go to make up the undertaking; but the term is the proper style, not for the ingredients, but for the completed work, and it is from the completed work that any return of moneys or earnings can arise (*Gardner v. London, Chatham and Dover Rail. Co.* (No. 1), *Drawbridge v. Same*, *Gardner v. Same* (No. 2), *Imperial Mercantile Credit Association v. Same* (1867), 2 Ch. App. 201).

(c) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 1.

(d) Thus ss. 6—13, *ibid.*, are prefaced with the words "with respect to the distribution of the capital of the company into shares be it enacted as follows." Where an Act so groups sections under various heads, with a heading to each group, the effect is the same as if the heading were repeated at the commencement of each section (*Eastern Counties and London and Blackwall Rail. Cos. v. Marriage* (1860), 9 H. L. Cas. 32, 68, 69; *Arrow Shipping Co. v. Tyne Improvement Commissioners*, *The "Crystal,"* [1894] A. C. 508, 529; and see *Falls v. Belfast and Ballymena Rail. Co.* (1849), 12 I. L. R. 233, Ex. Ch.; *Union Steamship Co. of New Zealand v. Melbourne Harbour Trust Commissioners* (1884), 9 App. Cas. 365, 369, P. C.; and title STATUTES.

(e) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 5.

PART IX.—STATUTORY COMPANIES FOR PUBLIC PURPOSES.

SECT. 1
In Gener

matter as the same is prescribed or provided for in the special Act; and the sentence in which such word occurs is construed as if, instead of the word "prescribed," the expression "prescribed for that purpose in the special Act" had been used (*f*).

The following words and expressions have, both in the Act of 1845 and in the special Act, the several following meanings, unless there is something in the subject or the context repugnant to such construction:—

Words importing the singular number only include the plural number; and words importing the plural number only include the singular number;

Words importing the masculine gender only include females;

The word "lands" extends to messuages, lands, tenements, and hereditaments of any tenure;

"Lease" includes an agreement for a lease;

"Month" means calendar month;

"Oath" includes affirmation in the case of Quakers, or other declaration lawfully substituted for an oath in the case of any other persons exempted by law from the necessity of taking an oath;

"County" includes any riding or other like division of a county, and also county of a city or county of a town;

"Justice" means justice of the peace acting for the county, city, borough, liberty, cinque port, or other place where the matter requiring the cognisance of any such justice arises, and who is not interested in the matter (*g*); and where any matter is authorised or required to be done by two justices, the expression "two justices" means two justices, assembled and acting together in petty sessions;

"The company" means the company constituted by the special Act;

"The directors" means the directors of the company, and includes all persons having the direction of the undertaking, whether under the name of directors, managers, committee of management, or under any other name;

"Shareholder" means shareholder, proprietor, or member of the company; and in referring to any such shareholder, expressions properly applicable to a person are to apply to a corporation; and

"The secretary" means the secretary of the company, and includes the word "clerk" (*h*).

(*f*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 2.

(*g*) As to when justices are interested, see *R. v. Hammond* (1863), 12 W. R. 208; *R. v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1867), L. R. 2 Q. B. 336; *R. v. Farrant* (1887), 20 Q. B. D. 58; *Wakefield Local Board of Health v. West Riding and Grimsby Rail. Co.* (1865), L. R. 1 Q. B. 84; *R. v. Lancashire Justices* (1906), 75 L. J. (K. B.) 198; *R. v. London Justices, Ex parte South Metropolitan Gas Co.* (1908), 24 T. L. R. 274, C. A.; and title MAGISTRATES.

(*h*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 3. The expression "superior courts" was defined as meaning "Her Majesty's Superior Courts of Record at Westminster or Dublin as the case may require." The former is now the High Court of Justice (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16).

SECT. 2.

SECT. 2.—*Principal Office and Notices.***Principal
Office and
Notices.**

What is
principal
office.

1186. The principal office is the office where the general superintendence and management of the company's business are carried on (i).

Any summons, notice, writ, or other proceeding, requiring to be served upon the company, may be served by being left at, or transmitted through the post directed to, its principal office, or one of its principal offices where there are more than one, or by being given personally to the secretary, or, in case there is no secretary, then by being given to any one director of the company (k). Where there is a secretary, service on a director is not sufficient (l).

Service on
shareholders.

1187. A notice requiring to be served by the company upon a shareholder may, unless expressly required to be served personally, be served by being sent by post, to his registered or other known address, within such period as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the giving of such notice. In proving such service it is sufficient to prove that the notice was properly directed and put into the post office (m).

With respect to any share to which persons are jointly entitled, notice must be given to the person named first in the register of shareholders; and notice so given is sufficient notice to all the proprietors of the share (n).

Advertise-
ment of
notices.

1188. All notices required to be given by advertisement must be advertised in the prescribed newspaper, or if no newspaper is prescribed, or if the prescribed newspaper has ceased to be published, in a newspaper circulating in the district within which the company's principal place of business is situated (o). In the absence of evidence that the newspaper in which notice of a meeting is advertised circulates in the district, the proceedings at the meeting are a nullity (p).

Authentica-
tion of
documents.

1189. Every summons, notice, or other document, requiring authentication by the company, may be signed by two directors, or

(i) *Garton v. Great Western Rail. Co.* (1858), E. B. & E. 837. Ex. Ch.; *Palmer v. Caledonian Rail. Co.*, [1892] 1 Q. B. 823, O. A.; and compare *Wilson v. Caledonian Rail. Co.* (1850), 5 Exch. 822. See *Jones v. Scottish Accident Insurance Co.* (1886), 17 Q. B. D. 421; and p. 17, *ante*.

(k) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 135; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 116; and p. 83, *ante*; see also Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 134; Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 138. The provisions of the section are not affected by R. S. O., Ord. 9, r. 8. As to the service of writs of summons issued against corporations in the absence of any statutory provision regulating service of process, see title CORPORATIONS, Vol. VIII., p. 619. As to the notice to a secretary received in another capacity, see *Re Sketchley, Ex parte Boulton* (1857), 1 De G. & J. 163, O. A.

(l) *Laurenson v. Dublin Metropolitan Junction Rail. Co.* (1877), 37 L. T. 32, O. A., where the plaintiff was secretary.

(m) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 136.

(n) *Ibid.*, s. 137.

(o) *Ibid.*, s. 138.

(p) *Swansea Dock Co. v. Levien* (1851), 20 L. J. (EX.) 447.

by the treasurer or secretary of the company, and need not be under the common seal. It may be in writing or in print, or partly in writing and partly in print (*q*).

SECT. 2.
Principal
Office and
Notices.

SECT. 3.—*Access to Special Acts.*

1190. The company must at all times after the expiration of six months after the passing of its special Act keep in its principal office of business a copy of the special Act, printed by the King's printers (*r*). If it fails to do so, it is to forfeit £20 for every such offence, and also, in case of a continuing offence, £5 a day (*s*).

Inspection of
special Acts.

SECT. 4.—*Change of Name.*

1191. The name of the company may be changed by a special Act (*t*). The change of name does not affect the powers vested in the company by its original name. Any reference in any statute to the company by its original name is interpreted as if a reference to the company by its new name was substituted (*a*).

How name of
company
changed.

1192. No proceeding, whether civil or criminal, which is pending at the passing of the special Act, either at the instance of or against the company, by its original name, is affected in any way by its change of name. Nor is any document or instrument whatever discharged or affected by reason of the company or its undertaking being therein called by the original name of the company or undertaking. It is not necessary in any such proceeding, document, or instrument to aver that the company or its undertaking had been known by its original name, and that by the special Act the name of the company and its undertaking were changed, and that the company had since been known by its new name, and its undertaking by its new name (*b*); but it is sufficient to describe the company by its new name, and its undertaking by its new name.

Effect of
change of
name.

The change of name does not invalidate anything done before the passing of the special Act effecting the change under or by virtue of any other Act (*c*). Nor does it affect any deeds, instruments, purchases, sales, securities, and contracts made before the passing of the special Act under any other Act, or with reference to the purposes thereof (*d*).

(*q*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 139.

(*r*) *Ibid.*, s. 161; Parliamentary Documents Deposit Act, 1837 (7 Will. 4 & 1 Vict. c. 83). As to the deposit of plans in the case of railway and other companies, see *Mutter v. Eastern and Midland Rail. Co.* (1888), 38 Ch. D. 92, C. A.; and title PARLIAMENT.

(*s*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 162.

(*t*) The special Act must incorporate Part IV. of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), ss. 36—39, relating to the change of name. The company may have been incorporated either before or after July 28th, 1863, the date of the passing of the Act (*ibid.*, s. 36).

(*a*) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 36.

(*b*) *Ibid.*, s. 37.

(*c*) *Ibid.*, s. 38.

(*d*) *Ibid.*, s. 39.

SECT. 5.
Share
Capital.

Division of
capital into
shares.

Nature of
shares.

Capital duty.

Creation of
new shares.

SECT. 5.—*Share Capital.*

SUB-SECT. 1.—*Division into Shares.*

1193. The capital of the company must be divided into shares of the prescribed number and amount, numbered in arithmetical progression, beginning with the number one; and each share must be distinguished by its appropriate number (e).

1194. All shares in the undertaking are personal estate, and transmissible as such. They are not of the nature of real estate (f); nor are they, even if the company's undertaking comprises land, an interest in land within s. 4 of the Statute of Frauds (g). They are choses in action (h), and not goods (i). Certificates for shares, or for the stock into which they have been converted, are not goods or documents of title to goods (k).

1195. A statement of the amount of the share capital, stamped with duty at 5s. per £100, must be delivered to the Commissioners of Inland Revenue within one month after the passing of the special Act, under penalty of 10 per cent. of the duty per month during default (l).

SUB-SECT. 2.—*Increase of Capital.*

(i.) *Under the Act of 1845.*

1196. Under the Act of 1845 a company may increase its share capital instead of exercising its borrowing powers, unless its special

(e) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 6, which, together with ss. 7—13, comprises the part of the Act described as relating to distribution of capital. As to *ibid.*, ss. 8—13, see pp. 687 *et seq.*, *post*. A person may become a member although the particular shares in respect of which he is a member may not be capable of identification by numbers (*Portal v. Emmens* (1876), 1 C. P. D. 201, 210, 211; affirmed (1876) 1 C. P. D. 664, C. A.; *Irish Peat Co. v. Phillips* (1861), 1 B. & S. 598, 626, 627, 638, Ex. Ch.; *East Gloucestershire Rail. Co. v. Bartholomew* (1867), L. R. 3 Exch. 15). The term "share" indicates simply a right to participate in the profits of a particular joint stock undertaking (*Morrice v. Aylmer* (1874), 10 Ch. App. 148, *per JAMES, L.J.*, at p. 155; affirmed (1875) L. R. 7 H. L. 717), and to attend and vote at the general meetings of the company (*Nanney v. Morgan* (1887), 37 Ch. D. 346, C. A., *per COTTON, L.J.*, at p. 352). As to issuing shares at a discount, see p. 684, *post*.

(f) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 7.

(g) 29 Car. 2, c. 3; *Bradley v. Holdsworth* (1838), 3 M. & W. 422; *Bligh v. Brent* (1837), 2 Y. & C. (ex.) 268, 294.

(h) *Colonial Bank v. Whitney* (1886), 11 App. Cas. 426; and see titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 175; CHOSSES IN ACTION, Vol. IV., p. 363.

(i) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 4 (1), 62 (1); and see *Humble v. Mitchell* (1839), 11 Ad. & El. 205, 208.

(k) *Freeman v. Appleyard* (1862), 32 L. J. (ex.) 175; *Williams v. Colonial Bank* (1888), 38 Ch. D. 388, 408, C. A.; affirmed *sub nom. Colonial Bank v. Cady and Williams* (1890), 15 App. Cas. 267; see title SALE OF GOODS.

(l) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 113; Finance Act, 1899 (62 & 63 Vict. c. 9), s. 7; and see *Great Northern, Piccadilly and Brompton Railway v. A.-G.*, [1909] A. C. 1. For the form of statement, see Encyclopædia of Forms, Vol. IV., p. 824. As to stamp duty on the copy of a private Act dissolving a company and re-incorporating it, vesting the property in the new company, and providing that the stockholders should receive the same amount of stock in the new company, see *A.-G. v. Felizstowe Gas Light Co.*, [1907] 2 K. B. 984.

PART IX.—STATUTORY COMPANIES FOR PUBLIC PURPOSES

Act otherwise provides (*m*). The whole or part of the additional sum authorised to be borrowed by the special Act (*n*) may be raised, with the previous authority of a general meeting, by creating new shares; new shares may also be issued to pay off part of an existing loan (*o*). The capital so raised is to be considered as part of the general capital, and is subject to the same provisions in all respects, whether with reference to the payment of calls, or the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital, except as to the times of making calls and the amount of such calls, which respectively the company may from time to time fix as it thinks fit (*p*).

SECT. 5.
Share
Capital.
—

1197. If, when any increase of capital takes place by the creation of new shares, the existing shares are at a premium, the sum to be raised must, unless it is otherwise provided by the special Act, be divided into shares of such an amount as will conveniently allow them to be apportioned among the shareholders in proportion to their holding. The new shares must be offered by letter under the hand of the secretary to the shareholders, in proportion to their holding (*q*).

Mode of
issue.

The new shares vest in and belong to the shareholders who accept them and pay for them at the time and by the instalments which are fixed by the company. If any shareholder fails for one month after the offer of new shares to accept them and pay the required instalments, the company may dispose of them in such manner as it deems most for its advantage (*r*).

If the existing shares are not at a premium, the new shares may be of such amount, and may be issued in such manner and on such terms, as the company thinks fit (*s*). They may be issued at a discount (*t*).

Issuing shar
at a disconn

(ii.) Under Subsequent Acts.

1198. The Companies Clauses Act, 1863 (*u*), does not confer upon companies generally any power of creating new shares (ordinary or preference), but regulates the exercise of such a power, in cases in which it has been conferred upon a company by special Act. Where a company is authorised by any special Act (*w*) to raise any additional sum or sums by the issue of new ordinary shares, or new ordinary stock, the company, with the sanction of the

Increase of
share capital

(*m*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 56—60.

(*n*) See *ibid.*, ss. 38—55.

(*o*) *Ibid.*, s. 56. A duty of 5s. per £100 is payable as in the case of the original capital; see p. 680, *ante*.

(*p*) *Ibid.*, s. 57.

(*q*) *Ibid.*, s. 58. The letter may be given to the shareholder or sent by post to his registered address, or left at his usual or last place of abode (*ibid.*).

(*r*) *Ibid.*, s. 59; and see proviso to Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 20; and p. 684, *post*. As to absence abroad, see also *Pearson v. London and Croydon Rail. Co.* (1845), 14 Sim. 541; *Campbell v. London and Brighton Rail. Co.* (1846), 5 Hare, 519.

(*s*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 60.

(*t*) *Statham v. Brighton Marine Palace and Pier Co.*, [1899] 1 Ch. 199, 204.

(*u*) 26 & 27 Vict. c. 118.

(*w*) The special Act must incorporate *ibid.*, Part II., ss. 12—21 (*ibid.*, s. 12). The company may have been incorporated either before or after July 28th, 1863, the date of the passing of the Act (*ibid.*).

SECT. 5.
Share
Capital.

prescribed (a) proportion of the votes of the shareholders and stockholders entitled to vote in that behalf at meetings of the company, present (personally or by proxy) at a meeting of the company specially convened for the purpose, may from time to time create and issue, according to the authority given by the special Act, such new ordinary shares, of such nominal amount, and subject to the payment of calls of such amounts and at such times as the company thinks fit, or such new ordinary stock as the company thinks fit (b).

Preference
shares.

1199. There was in the Act of 1845 no general provision authorising the creation of preference shares, or regulating, as to companies empowered by special Act to create such shares, the exercise of that power. Before the passing of the Act of 1863, however, certain companies had been by special Acts empowered to issue preference shares, and, in effect, to attach to them the right to a dividend, not only of a preferential but also of a cumulative character (c).

By the Act of 1863, a company authorised by any special Act (d) to raise any additional sum or sums by the issue of new preference shares or new preference stock, or (at the option of the company) by either of these modes, may, from time to time, with the like sanction as in the case of the issue of new ordinary shares, create and issue, according to the authority given by the special Act, such new shares or new stock, either ordinary or preference, and either of one class and with like privileges, or of several classes and with different privileges, and of the same or different amounts, and respectively with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred, or other dividend or interest, not exceeding the rate prescribed (e), and subject to the payment of calls of such amounts and at such times as the company from time to time thinks fit. Any preference assigned to any shares or stock issued under the special Act does not affect any guarantee or any preference or priority in the payment of dividend or interest on any shares or stock that may have been granted by the company under or confirmed by any previous Act, or that may be otherwise lawfully subsisting (f).

(a) If no proportion is prescribed the proportion is three-fifths (*ibid.*). As to the meaning of prescribed, see p. 676, *ante*.

(b) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 12. A duty of 5s. per £100 is payable as in the case of the original capital; see p. 680, *ante*.

(c) In such special Acts, the so-called preference "dividend" was in the nature of interest chargeable upon profits generally, and therefore in effect cumulative; see *Henry v. Great Northern Rail. Co.* (1857), 1 De G. & J. 606, 636, 648, C. A.; *Matthews v. Great Northern Rail. Co.* (1859), 28 L. J. (OH.) 375, 378; *Corry v. Londonderry and Enniskillen Rail. Co.* (1860), 29 Beav. 263; *Staples v. Eastman Photographic Materials Co.*, [1896] 2 Ch. 303, C. A., *per* KAY, L.J., at pp. 309, 310; see also *Lamplough v. Kent Waterworks (Company of Proprietors)*, [1903] 1 Ch. 575, C. A.; affirmed [1904] A. C. 27.

(d) The special Act must incorporate the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), Part II., ss. 12—21 (*ibid.*, s. 13).

(e) If no rate is prescribed the rate must not exceed £5 per cent. per annum.

(f) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 13. As to the stamp duty on increase of capital, see Stamp Act, 1891 (54 & 55 Vict. c. 39).

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The preference shares or stock so issued are entitled to the preferential dividend or interest assigned thereto, out of the profits of each year, in priority to the ordinary shares and stock of the company; but they are non-cumulative (g).

SECT. 5
Share
Capital

In the absence of special provision the preference shareholders have no priority over ordinary shareholders as to repayment of capital, but the assets must be distributed rateably among all the shareholders in proportion to their capital (h).

The terms and conditions to which any preference share or preference stock is subject must be clearly stated on the certificate of that preference share or portion of preference stock (i).

1200. If, after having created new shares or new stock, the company determines not to issue the whole, it may cancel the unissued shares or stock (j). Cancellation of unissued shares.

1201. If, at the time of the issue of new shares or new stock, the ordinary shares or ordinary stock are or is at a premium, then, unless the company before the issue of the new shares or stock otherwise determines, the new shares or stock must be of such amount as will conveniently allow the same to be apportioned among the holders of the ordinary stock and ordinary shares in proportion, as nearly as conveniently may be, to their holding, and must be offered to them at par in that proportion. It is not obligatory on the company so to apportion or offer any new shares or stock unless the amount of every new share or portion of new stock to be so offered would, if so apportioned, be at least the sum prescribed in the special Act, and, if no sum is prescribed, then at least £10 (a). Apportionment of new shares.

The offer of new shares or new stock must be made by letter under the hand of the treasurer or secretary of the company, given to every holder of ordinary shares or stock, or sent by post addressed to him according to his address in the shareholders' or stockholders' address book, or left for him at his usual or then last known place of abode in England, Scotland, or Ireland (as the case may require); and every such offer made by letter sent by post is considered as made on the day on which the letter in due course of delivery ought to be delivered at the place to which it is addressed (b).

The new shares or portions of new stock so offered vest in and belong to the shareholders or stockholders who accept them or their nominees (c).

Any shareholder or stockholder failing to signify his acceptance

s. 112; and title REVENUE; see also *A.-G. v. Anglo-Argentine Tramways Co., Ltd.*, [1909] 1 K. B. 677.

(g) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 14; compare *Staples v. Eastman Photographic Materials Co.*, [1896] 2 Ch. 303, C. A.

(h) *Re Accrington Corporation Steam Tramways Co.*, [1909] 2 Ch. 40.

(i) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 15.

(j) *Ibid.*, s. 16.

(a) *Ibid.*, s. 17; and compare Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 58; see p. 681, *ante*.

(b) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 18.

(c) *Ibid.*, s. 19; compare Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 59; see p. 681, *ante*.

SECT. 5.
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Capital.

of the whole or part of the new shares or stock offered him within the time prescribed (*d*) is deemed to have declined the offer either wholly or in part. Where, however, from absence abroad or other cause satisfactory to the directors of the company, he omits to signify within the time prescribed his acceptance of the new shares or stock offered to him, the directors, if they think proper, may permit him to accept them, notwithstanding that such time has elapsed (*e*).

Disposal of
new shares.

Subject to the above right of pre-emption, the company may from time to time dispose of new shares and new stock at such times, to such persons, on such terms and conditions, and in such manner as the directors think advantageous to the company (*f*).

SUB-SECT. 3.—*Issuing Shares at a Discount.*

Issuing shares
at a discount.

1202. New shares issued under the Act of 1845 (*g*), and new shares or stock to which the Act of 1863 (*h*) applies (*i*), may be issued at a discount (*j*).

The Act of 1863 (*k*) regulates the disposal of any shares, forming part of the capital, whether original or additional, authorised to be raised by any special Act of a company passed before the parliamentary session of 1869, which have not been disposed of (*l*). Any shares the creation of which has been authorised by a company, but which have not been issued before the passing of the Act of 1869, must not be issued on any terms other than those on which they might have been issued if the Act of 1869 had not been passed, except where the company has authorised the issue on other terms in the proper manner (*m*). The Act of 1869 does not alter or extend the

(*d*) If no time is prescribed the period is for one month (Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 20). As to the meaning of "prescribed," see p. 676, *ante*.

(*e*) *Ibid.* The corresponding section of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 59 (see p. 680, *ante*), does not contain any such provision in favour of shareholders not signifying acceptance within the prescribed time.

(*f*) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 21, as amended by s. 5 of the Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), whereby it was made clear that the legislature contemplated and authorised new shares or stock of companies governed by these Acts being thereafter issued at a discount; see *Statham v. Brighton Marine Palace and Pier Co.*, [1899] 1 Ch. 199; *Webb v. Shropshire Railways Co.*, [1893] 3 Ch. 307, 329, C. A.

(*g*) See Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 56—60; and p. 680, *ante*.

(*h*) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), ss. 12—21; see p. 681, *ante*.

(*i*) *Statham v. Brighton Marine Palace and Pier Co.*, *supra.*; *Webb v. Shropshire Railways Co.*, *supra.*

(*j*) *Statham v. Brighton Marine Palace and Pier Co.*, *supra.*

(*k*) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), ss. 20, 21, as amended by Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), s. 6, the effect of which is to make it clear that companies governed by these Acts may issue their unissued original shares, as well as new shares, at a discount.

(*l*) Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), s. 6.

(*m*) *Ibid.*, s. 7. The authorisation referred to probably means or involves that, in the case postulated by the section, there must, before the issue of shares takes place, be a resolution passed by the company in the manner prescribed by s. 12 of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118) (see p. 682, *ante*), expressly authorising the particular terms of issue intended; compare s. 2 of the Act of 1869; and note (*f*), p. 740, *post*.

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provisions of any Act relating to share capital in respect of which the amount of profits to be divided is limited to a fixed rate per cent. upon the paid-up capital of the company (a).

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**Share
Capital.**

SUB-SECT. 4.—*Conversion of Shares into Stock.*

1203. The company may from time to time, with the consent of three-fifths of the votes of the shareholders present in person or by proxy at any general meeting, when due notice for that purpose has been given, convert or consolidate all or any part of the shares then existing in the capital, and in respect of which the whole money subscribed has been paid up, into a general capital stock, to be divided amongst the shareholders according to their respective interests therein (b).

Mode of
conversion.

After the conversion all the provisions contained in the Act of 1845, or the special Act, which require or imply that the capital of the company must be divided into shares of any fixed amount, and distinguished by numbers, cease to have effect, as to so much of the capital as is converted into stock. The stock is transferable in the same manner and subject to the same regulations and provisions as the original shares. The company must keep a register of transfers, and for every entry may demand any sum not exceeding the prescribed amount, or, if no amount be prescribed, a sum not exceeding 2s. 6d. (c).

1204. The company must also from time to time cause the names of the stockholders, with the amount of their interest, to be entered in a book to be kept for the purpose, called "The Register of Holders of Consolidated Stock." This book is to be accessible at all seasonable times to the holders of shares or stock in the undertaking (d).

Register of
stockholders

1205. A stockholder is entitled to participate in the dividends and profits of the company, according to the amount of his holding. For the purpose of voting at meetings, qualification for the office of directors, and other purposes, he has the same rights, in proportion to his holding, as would have been conferred by shares of equal amount in the capital; but, except the participation in dividends

Participatio
in dividends

(a) Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), s. 8.

(b) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 61: and see the provisions as to new stock contained in Part II. of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118); and p. 681, *ante*. Capital stock is simply a set of shares put together in a bundle, and a bequest of shares in (for instance) a railway company will generally pass capital stock of the company (*Morrice v. Aymer* (1875), L. R. 7 H. L. 717, 725); but not debenture stock if the testator holds any shares (*Re Bodman, Bodman v. Bodman*, [1891] 3 Ch. 135). If he holds no shares, debenture stock may pass (*Re Weeding, Armstrong v. Wilkin*, [1896] 2 Ch. 364).

(c) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 62. There is no distinction between stock and shares as regards the requisites of a valid and effectual transfer (*Nanney v. Morgan* (1887), 37 Ch. D. 346, 353, C. A.).

(d) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 63; compare Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 28; and p. 742, *post*. As to inspection, perusal, and taking copies or extracts, see *Holland v. Dickson* (1888), 37 Ch. D. 669; *Mutter v. Eastern and Midlands Rail. Co.* (1888), 38 Ch. D. 92, C. A.; and pp. 152, 364, *ante*; p. 690, *post*.

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Capital.

and profits, no rights are conferred by any aliquot part of such amount of consolidated stock as would not, if existing in shares, have conferred them (e).

SUB-SECT. 5.—Application of Capital.

Application
of share and
loan capital.

1206. All the money raised by the company, whether by subscriptions of the shareholders or by loan or otherwise, must be applied (1) in paying the costs and expenses incurred in obtaining the special Act and all expenses incident thereto, and (2) in carrying the purposes of the company into execution

Promotion
expenses.

1207. An action may be maintained against the company by solicitors and others for the costs incurred in obtaining its special Act, and expenses incident thereto (g). Among the promoters and persons engaged in getting up the Bill those persons only who have acted directly for the company contemplated by the Bill, without being employed to do the work by any other person for hire or reward, are entitled to require, and in case of need to sue for, payment of the costs and expenses incurred by them out of the company's funds; those who have been employed by some other person for hire or reward to do such work must look for payment to the person who employed them (h).

The above costs and expenses include money advanced for the purpose of paying the necessary House fees payable in respect of a Bill in Parliament (i). A promise by promoters of a railway company to pay a sum of money to an influential landowner for his countenance and support does not constitute an expense, incident to obtaining the special Act, which the company is liable to or lawfully can pay (k). The Statute of Limitations does not begin to run against a person who is entitled to sue a company for the costs and expenses mentioned above, until the company has assets wherewith to pay him (l).

Ultra vires
application
of capital.

1208. The funds of a company, incorporated by Parliament for particular purposes, can only be applied for the purposes directed

(e) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 64.

(f) *Ibid.*, s. 65.

(g) *Hutchins v. Kilkenny Rail. Co.* (1850), 9 C. B. 536, 540; and see *Muir v. Forman's Trustees* (1903), 5 F. (Ct. of Sess.) 546; and title RAILWAYS AND CANALS.

(h) *Re Skegness and St. Leonard's Tramways Co., Ex parte Hanly* (1888), 41 Ch. D. 215, 233, 239, C. A.; *Re Kent Tramways Co.* (1879), 12 Ch. D. 312, C. A.; *Wyat v. Metropolitan Board of Works* (1862), 11 C. B. (N. S.) 744. Where the company's Act sanctioned two only out of six lines of railway originally projected by the Bill, the company's solicitor was held entitled to be paid out of the company's funds the costs incurred in relation to the four unsanctioned lines; but in that case the special Act expressly provided that the costs incidental and preparatory to obtaining the Act should be paid by the company (*Re Tilleard* (1863), 3 De G. J. & Sm. 519, C. A.).

(i) *Scott v. Ebury (Lord)* (1867), L. R. 2 C. P. 255; see title PARLIAMENT.

(k) *Shrewsbury (Earl) v. North Staffordshire Rail. Co.* (1865), L. R. 1 Eq. 593, 619; and see *Cutbill v. Shropshire Railways Co.*, [1891] W. N. 65, where promoters had advanced the parliamentary deposit. But funds of a company may probably be lawfully applied in opposing, in Parliament, the passing of an Act calculated to prejudice the company's undertaking (*A.-G. v. Andrews* (1850), 9 Mac. & G. 225, 230).

(l) *Re Kensington Station Act* (1875), L. R. 20 Eq. 197, 206.

and provided for by the Act. The company has only a limited authority, and cannot, even with the consent of all its shareholders, do or contract to do anything outside the scope of that authority, however advantageous it may appear to be^(m). Although an application to Parliament by directors, in the name of the company, for sanction to a scheme to alter the existing rights and interests of two classes of shareholders may not be a breach of trust or of duty to the company, the directors will be restrained by injunction from applying any of its funds towards payment of the parliamentary costs relating to or occasioned by such an application⁽ⁿ⁾. Nor are they entitled to be indemnified out of its funds against the expenses of promoting a Bill for the acquisition of further powers for the company, if its special Act does not authorise such expenditure^(o).

SECT. 5.
Share
Capital.
—

SECT. 6.—*Prospectus.*

1209. There is no special provision in the Companies Acts with reference to prospectuses of companies which are subject to their enactments^(p). The directors or promoters of such companies are not subject to the provisions of the Act of 1908 which apply in case of untrue statements in a prospectus inviting persons to subscribe for shares in or debentures of a company within that Act^(q); nor do its provisions as to the contents and filing of a prospectus of a company within that Act^(r) apply to them^(s). No statutory provision.

On the other hand, the common law remedy by an action of deceit for damages, and the equitable remedy by an action for rescission of a contract to take shares or debentures on the ground of misrepresentation, will apply to such companies equally with companies subject to the provisions of the Act of 1908^(t). Remedies for deceit.

SECT. 7.—*Shares and Shareholders.*

SUB-SECT. 1.—*Description of Shareholder.*

1210. Every person who has subscribed^(a) the prescribed sum or upwards to the capital of the company, or otherwise has become Meaning of "shareholders."

^(m) *East Anglian Railways Co. v. Eastern Counties Rail. Co.* (1851), 11 C. B. 775, 811—813; *Munt v. Shrewsbury and Chester Rail. Co.* (1850), 13 Beav. 1; see title CORPORATIONS, Vol. VIII., p. 359.

⁽ⁿ⁾ *Stevens v. South Devon Rail. Co.* (1851), 20 L. J. (OH.) 491.

^(o) *Caledonian Rail. Co. v. Solway Junction Rail. Co.* (1883), 32 W. R. 164.

^(p) As to what companies are meant, see Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 2; and p. 676, *ante*.

^(q) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84; see p. 136, *ante*.

^(r) *Ibid.*, ss. 80, 81.

^(s) The statutory definition of a "company" in the Act of 1908 does not include them; see *ibid.*, s. 285; and p. 36, *ante*.

^(t) See pp. 126 *et seq.*, *ante*.

^(a) The word "subscribed" primarily referred to the signing of the subscription or parliamentary contracts (formerly in vogue when application was made for a special Act to incorporate a company for the execution of some public undertaking), whereby a number of signatories bound themselves to

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and Share-
holders.

Who may be
shareholders.

entitled to a share in the company, and whose name has been entered on the register of shareholders, is deemed a shareholder of the company (b).

A scrip-holder may be entitled, in certain events and on certain terms, to come in and take shares, without being liable to be registered against his will as a shareholder (c). Generally a person becomes entitled to shares by sending to the company a signed form of application and receiving notice of an allotment pursuant to the application, a binding contract, by offer and acceptance, being thus constituted as in the cases of companies under the Act of 1908 (d). Although there cannot be a register in the strictest sense of the term until the book containing it is sealed at the first ordinary meeting of a company (e), there are shareholders before that time, inasmuch as the first ordinary meeting is a meeting of shareholders (f). A transferee may be a shareholder without his name being on the register of shareholders, if it is on the register of transfers (g).

Where the special Act contains the usual provision that the company shall not issue any share, nor shall any share vest in the person accepting it, unless and until a sum not being less than one-fifth part of the amount of the share has been paid up in respect of it, anyone who has subscribed for shares, and whose name is entered on the register, is to be deemed a shareholder, and accordingly is liable for calls, notwithstanding that, at the time when the call is made, the prescribed one-fifth has not been paid up on the shares (h). Where, however, there is such a provision as to the issue and vesting of shares, and a person, who has agreed to take shares but has paid nothing on them, executes a transfer which is registered by the company, the transfer operates as a new contract between the transferor, the transferee, and the

contribute specified sums for the purpose of the undertaking (*Portal v. Emmens* (1876), 1 C. P. D. 664, C. A.). For forms of subscription contracts and of the subscribers' agreements which usually accompanied them, see *Cork and Youghal Rail. Co. v. Paterson* (1856), 18 C. B. 414, 415, 422, 433; *Burke v. Lechmere* (1871), L. R. 6 Q. B. 297, 303. A subscription contract is not now necessary nor usual, and signing such a contract is not the only way of subscribing; anyone who has agreed in writing to take shares is for this purpose a subscriber (*Portal v. Emmens, supra*; *Re Littlehampton Steam-Ship Co., Ltd., Gregg's Case* (1866), 15 W. R. 82).

(b) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 8. For the definition of shareholder, see p. 677, *ante*.

(c) *McIlwraith v. Dublin Trunk Connecting Rail. Co.* (1871), 7 Ch. App. 134, 140. Compare *Ormerod's Case* (1867), L. R. 5 Eq. 110; as to the liability of scrip-holders, see also *Eustace v. Dublin Trunk Connecting Rail. Co.* (1868), L. R. 6 Eq. 182; *Re Asiatic Banking Corporation, Ex parte Collum* (1869), L. R. 9 Eq. 236.

(d) See pp. 145, 172, *ante*. For form of application, see *Encyclopædia of Forms*, Vol. IV., p. 827.

(e) See p. 689, *post*.

(f) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 69; and see p. 718, *post*.

(g) *Portal v. Emmens, supra*; compare *Kipling v. Todd* (1878), 3 C. P. D. 350, C. A.

(h) *East Gloucestershire Rail. Co. v. Bartholomew* (1867), L. R. 3 Exch. 15, 18, 24; *McEuen v. West London Wharves and Warehouses Co.* (1871), 6 Ch. App. 655.

company, whereby the transferee becomes the taker of the shares, and the transferor is discharged from his agreement to take them (*i*).

SECT. 7
Shares
and Share-
holders.

Non-recognition of trust affecting shares.

1211. The company is not bound to see to the execution of any trust, whether express, implied, or constructive, to which any shares are subject. The receipt of the party in whose name any share stands in the books of the company, or, if it stands in the names of more persons than one, the receipt of one of the persons named in the register of shareholders, is a sufficient discharge to the company for any dividend or other sum of money payable in respect of the share, notwithstanding any trusts to which the share may then be subject, and whether or not the company has had notice of them; and the company is not bound to see to the application of the money paid upon such receipt (*k*). Therefore, as between themselves and the company, executors or trustees, registered as the holders of shares, have and are subject to precisely the same rights and liabilities as other joint holders; they are joint holders in their individual capacity, and any transfer of the shares must be executed by all of them; the company has nothing to do with the character in which they hold the shares (*l*).

Where, however, directors make an illegal application of the company's funds, by investing them in the purchase, in the name of the chairman of the board, of shares in another company, notwithstanding the illegality of the transaction, the chairman is a trustee of the shares for his company, and compellable to transfer them as it directs (*m*).

SUB-SECT. 2—Shareholders' Register and Address Book.

1212. The company must keep a book, called the "Register of Shareholders," in which must be entered, in alphabetical order, the names of the corporations, and the names and additions of the persons entitled to shares in the company, with the number of shares to which each shareholder is entitled, distinguishing each share by its number, and the amount of the subscriptions paid on the shares. This book must be authenticated by the common seal of the company being affixed thereto at the first ordinary meeting, or at the next subsequent meeting of the company, and so from time to time at each ordinary meeting of the company (*n*). The provision as to distinguishing each share by its number is directory, and the insertion of the distinguishing numbers in the register is

Register.

(*i*) *Morton's Case* (1873), L. R. 16 Eq. 104.

(*k*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 20.

(*l*) *Barton v. North Staffordshire Rail. Co.* (1888), 38 Ch. D. 458, 464, 465; *Barton v. London and North Western Rail. Co.* (1889), 24 Q. B. D. 77, 89, C. A.; and see *Muir v. City of Glasgow Bank* (1879), 4 App. Cas. 337; *City of Glasgow Bank in Liquidation* (1879), 4 App. Cas. 547; *Cunninghame v. City of Glasgow Bank* (1879), 4 App. Cas. 607; compare *Re Shelley, Ex parte Stewart* (1864), 4 De G. J. & Sm. 543, 547, 548; and see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 27; and p. 150, *ante*.

(*m*) *Great Eastern Rail. Co. v. Turner* (1872), 8 Ch. App. 149; compare *Pinkett v. Wright* (1842), 2 Hare, 120, 127.

(*n*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 9.

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not essential (*o*). Nor is the direction as to the time at which the register is to be made up an essential condition to the validity of the register, and a register made up after that time may be valid (*p*). The register does not necessarily consist of a single volume; where it is contained in several volumes, and only the last one of the series is sealed, the whole of the register is admissible in evidence (*q*).

Address book.

1213. In addition to the register of shareholders, the company must provide a book called the "Shareholders' Address Book," in which the secretary must from time to time enter in alphabetical order the corporate names and places of business of the shareholders of the company, being corporations, and the surnames of the other shareholders with their respective christian names, places of abode, and descriptions, so far as the same are known to the company. Every shareholder, or if such shareholder is a corporation, its clerk or agent, may at all convenient times peruse such book gratis, and may require a copy of the whole or of any part of it; and for every hundred words so required to be copied the company may demand a sum not exceeding 6*d.* (*r*). This right to have a copy is a private right conferred on a person as a member of the company, and not as a member of the public. The remedy to enforce the right is by an injunction to restrain the company from continuing to refuse to supply him, or by an action of mandamus or for a mandatory injunction directing the company to supply him, and not by a prerogative writ of mandamus; and the court cannot inquire into the applicant's motives (*s*).

SUB-SECT. 3.—Certificates of Shares.

Delivery
and effect.

1214. On demand of the holder of any share, a company must cause to be delivered to him a certificate of the proprietorship of the share under its common seal, specifying the share in the undertaking to which he is entitled. The certificate may be according to the statutory form, or to the like effect; and for such certificate the company may demand any sum not exceeding the prescribed amount, or, if no amount be prescribed, then a sum not exceeding 2*s.* 6*d.* (*t*). The certificate is a solemn affirmation under the seal of the company that a certain amount of shares or stock stands in the name of the individual mentioned in the certificate (*u*), and

(*o*) *East Gloucestershire Rail. Co. v. Bartholomew* (1867), L. R. 3 Exch. 15.

(*p*) *Burke v. Lechmere* (1871), L. R. 6 Q. B. 297, 304; *Wolverhampton New Waterworks Co. v. Hawksford* (1860), 7 C. B. (N. S.) 795, 815; affirmed (1861) 11 C. B. (N. S.) 456, Ex. Ch.

(*q*) *Inglis v. Great Northern Rail. Co.* (1852), 1 Macq. 112, H. L.; see *Bain v. Whit-haven and Furness Junction Rail. Co.* (1850), 3 H. L. Cas. 1; and compare *London Grand Junction Rail. Co. v. Freeman* (1841), 2 Man. & G. 606, 637 (a case before the Act).

(*r*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 10.

(*s*) *Davies v. Gas Light and Coke Co.*, [1909] 1 Ch. 708, O. A.; and see p. 722, *post*.

(*t*) Companies Clauses (Consolidation) Act, 1845 (8 & 9 Vict. c. 16), s. 11. For the form of certificate see, *ibid.*, Sched A; and Encyclopædia of Forms, Vol. IV., p. 841.

Shropshire Union Railways and Canal Co. v. R. (1875), L. R. 7 H. L.

a representation, binding on the company by way of estoppel, that the amount stated in the certificate to have been paid on the shares has been paid (a).

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The certificate is to be admitted in all courts as *prima facie* evidence of the title of the shareholder, his executors, administrators, successors, or assigns, to the share therein specified. It is not, however, conclusive evidence of title (b); and the want of it does not prevent the holder of any share from disposing thereof (c).

1215. If any such certificate is worn out or damaged, then, upon it being produced at some meeting of the directors, they may order it to be cancelled, and thereupon another similar certificate must be given to the person in whom the property of such certificate, and of the share therein mentioned, is at the time vested. If the certificate is lost or destroyed, then, upon proof thereof to the satisfaction of the directors, a similar certificate must be given to the person entitled to the certificate so lost or destroyed. In either case a due entry of the substituted certificate must be made by the secretary in the register of shareholders. For every such certificate so given or exchanged the company may demand any sum not exceeding the prescribed amount, or if no amount be prescribed, then a sum not exceeding 2s. 6d. (d).

New
certificates.

SUB-SECT. 4.—*Liability of Shareholders in respect of Calls or otherwise.*

(i.) *In General.*

1216. The persons who have subscribed (e) any money towards an undertaking, or their legal representatives (f), must pay the

Shareholders'
liability.

(a) *Burkinshaw v. Nicolls* (1878), 3 App. Cas. 1004, 1016, 1026, 1027. As to estoppel, see *Re Bahia and San Francisco Rail. Co.* (1868), L. R. 3 Q. B. 584; *Bulkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396, 403–405; *Hart v. Fruntino etc. Gold Mining Co.* (1870), L. R. 5 Exch. 111; *Simm v. Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, 203, 206, 213, C. A.; *Turpin's Case*, [1877] W. N. 70; and p. 182, *ante*. See generally, title ESTOPPEL.

(b) *Powell v. London and Provincial Bank*, [1893] 1 Ch. 610, 617; and compare *Burkinshaw v. Nicolls*, *supra*; *Shropshire Union Railways and Canal Co. v. R.*, (1875), L. R. 7 H. L. 496; *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20, 35; and see p. 182, *ante*.

(c) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 12.

(d) *Ibid.*, s. 13. As to the effect of the note at the foot of a share certificate, requiring production thereof prior to registration of a transfer, see *Société Générale de Paris v. Walker*, *supra*, at p. 37; *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426; *Shropshire Union Railways and Canal Co. v. R.*, *supra*, at p. 509; *Ruinford v. Keith (James) and Blackman Co.*, [1905] 2 Ch. 147, C. A.; *Guy v. Waterlow Brothers and Layton* (1909), 25 T. L. R. 515; and p. 184, *ante*.

(e) This word is used with reference, primarily, to subscription of the parliamentary contract and subscribers' agreement which, in 1845, were required by the standing orders of both Houses of Parliament in the case of such companies as the Act applies to; see p. 687, *ante*; *Cromford Rail. Co. v. Lucey* (1829), 3 Y. & J. 80, 86, 90. But the section also applies to the modern method of subscription, by application for shares in a company after its incorporation. Liability to pay calls is incurred by so subscribing as to become entitled to shares (*Waterford, Wexford, Wicklow and Dublin Rail. Co. v. Pidcock* (1853), 8 Exch. 279, 283, 285; *Edwards v. Kilkenny etc. Rail. Co.* (1863), 14 C. B. (N. S.) 526).

(f) These words apply to executors who are in the possession of shares and render them liable for calls upon those shares; but an executor cannot be sued

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sums subscribed, or such portions as are from time to time called for by the company, at the times and places appointed by the company (g). A company's remedy by a statutory action for recovery of calls is enforceable only against persons who were shareholders when the calls were made; a subscriber is not liable to be so sued for a call unless he was also a shareholder at the time of making it (h).

(ii.) *Calls.*

Power to
make calls.

1217. A company may from time to time make such calls upon the shareholders, in respect of the amount of capital subscribed or owing by them, as it thinks fit, provided that twenty-one days' notice at the least is given of each call, and that no call exceeds the prescribed amount, if any, and that successive calls are not made at less than the prescribed interval, if any, and that the aggregate amount of calls made in any one year does not exceed the prescribed amount, if any. Every shareholder is liable to pay the amount of the calls so made, in respect of the shares held by him, to the persons, and at the times and places, from time to time appointed by the company (i).

How made.

1218. The power to make calls may be, and usually is, exercised by the directors (k). A call is generally deemed to have been made when the resolution to call for the money is passed; the resolution need not specify either the time or the place for payment, it being only a determination that an application is to be made to each shareholder for a portion of the amount of his shares (l). The resolution is not invalid merely because it is prospective. Thus, a resolution may be passed on the 18th of March that a call be made on the 30th of the same month, payable on the 1st of May following (m). A call may validly be made payable by instalments (n). But probably, in such a case, the company cannot maintain an action for any part of the call until the last instalment is due, the day appointed for payment of the last instalment being, in such a case,

under the Companies Clauses (Consolidation) Act, 1845 (8 & 9 Vict. c. 16), ss. 24—26, for a call made in his testator's lifetime (*Birkenhead, Lancashire and Cheshire Rail. Co. v. Cotesworth* (1850), 6 Ry. & Can. Cas. 211, 213). With respect to the provisions of the Act of 1845 or the special Act for enforcing the payment of calls, the word "shareholder" includes the legal personal representatives of a shareholder.

(g) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 21.

(h) *Wolverhampton New Waterworks Co. v. Hawkesford* (1859), 6 C. B. (N. S.) 336, 353, 357.

(i) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 22. The particulars as to the persons to whom, and the times and places at which, payment is to be made must be specified in the notice of the call, the particulars of which the directors may determine upon by a distinct subsequent act (*Great North of England Rail. Co. v. Biddulph* (1840), 7 M. & W. 243, 262; *London and Brighton Rail. Co. v. Fairclough* (1841), 2 Man. & G. 674, 703; *Sheffield and Manchester Rail. Co. v. Woodcock* (1841) 7 M. & W. 574).

(k) *Ambergate, Nottingham, and Boston and Eastern Junction Rail. Co. v. Mitchell* (1849), 4 Exch. 540.

(l) *R. v. Londonderry and Coleraine Rail. Co.* (1849), 13 Q. B. 998, 1005; *Newry and Enniskillen Rail. Co. v. Edmunds* (1848), 2 Exch. 119, 122.

(m) *Sheffield and Manchester Rail. Co. v. Woodcock* (1841), 7 M. & W. 574, 589.

(n) *Ambergate etc., Rail. Co. v. Norcliffe* (1851), 6 Exch. 629.

the day appointed for the payment of the call within the meaning of the statute (o).

1219. The making of the call and the notice of its having been made are two distinct things (p). Consequently, a shareholder cannot, after a call has been made on his shares, transfer them so as to escape from liability, as between himself and the company, to pay it, although at the time of the transfer he may not have received notice (q). This right of the company against a transferor does not, however, affect any right of his against the transferee under the contract of transfer (r). If the transfer is not registered, and the transferor, as registered owner, is compelled to pay a call made after the transfer, he may maintain an action against the transferee for the recovery of the amount so paid to the company (s).

The person whose name appears on the register is alone personally liable to the company for calls. The company cannot, therefore, compel an equitable mortgagee or other owner of shares to pay calls on them (t). Nor can it sue a transferee for calls until his name has been entered on a duly sealed register (a).

1220. If a call has been made which cannot be enforced, and it is desired to make another and valid call, the directors ought, by proper notice to the shareholders, to get rid of the invalid call before proceeding to enforce the valid one (b).

1221. If, before or on the day appointed for payment, any shareholder does not pay the amount of any call to which he is liable, he is liable to pay interest at the rate allowed by law from the day appointed for payment to the time of the actual payment (c). The company may also sue him in any court having competent jurisdiction, and recover the amount, with lawful interest, from the day on which the call was payable (d).

1222. An infant is capable of becoming a shareholder in a company governed by the Act of 1845; and an action for calls may, it seems, be maintained against him even during his

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holders.

Transfer of
share after
call made.

Liability
for calls.

Invalid call.

Non-payment
of call.

Infant's
liability.

(o) *Ambergate etc. Rail. Co. v. Norcliffe* (1851), 6 Exch. 629; *Birkenhead, Lancashire and Cheshire Junction Rail. Co. v. Webster* (1851), 6 Exch. 277, 278; *Re Jennings* (1851), 1 I. Ch. R. 654, 656.

(p) *R. v. Londonderry and Coleraine Rail. Co.* (1849), 13 Q. B. 998, 1005.

(q) See Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 16.

(r) *R. v. Londonderry and Coleraine Rail. Co.*, *supra*.

(s) *Sayles v. Blane* (1849), 14 Q. B. 205.

(t) *Newry etc. Rail. Co. v. Moss* (1851), 14 Beav. 64.

(a) *Newry and Enniskillen Rail. Co. v. Edmunds* (1848), 2 Exch. 119, 127; compare *McEuen v. West London Wharves and Warehouses Co.* (1871), 6 Ch. App. 665; and p. 689, *ante*.

(b) *Welland Rail. Co. v. Berrie* (1861), 6 H. & N. 416, 422.

(c) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 23. There is no hard-and-fast rule of law that 5 per cent. is the rate to be allowed, even in mercantile cases, in courts of law, and probably the current rate of interest for the time being is the rate demandable by a company under this section; see *London, Chatham and Dover Rail. Co. v. South Eastern Rail. Co.*, [1892] 1 Ch. 120, 133, 136, 137, C. A.; and title MONEY AND MONKY-LENDING.

(d) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 25. As to forfeiture in case of non-payment, see p. 702, *post*.

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minority (e). If, having been registered while an infant, he, after attaining majority, permits his name to continue registered, he is liable to be sued for calls, whether made during or since his infancy (f). Where, however, he has become a shareholder by contract, he may disaffirm the contract either during his minority or when he comes of age; and after such disaffirmance cannot be sued for calls (g).

Statement
of claim
in action.

1223. In any action for calls it is not necessary to set forth the special matter; it is sufficient for the company to allege that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear amount, in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action has accrued to the company by virtue of the Act of 1845 and the special Act (h). An allegation in the pleading that the defendant "is" a holder may be supported by proof that he was so when the call was made (i).

Action against
executors.

An action in this statutory form cannot be maintained against the executors of a deceased shareholder, where the call was made in his lifetime (k).

Statute of
Limitations.
Evidence.

In such an action the period of limitation is twenty years (l).

1224. On the trial of the action it is sufficient to prove that the defendant at the time of making the call was a holder of one share or more in the undertaking, and that the call was in fact made, and notice of the making of the call given as directed by the Act of 1845 or the special Act. It is not necessary to prove the appointment of the directors who made the call, or any other matter whatsoever. The company is thereupon entitled to recover what is due upon the call, with interest, unless it appears either that the call exceeds the prescribed amount, or that due notice was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period (m).

Register.

The production of the register of shareholders is *prima facie* evidence of the defendant being a shareholder, and of the number

(e) *Leeds and Thirsk Rail. Co. v. Fearnley* (1849), 4 Exch. 26; compare *Re Royal Naval School, Seymour v. Royal Naval School*, [1910] W. N. 88; and see, generally, title INFANTS AND CHILDREN.

(f) *Cork and Bandon Rail. Co. v. Cazenove* (1847), 10 Q. B. 935, 939.

(g) *Neury and Enniskillen Rail. Co. v. Coombe* (1849), 3 Exch. 565, 574, 575.

(h) Companies Clauses (Consolidation) Act, 1845 (8 & 9 Vict. c. 16), s. 26. Where the statement of claim is framed in strict accordance with the section, interest may probably be recovered, though not expressly claimed; compare *Southampton Dock Co. v. Richards* (1840), 1 Man. & G. 448, 464.

(i) *Belfast and County Down Rail. Co. v. Strange* (1848), 1 Exch. 739, 742; *Wilson v. Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (1851), 6 Exch. 626, 628; *Inglis v. Great Northern Rail. Co.* (1852), 1 Macq. 112, H. L.

(k) *Birkenhead, Lancashire and Cheshire Rail. Co. v. Cotesworth* (1850), 6 Ry. & Can. Cas. 211, 213.

(l) *Cork and Bandon Rail. Co. v. Goode* (1853), 13 C. B. 826, 835.

(m) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 27; *R. v. Londonderry and Coleraine Rail. Co.* (1849), 13 Q. B. 998, 1006.

and amount of his shares (*n*), without proof that the company's seal has been duly affixed at a meeting (*o*). If the company resorts to and relies on this provision, the register must contain within itself all the particulars necessary to charge the defendant with liability in the action (*p*). Each of the provisions of the enactment as to how the register is to be kept is to be regarded as imperative rather than as directory (*q*). If, in addition, it is proved that such person has become, by subscribing the prescribed sum or otherwise, entitled to a share in the company, the evidence that he is a shareholder is conclusive.

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If there is no register, or if the register is so defective as to be inadmissible in evidence, other evidence must be adduced to prove that a person is a shareholder (*r*). Where no register.

The defendant may disprove the *prima facie* liability arising from his name being on the register by showing that the company had no authority to put, and ought not to have put, his name there (*s*). He may, however, be precluded by his own conduct from denying, as against the company, that he is a shareholder; and if he has so acted as, in effect, to claim the position of a shareholder, he may be estopped from raising some objection, which he might otherwise have raised, to his liability for calls (*t*). Estoppel.

1225. Although the Act in general does not extend to Scotland (*a*), if any shareholder residing in Scotland fails to pay the amount of any call made upon him by the company, the company may proceed against him in Scotland, and sue for and recover the amount of the call, or declare his share forfeited, in such manner as is by the Companies Clauses Consolidation (Scotland) Act, 1845, provided in regard to shareholders of any company in Scotland (*b*). Proceedings in Scotland to recover calls.

(iii.) *Execution against Shareholders for Debts of Company.*

1226. If any execution has been issued against the property or effects of a company, and if there cannot be found sufficient Order of court necessary.

(*n*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 28. But where B., acting professedly on behalf of himself and his co-trustees, T. and another, accepted an allotment of shares, which in the sealed register were entered as held by "B. and others," the entry was held to be no evidence against T. (*Birkenhead, Lancashire and Cheshire Junction Rail. Co. v. Brownrigg* (1849), 4 Exch. 426).

(*o*) See Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 9; *London and North Western Rail. Co. v. M'Michael* (1850), 5 Exch. 855.

(*p*) *East Gloucestershire Rail. Co. v. Bartholmew* (1867), L. R. 3 Exch. 15, 22.

(*q*) *Buin v. Whitehaven and Furness Junction Rail. Co.* (1850), 3 H. L. Cas. 1, per Lord BROUGHAM, at p. 22; and see *Waterford, Wexford, Wicklow and Dublin Rail. Co. v. Pidcock* (1853), 8 Exch. 279, 283.

(*r*) *Portul v. Emmens* (1876), 1 C. P. D. 201, 212; affirmed (1876) 1 O. P. D. 664, C. A.; *Wolverhampton New Waterworks Co. v. Hawksford* (1861), 11 O. B. (N. S.) 456, 470, 471, Ex. Ch.

(*s*) *Waterford, Wexford, Wicklow and Dublin Rail. Co. v. Pidcock*, *supra*; *Newry and Enniskillen Rail. Co. v. Edmunds* (1848), 2 Exch. 119, 126.

(*t*) See, for instance, *Cromford Rail. Co. v. Lucey* (1829), 3 Y. & J. 80; *Cheltenham and Great Western Union Rail. Co. v. Daniel* (1841), 2 Q. B. 281, 292; *Sheffield and Manchester Rail. Co. v. Woodcock* (1841), 7 M. & W. 574, 580, 582.

(*a*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 163.

(*b*) *Ibid.*, s. 164. For an instance of the exercise of this power, see *Inglis v. Great Northern Rail. Co.* (1852), 1 Macq. 112, 11 L.

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whereon to levy such execution, then execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up, upon an order of the court in which the action, or other proceeding, has been brought or instituted, made upon motion in open court after sufficient notice in writing to the persons sought to be charged or by summons in chambers (c). The court may order execution to issue, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried; and in either case such terms as to costs or otherwise as are just may be imposed (d).

Right to
inspect
register.

For the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, any person entitled to any such execution may, at all reasonable times, inspect the register of shareholders without fee (e). The right to inspect is enforceable by application to the court in the action in which the judgment against the company was recovered (f); and it includes a right to take a copy of the material part or parts of the register (g).

Reimburse-
ment.

If by means of any such execution any shareholder has paid any sum of money beyond the amount then due from him in respect of calls, he must forthwith be reimbursed by the directors out of the funds of the company (h).

It may well be that if a shareholder wishes to be reimbursed, he must submit to execution before he pays; but if proceedings to enforce the creditor's judgment have been commenced against him, a *bonâ fide* payment by him under those proceedings, at whatever stage they may be, is a good answer against another creditor (i).

SUB-SECT. 5.—Payment of Subscriptions in advance of Calls.

Payment in
advance of
calls.

1227. A company, if it thinks fit, may receive from any of its shareholders payment in advance of all or any part of the moneys due upon their shares, beyond the sums actually called for. Upon the principal moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls

(c) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 36; B. S. C., 1883, Ord. 42, r. 23; Yearly Practice of the Supreme Court, 1910, pp. 577 *et seq.*

(d) *Ibid.*; This supersedes, but does not abolish, the old remedy by *scire facias*; see, further, Chitty's Archbold's Practice, 14th ed., pp. 1072—1077; and title EXECUTION.

(e) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 116), s. 36.

(f) *Meador v. Isle of Wight Ferry Co.* (1861), 9 W. R. 750.

(g) *Mutter v. Eastern and Midlands Rail. Co.* (1888), 38 Ch. D. 92, 106, C.A.; approved in *Re Balughât Gold Mining Co.*, [1901] 2 K. B. 665, C. A.; *Ormerod, Grierson & Co. v. St. George's Ironworks, Ltd.*, [1905] 1 Ch. 505, C. A.; *Davies v. Gas Light and Coke Co.*, [1909] 1 Ch. 708, C. A.

(h) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 37.

(i) *Kernaghan v. Dublin Trunk Rail. Co. (James's Case)* (1867), L. R. 3 Q. B. 47, 49.

then made upon the shares in respect of which the advance is made, the company may pay interest at such rate, not exceeding the legal rate of interest for the time being, as the shareholder paying such sum in advance and the company agree upon (j).

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SUB-SECT. 6.—*Transfer and Transmission of Shares.*

(i.) *In General.*

1228. The mutual obligations, in ordinary cases, of the seller and the buyer of shares are briefly as follows:—The seller must at the time fixed by the contract, or, if no time is fixed, within a reasonable time (k), deliver to the buyer, against payment of the agreed price, a duly executed transfer of, and the certificate for, the shares agreed to be sold, and must do nothing to prevent the registration of the buyer as transferee. Where the contract is subject to the rules of the Stock Exchange there is no implied term that, if the company refuses to register the transfer, the price is to be refunded (l). The buyer must (1) prepare a proper instrument of transfer, and send it to the seller for execution (in practice, however, the seller's broker prepares and procures the seller's execution of the transfer, and then sends it to the buyer) (m); (2) on receipt of a transfer duly executed by the seller, and of the relative certificates, pay the agreed price; (3) procure the registration of the transfer (n); and (4) pay and indemnify the seller against all liability for calls made subsequently to the contract of sale (o). When such contracts are made subject to the rules of the Stock Exchange they are governed in many important respects by those rules (p). A purchaser of shares is (in the absence of any stipulation in the contract to the contrary) entitled to all dividends on them declared after the date of the contract (q).

Obligations
of seller and
buyer.

1229. A forged transfer is a nullity. If a company subject to the Act of 1845, acting on a forged deed of transfer, alters its register of shareholders by striking out the name of the true owner and inserting that of the transferee, the owner, or his personal representative, is generally entitled to call on the company

Forged
transfer.

(j) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 24. As to the rate of interest, see *ibid.*, s. 23.

(k) *De Waal v. Adler* (1886), 12 App. Cas. 141, P. C.

(l) *London Founders Association v. Clarke* (1888), 20 Q. B. D. 576, 579, 585, C. A.; *Maxted v. Paine* (1871), L. R. 6 Exch. 122, 150, Ex. Ch.

(m) *Stephens v. De Medina* (1843), 4 Q. B. 422, 429; *Bowlby v. Bell* (1846), 3 C. B. 284, 294.

(n) *Sayles v. Blane* (1849), 14 Q. B. 205.

(o) *Wynne v. Price* (1849), 3 De G. & Sm. 310; *Maxted v. Paine*, *supra*. As to the specific performance of contracts for the sale and purchase of shares, see *Duncuft v. Albrecht* (1841), 12 Sim. 189; *Chenle v. Kenward* (1868), 3 De G. & J. 27; *Ferguson v. Wilson* (1866), 2 Ch. App. 77.

(p) *Nickalls v. Merry* (1876), L. R. 7 H. L. 530, 539; see title STOCK EXCHANGE.

(q) *Black v. Homersham* (1878), 4 Ex. D. 24.

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 —

to replace the shares (*r*); but the company is not necessarily estopped from disputing, as against the transferee, the validity of the transfer (*s*). The real owner of the shares may, at his option, sue the company alone, or jointly with the transferee (*t*). The Statute of Limitations does not begin to run against him in favour of the company until the company resists his claim, as his cause of action is not the invalid transfer of his shares, but the company's refusal, when the forgery is made known to it, to treat him as the shareholder (*a*). Negligence on his part does not create an estoppel disentitling him to succeed, unless it is the proximate cause of what the company has done (*b*). The duty of the company is not to accept a forged transfer, and involves an obligation towards each of its shareholders not to take his shares out of his name, unless he has executed a valid transfer of them (*c*).

Forged
Transfers
Acts, 1891
and 1892.

1230. By the Forged Transfers Acts, 1891 and 1892 (*d*), a company subject to the Act of 1845 may make compensation out of its funds for loss arising from a transfer of any of its shares or stock in pursuance of a forged transfer, or of a transfer under a forged power of attorney, whether the person receiving such compensation, or any person through whom he claims, has or has not paid any fee or otherwise contributed to any fund out of which the compensation is paid.

Vesting
 to

1231. Where stock of a company subject to the Act of 1845 is standing in the name of a person of unsound mind, a vesting order with respect to it, or an order appointing some proper person to transfer or join in transferring it, may be obtained under the Lunacy Act, 1890 (*e*); and in various cases connected with trusts similar orders with respect to stock or fully-paid shares may be obtained under the Trustee Act, 1893 (*f*).

Charging
orders.

1232. A charging order under the Judgments Acts, 1838 and 1840 (*g*) (which at first is an order *nisi*), restrains the company from permitting a transfer of stock or shares until the order *nisi* is

(*r*) *Midland Rail. Co. v. Taylor* (1862), 8 H. L. Cas. 751, 756; *Barton v. London and North Western Rail. Co.* (1889), 24 Q. B. D. 77, C. A.

(*s*) *Waterhouse v. London and South Western Rail. Co.* (1879), 41 L. T. 553; compare *Simm v. Anglo-American Telegraph Co.* (1879), 5 Q. B. D. 188, C. A.; and see further pp. 194 *et seq. ante*; and title ESTOPPEL.

(*t*) *Barton v. London and North Western Rail. Co.* (1888), 38 Ch. D. 144, 149, 152, C. A.; *Johnston v. Renton* (1870), L. R. 9 Eq. 181, 188.

(*a*) *Barton v. North Staffordshire Rail. Co.* (1888), 38 Ch. D. 458, 463; and see pp. 194 *et seq. ante*; and title ESTOPPEL.

(*b*) *Merchants of the Staple of England (Mayor etc.) v. Bank of England (Governor & Co.)* (1887), 21 Q. B. D. 160, 173, 174, C. A.; compare *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175, Ex. Ch.

(*c*) *Simm v. Anglo-American Telegraph Co.*, *supra*, at p. 214; and see p. 691, *ante*.

(*d*) 54 & 55 Vict. c. 43; 55 & 56 Vict. c. 36; and see further p. 195, *ante*.

(*e*) 53 Vict. c. 5, ss. 9, 133, 134, 136—139, 341; *Re C. M. G., Spinster (a Person of Unsound Mind not so found)*, [1898] 2 Ch. 324, C. A.; and compare *Re Ives* (1863), 3 De G. J. & Sm. 453, C. A.

(*f*) 56 & 57 Vict. c. 53, ss. 35, 36, 50; see title TRUSTS AND TRUSTEES.

(*g*) 1 & 2 Vict. c. 110, ss. 14, 15; 3 & 4 Vict. c. 82, s. 1; and see B. S. C., 1. 46, r. 1.

made absolute or discharged; and, if and when made absolute, the order operates as from the date of the order *nisi* (h).

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Shares
and Share-
holders.

(ii.) *Mode of Transfer.*

1233. The statutory provisions (i), grouped as relating to the transfer and transmission of shares, govern all cases in which the property in shares or stock passes out of the proprietor to a new taker (k). How shares transferred.

They are not restricted to transfers by actual sale and purchase for money, and apply to a transfer for a nominal consideration by way of voluntary settlement (l).

Subject to the regulations in the Act of 1845 (m) or in the special Act, every shareholder may sell and transfer all or any of his shares or stock. Every transfer must be by deed duly stamped, in which the consideration must be truly stated; the deed may be according to the statutory form, or to the like effect (n). A deed executed by the transferor, and duly registered, is essential to pass the legal title (o). The company is not bound to register a deed differing materially from the statutory form (p), which requires execution by the transferee as well as by the transferor (q).

The deed of transfer, when duly executed, must be delivered to the secretary, and be kept by him (r). This delivery is essential to the legal efficacy of a transfer (s).

1234. The secretary must enter a memorial of the transfer in a book called the "Register of Transfers," indorsing such entry on the deed of transfer, and, on demand, delivering a new certificate to the purchaser. For every entry, indorsement, and certificate the company may demand any sum not exceeding the prescribed amount, or if no amount be prescribed, then a sum not exceeding 2s. 6d. On the request of the purchaser of any share an indorsement of the transfer must be made on the certificate, instead of a new certificate being granted; and this indorsement, being signed by the secretary, is considered in every respect the same as a new certificate (t). Register

(h) *Haly v. Barry* (1868), 3 Ch. App. 452; *Gill v. Continental Gas Co.* (1872)¹ L. R. 7 Exch. 332; see title EXECUTION.

(i) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 14—19.

(k) *Copeland v. North Eastern Rail. Co.* (1856), 6 E. & B. 277, 283.

(l) *Ibid.*

(m) *Nanney v. Morgan* (1887), 37 Ch. D. 346, C. A.

(n) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 14. For forms of transfer, see *ibid.*, Sched. B; and *Encyclopædia of Forms*, Vol. IV., p. 841.

(o) *McEuen v. West London Wharves and Warehouses Co.* (1871), 6 Ch. App. 655; *Roots v. Williamson* (1888), 38 Ch. D. 485; *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555, 560, C. A.; *Société Générale de Paris v. Walker* (1885), 11 App. Cas. 20, 28.

(p) *R. v. General Cemetery Co.* (1856), 6 E. & B. 415, 419, 420.

(q) See Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), Sched. B.

(r) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 15.

(s) *Nanney v. Morgan*, *supra*; and see *Roots v. Williamson*, *supra*.

(t) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 15.

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Shares
and Share-
holders.

Effect of
 registration.

has been delivered to the secretary, the seller of the share continues liable to the company for any calls that may be made upon the share, and the purchaser is not entitled to receive any share of the profits of the undertaking, or to vote in respect of the share (a).

Where a valid and duly executed deed of transfer of shares has been left with the secretary for registration, mere neglect on the company's part to register the transfer does not affect the right of the transferee to be treated as the legal owner of the shares (b). On the other hand, registration, unless preceded by a valid transfer, does not give the transferee a good title (c). A company cannot refuse to register a real and absolute transfer merely because it is made to a pauper with the object of escaping from liability to calls (d).

Registration of a transfer may be enforced by prerogative writ, or by action of mandamus (e).

Transfer
 when calls
 unpaid.

1235. A shareholder cannot transfer any share after a call has been made until he has paid the call, or until he has paid all calls for the time being due on every share held by him (f). Neglect to do so, if it is waived, as it may be, by the company, does not make the transfer void; and, if directors consent to and register a transfer of shares on which there is a call in arrear, the property in the shares passes, and the transferor ceases to be a shareholder in respect of them, though he may remain liable to the company for the amount of the call (g). Where a shareholder executes a transfer after the directors of the company have passed a resolution to make a call, but before he has received any notice of it, the company is not bound to register the transfer, and a mandamus to compel registration will be refused (h). The company's right, in such a case, to compel the transferor to pay a call does not, however, affect any right which he in his turn may have against the transferee under the contract between them (i).

The company cannot refuse to register a transfer of fully-paid shares or stock on the ground that the transferor holds other shares on which a call is in arrear (k).

(a) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 15.

(b) *Nanney v. Morgun* (1887), 37 Ch. D. 346, C. A.

(c) *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555, 560, C. A.

(d) *R. v. Lambourn Valley Rail. Co.* (1888), 22 Q. B. D. 463, 465; and see *Re Discoverers' Finance Corporation, Lindlar's Case*, [1910] 1 Ch 312, C. A.

(e) *R. v. Carnatic Rail. Co.* (1873), L. R. 8 Q. B. 299; *R. v. Shropshire Union Co.* (1873), L. R. 8 Q. B. 420, Ex. Ch.; *R. v. Lambourn Valley Rail. Co.*, *supra*; *R. v. London and North Western Rail. Co.*, [1894] 2 Q. B. 512; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8); R. S. C., Ord. 50, r. 6; Ord. 53.

(f) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 16; *R. v. Wing* (1851), 17 Q. B. 645, 650, 651.

(g) *Re Hoylake Rail. Co., Ex parte Littledale* (1874), 9 Ch. App. 257, 259, 262.

(h) *R. v. Londonderry and Coleraine Rail. Co.* (1849), 13 Q. B. 998, 1005.

(i) *Ibid.*

(k) *Hubbersty v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1867), L. R. 2 Q. B. 59, 471, Ex Ch.

(iii.) *Closing Register of Transfers.*

1236. The directors may close the register of transfers for the prescribed period, or if no period be prescribed, then for a period not exceeding fourteen days previous to each ordinary meeting, and may fix a day for the closing, of which seven days' notice must be given by advertisement (*l*). Any transfer made during the time when the transfer books are so closed is, as between the company and the party claiming under it, but not otherwise, to be considered as made subsequently to such ordinary meeting (*m*).

SECT. 7.

Shares
and Share-
holders.Closing
register of
transfers.(iv.) *Transmission of Shares.*

1237. If the interest in any share becomes transmitted in consequence of the death, or bankruptcy (*n*), or insolvency of any holder (*o*), or by any other lawful means (*p*) than by a transfer according to the provisions of the Act of 1845 or the special Act, such transmission must be authenticated by a declaration in writing (*q*), or in such other manner as the directors require. The declaration must state the manner in which and the person to whom the share has been so transmitted, and must be made and signed by some credible person before a justice, or before a master of the High Court. It must be left with the secretary, who thereupon must enter the name of the person entitled under the transmission in the register of shareholders. For every entry the company may demand any sum not exceeding the prescribed amount, and where no amount is prescribed then not exceeding 5s. Until the transmission has been so authenticated no person claiming by virtue of it is entitled to receive any share of the profits of the undertaking, or to vote as a shareholder in respect of any such share (*r*).

Transmission
of shares.

(*l*) See p. 678, *ante*.

(*m*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 17. As to the meaning and effect of this section, see *Nanney v. Morgan* (1887), 35 Ch. D. 598, 604, 605.

(*n*) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 44, 50, 54, 55; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 188, 199.

(*o*) Transmission in consequence of the marriage of a female shareholder cannot now take place; see Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 2, 5, 6, 7, 14, 18, 24; and title HUSBAND AND WIFE.

(*p*) These words do not cover a transfer by conveyance (*Copeland v. North Eastern Rail. Co.* (1856), 6 E. & B. 277, 284).

(*q*) For a form of declaration, see *Encyclopædia of Forms*, Vol. IV., pp. 842, 843, 844.

(*r*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 18.

When the transmission is to persons as executors, it must be stated in the declaration that that is so, and their names must be given (*Barton v. London and North Western Rail. Co.* (1889), 24 Q. B. D. 77, 88, C. A.). The provision as to leaving the declaration is not obligatory in the sense that the person entitled must leave the declaration with the secretary, but it is obligatory in the sense that such declaration can only be effective against the company if it is left with the secretary. The company cannot compel a person entitled by transmission to have his name put on the register; but if he wishes to make his claim to the transmitted shares effective against the company, he must follow the course prescribed by ss. 18 and 19 of the Act of 1845 (*ibid.*).

SECT. 7.
Shares
and Share-
holders.

Position
of personal
represent-
ative.

If the transmission has taken place by virtue of any testamentary instrument, or by intestacy (*s*), the probate of the will or the letters of administration, or an official extract, must, together with the declaration, be produced to the secretary; and upon such production the secretary must make an entry of the declaration in the register of transfers (*a*).

The executor of a man who has died entitled to shares may, however, leave the shares standing in his testator's name, in which case he cannot transfer them, or vote in respect of them, or receive dividends on them, and, though he may be liable for calls, will be so only in his representative capacity. If he wishes to deal with the shares or to vote or receive dividends in respect of them, he may procure himself to be registered as a shareholder in the manner described above, in which case he will become a shareholder in the company, with and subject to the ordinary rights and liabilities of a shareholder (*b*). If two or more executors are so registered as joint holders, a transfer by one only is invalid (*c*).

SUB-SECT. 7.—Forfeiture of Shares.

When shares
may be
forfeited.

1238. If any shareholder fails to pay any call payable by him, together with interest, if any, the directors, at any time after the expiration of two months from the day appointed for payment, may declare the share in respect of which the call was payable forfeited, whether the company has sued for the amount of the call or not (*d*).

The remedy of forfeiture is cumulative to that by action, and is a further security for unpaid calls, in the nature of a mortgage or pledge. Hence, until the company has finally disposed of the shares, and the debt and the costs have been satisfied, it may go on with its action for calls in arrear (*e*). When it has sold the forfeited shares and converted them into money, the defendant is entitled to credit to the extent of the net proceeds of the sale. If, before sale, they are converted into other shares, he is entitled to the benefit of the value of the new shares, in satisfaction *pro tanto* of his liability (*f*).

Notice of
intention to
forfeit shares.

1239. Before declaring any share forfeited the directors must cause notice of their intention to be left at or transmitted by post to the usual or last place of abode of the person appearing by the register of shareholders to be the proprietor of the share. If the holder of the share is abroad, or if his usual or last place

(*s*) The transmission here referred to is the transmission in consequence of death mentioned in the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 18 (*Copeland v. North Eastern Rail. Co.* (1856), 6 E. & B. 277).

(*a*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 19. The section also contains provisions relating to transmission by marriage, as to which see note (*a*), p. 701, *ante*.

(*b*) *Barton v. London and North Western Rail. Co.* (1889), 24 Q. B. D. 77.

(*c*) *Ibid.*; *Barton v. North Staffordshire Rail. Co.* (1888), 38 Ch. D. 458, 464.

(*d*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 29.

(*e*) *Great Northern Rail. Co. v. Kennedy* (1849), 4 Exch. 417, 424—426; *Inglis v. Great Northern Rail. Co.* (1852), 1 Macq. 112, H. L.; compare *Birmingham, Bristol and Thames Junction Rail. Co. v. Locke* (1841), 1 Q. B. 258.

of abode is not known to the directors by reason of its being imperfectly described in the shareholders' address book, or otherwise, or if the interest in the share is known by the directors to have become transmitted otherwise than by transfer, as above mentioned, but a declaration of the transmission has not been registered, and so the address of the parties to whom the same may have been transmitted, or may for the time being belong, is not known to the directors, the directors must give public notice of such intention in the *London Gazette*, if the company's principal place of business is situate in England, and also in some newspaper (g). These notices must be given twenty-one days at least before the directors make a declaration of forfeiture (h).

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Shares
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holders.

1240. The declaration of forfeiture does not take effect so as to authorise the sale or other disposition of any share until it has been confirmed at a general meeting of the company to be held after the expiration of two months at the least from the day on which the notice of intention to make the declaration of forfeiture has been given. At any such meeting the company may confirm the forfeiture, and by an order at such meeting, or at any subsequent general meeting, may direct the share so forfeited to be sold or otherwise disposed of (i).

Confirmation
of declaration
of forfeiture.

1241. After such confirmation the directors may sell the forfeited share, either by public auction or by private contract, and if there are more than one of such forfeited shares, then either separately or together. Any shareholder may purchase any forfeited share so sold (k). A company exercising the right of forfeiture is bound to proceed *modo et formâ* in accordance with the provisions of the statute; and an improper sale may be restrained by injunction, or set aside, at any time while it remains uncompleted (l).

Sale of
forfeited
shares.

1242. A declaration in writing by some credible person not interested in the matter, made before any justice, or before any master of the High Court, that the call in respect of a share was made, and due notice given, and that default in payment of the call was made, and that the forfeiture of the share was declared and confirmed in the proper manner, is sufficient evidence of the facts therein stated. This declaration, and the receipt of the treasurer of the company for the price of the share, constitute a good title to the share; and a certificate of proprietorship must be delivered to the purchaser. He is thereupon deemed the holder of the share, discharged from all calls due prior to the purchase etc. He is not bound to see to the application of the purchase-money, nor

Evidence of
forfeiture.

(g) See p. 678, *ante*.

(h) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 30. Such a notice, of course, does not excuse a shareholder from payment of calls in arrear; see *Birmingham, Bristol and Thames Junction Rail. Co. v. Locke* (1841), 1 Q. B. 256.

(i) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 31.

(l) See *Stubbs v. Lister* (1841), 1 Y. & C. Ch. Cas. 81, 97 (a case which arose upon a deed of settlement).

SECT. 7.
Shares
and Share-
holders.

Limit on
exercise of
power of sale.

is his title to such share affected by any irregularity in the proceedings in reference to such sale (*m*). A company which has wrongfully forfeited and sold shares is liable in damages to the person wronged (*n*).

1243. The company must not sell or transfer more of the shares of a defaulter than will be sufficient, as nearly as can be ascertained at the time of the sale, to pay the arrears then due from him on account of any calls, together with interest, and the expenses attending the sale and declaration of forfeiture. If the money produced by the sale of any forfeited shares is more than sufficient to pay all arrears of calls and interest due at the time of the sale, and the expenses attending the declaration of forfeiture and sale, the surplus must on demand be paid to the defaulter (*o*).

Effect of
paying
arrears of
calls.

1244. If the arrears of calls and interest and expenses are paid before any share so forfeited and vested in the company has been sold, the share reverts to the person to whom the same belonged before the forfeiture, as if the calls had been duly paid (*p*). Where a forfeiture has been regularly effected, the defaulter can recover the ownership of his share on this ground only; the court will not relieve against such a forfeiture upon the ground that by accident he never received the notice of forfeiture (*q*).

SUB-SECT. 8.—*Cancellation and Surrender of Shares.*

When the
Act of 1863
applies.

1245. Although the Act of 1845 applies to all companies incorporated by special Acts for the purpose of carrying on undertakings of a public nature, save so far as its provisions are expressly varied or excepted by any such special Act, the provisions of the Act of 1863 relating to the cancellation and surrender of shares (*r*) only apply to a company which obtains a special Act incorporating them (*s*).

Cancellation
of forfeited
shares.

1246. Where any share of the capital of a company is declared forfeited under the provisions contained in the Act of 1845, and the forfeiture is confirmed by a meeting, and notice of the forfeiture has been given, then, if the directors are unable to sell the share for a sum equal to the arrears of calls and interest and expenses, the company at any general meeting held not less than two months after such notice is given may, in case payment of the arrears of

(*m*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 33.

(*n*) *Catchpole v. Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.* (1852), 1 E. & B. 111. It is an established rule that no forfeiture of property can be made unless every condition precedent has been strictly and literally complied with, and very little inaccuracy is as bad as the greatest (*Johnson v. Lyttle's Iron Agency* (1877), 5 Ch. D. 687, 694, C. A.).

(*o*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 34. The fact that the defaulter has a right to redeem until and at the last moment before sale shows that the forfeited shares are, during the period between forfeiture and sale, a security only (*Great Northern Rail. Co. v. Kennedy* (1849), 4 Exch. 417, 426).

(*p*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 35.

(*q*) Compare *Sparks v. Liverpool Waterworks Co.* (1807), 13 Ves. 428.

(*r*) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), ss. 3—11.

(*s*) *Ibid.*, s. 3.

calls, interest, and expenses is not made by the registered holder of the share before the meeting is held, resolve that the share instead of being sold shall be cancelled, and the share is thereupon cancelled accordingly (t). If payment is made before the meeting is held the share reverts to the shareholder and must be re-entered in the register (u).

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Shares
and Share-
holders.

A declaration in writing made by some credible person before a justice, stating that a sum of money sufficient to pay the arrears of calls, interest, and expenses due in respect of the share could not at the time of the cancellation of the share be obtained for the same upon the prescribed stock exchange, or if no stock exchange is prescribed, the London Stock Exchange is sufficient evidence of the fact so declared (a).

1247. Where it is resolved that any share shall be cancelled, the holder is from and after the passing of the resolution precluded from all right and interest in and in respect of the share. The cancellation does not, however, affect the liability of the last registered holder to pay to the company all arrears of calls, interest, and expenses due at the time of the cancellation, or the power of the company to enforce payment by action or otherwise (b). If the company enforces payment of arrears, the value of the share at the time of the cancellation must be deducted from the amount due (c).

Effect of
cancelling
shares.

1248. Where any share is declared forfeited, or where any sum payable on any share remains unpaid, the company, with the consent in writing of the registered holder, and with the sanction of a general meeting, may resolve that the share shall be cancelled. The share is immediately thereupon cancelled and all liabilities and rights with respect to it absolutely extinguished (d).

Cancellation
with consent
of share-
holder.

1249. A company may from time to time accept, on such terms as it thinks fit, surrenders of any shares which have not been fully paid up (e).

Surrender
of shares.

1250. A company must not pay or refund to any shareholder any sum of money for or in respect of the cancellation or surrender of

Company not
to pay for
cancellation.

1251. A company may from time to time, in lieu of any shares that have been cancelled or surrendered, issue new shares of such amounts as will allow the same to be conveniently apportioned or disposed of according to the resolution of any ordinary or extraordinary meeting of the company, fixing the amounts and

Issue of
shares.

(t) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 4. As to forfeiture under the Companies Clauses (Consolidation) Act, 1845 (8 & 9 Vict. c. 16), see ss. 29—35 of that Act; and pp. 702 *et seq.*, *ante*.

(u) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 7.

(a) *Ibid.*, s. 5.

(b) *Ibid.*, s. 6.

(c) *Ibid.*, s. 7.

(d) *Ibid.*, s. 8.

(e) *Ibid.*, s. 9.

(f) *Ibid.*, s. 10.

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Shares
and Share-
holders.

times of payment of the calls on them, and disposing of them on such terms and conditions as may be so resolved upon. The aggregate nominal amount of the new shares must not exceed the aggregate nominal amount of the shares in lieu of which they are issued, after deducting the amount actually paid up in respect of the shares cancelled or surrendered (g).

SECT. 8.—*Regulation and Management.*

SUB-SECT. 1.—*In General.*

How power
of company
exercised.

1252. The directors are, by the Act of 1845, invested with the management and superintendence of the affairs of the company, and they may lawfully exercise all its powers, except as to such matters as are directed by that Act or the special Act to be transacted by a general meeting (h). The exercise of these powers is subject to the provisions of the Act of 1845 and the special Act, and also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting (i).

The principles which are applicable to litigation in the name of the company, or by shareholders suing on behalf of their class, and those relating to the interference of the court with the internal management of the company, are, in substance, the same as those which apply to companies subject to the Act of 1908 (k).

SUB-SECT. 2.—*Directors.*

(i.) *Appointment.*

Appointment
of first
directors.

1253. The original directors are usually appointed by the special Act, and the number of directors must be the number thereby prescribed (l). If the special Act does not contain negative words, such as "not less than" a specified number, a provision as to the number of directors may be directory only; but a provision that the number shall be, for instance, "not less than five nor more than seven" is imperative (m).

(g) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 11.

(h) The powers of the company which, except as otherwise provided by the special Act, or by any general Act, the whole or part of which is incorporated with the special Act, are to be exercised only at a general meeting of the company, are specified in s. 91 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); see p. 723, *post*. The powers of cancelling forfeited shares and of creating and issuing new ordinary or preference shares or stock and debenture stock can only be exercised at a general meeting of the company (Companies Clauses Act, 1863 (26 & 27 Vict. c. 118)).

(i) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 90; compare Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), Table A, clause 71; *Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cuninghame*, [1906] 2 Ch. 34, C. A.; *Quin and Axtens, Ltd. v. Salmon*, [1909] A. C. 442; *Marshall's Valve Gear Co., Ltd. v. Manning, Wardle & Co., Ltd.*, [1909] 1 Ch. 267.

(k) See pp. 289, 318, 319, *ante*.

(l) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 81.

(m) See *Thames Haven Dock and Rail. Co. v. Rose* (1842), 4 Man. & G. 552, 559; *Kirk v. Bell* (1851), 16 Q. B. 290; and the comments of JESSEL, M.R., on those cases in *Bottomley's Case* (1880), 16 Ch. D. 681, 687.

Where the company is authorised by its special Act to increase or to reduce the number of the directors, it may from time to time, in general meeting, after due notice for that purpose, increase or reduce their number within the prescribed limits, if any, and determine the order of rotation in which they are to go out of office, and what number is to be a quorum at their meetings (*n*).

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1254. The directors appointed by the special Act, unless the Act otherwise provides, hold office until the first ordinary meeting to be held in the year next after that in which the special Act was passed. At this meeting the shareholders present, personally or by proxy, may either re-elect the directors appointed by the special Act, or any number of them, or may elect a new body of directors, or directors to supply the places of those not re-elected. At the first ordinary meeting to be held every year afterwards the places of the directors then retiring from office must be supplied in accordance with the provisions of the Act of 1845. The several persons elected at any such meeting, if not removed or disqualified, and not having resigned, continue to be directors until others are elected in their stead (*o*). The directors cannot legally agree to an arrangement with contractors or others which would have the effect of depriving the shareholders of their power of appointing their own directors (*p*).

Tenure of
of office.

If at any meeting at which an election of directors ought to take place the prescribed quorum is not present within one hour from the time appointed for the meeting, no election of directors can be made, but the meeting stands adjourned to the following day at the same time and place. If at the adjourned meeting the prescribed quorum is not present within one hour from the time appointed for the meeting, the existing directors continue to act and retain their powers until new directors are appointed at the first ordinary meeting of the following year (*q*).

1255. If a director dies, or resigns, or becomes disqualified or incompetent to act as such, or ceases to be a director by any other cause than that of going out of office by rotation, the remaining directors, if they think proper so to do, may elect in his place some other shareholder, duly qualified, to be a director. The director so elected continues in office so long only as the person in whose place he has been elected would have been entitled to continue if he had remained in office (*r*).

Casual
vacancy in
office of
director.

(ii.) *Qualification and Disqualification.*

1256. No person not appointed by the company's special Act is capable of being a director unless he is a shareholder, and possessed of the prescribed number (if any) of shares. A person holding an office or place of trust or profit under the company, or interested in

Qualification.

(*n*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 82.

(*p*) *James v. Eve* (1873), L. R. 6 H. L. 335, 342. As to the statutory obligation to remain in office, see *Re South London Fish Market Co.* (1898), 39 Ch. D. 324, C. A.

(*q*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 84.

(*r*) *Ibid.*, s. 89.

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ment.

any contract with the company, cannot be a director; nor can a director accept any other office or place of trust or profit under the company, or be interested in any contract with the company, during the time he is a director (s). If the special Act prescribes a certain share qualification for the directors, and names a person as one of the first directors, he is in effect constituted by the Act a shareholder to the extent of the prescribed share qualification; and if, in neglect of his duty, he fails to take up that number of shares, and to procure himself to be registered in respect of them, he is liable in respect of that number of shares (t).

Pecuniary
interest.

1257. If any director at any time subsequently to his election accepts or continues to hold any other office or place of trust or profit under the company, or is, either directly or indirectly, concerned in any contract with the company, or participates in any manner in the profits of any work to be done for the company, his office of director becomes vacant, and thenceforth he must cease from voting or acting as a director (u). A member of any incorporated joint stock company is not, however, disqualified or prevented from acting as a director of a company subject to the Act of 1845 by reason of any contract entered into between the two companies, although he must not vote on any question as to any contract with the joint stock company (a). Nor can a director validly deal, on behalf of the company, with himself or with a firm in which he is a partner; as a fiduciary agent of the company he cannot enter into engagements in which his personal interest may possibly conflict with his duty to the company (b). The disqualification applies only to contracts with the company in the execution of its enterprise; hence, a director may be a partner in a banking company which is the company's banker (c).

Consequences
of disquali-
fication.

The consequences of a director being interested in a contract with his company are:—(1) the statutory consequence that he ceases to hold office (d); and (2) the legal consequence that he cannot enforce, as against the company, any contract which he has entered into while having a personal interest in it (e). A contract between two companies is not, however, to be treated as invalid, and beyond the power of one of the companies, merely because one of its directors is interested in it (f).

(s) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. 16), s. 85; *Portal v. Emmens* (1876), 1 C. P. D. 664, 667, C. A.

(t) *Portal v. Emmens*, *supra*; and see *Kincaid's Case* (1870), L. R. 11 Eq. 192; *Forbes' Case* (1875), L. R. 19 Eq. 353.

(u) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 86; *Portal v. Emmens*, *supra*.

(a) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 87.

(b) *Aberdeen Rail. Co. v. Blaikie Brothers* (1854), 1 Macq. 461, 471, H. L.; and see the cases collected in *Imperial Mercantile Credit Association v. Coleman* (1871), 6 Ch. App. 558, *per* MALINS, V.-C., at p. 563, n.; *Great Luxemburg Rail. Co. v. Magnay (Sir William)* (No. 2) (1858), 25 Beav. 587.

(c) *Sheffield and Manchester Rail. Co. v. Woodcock* (1841), 7 M. & W. 574.

(d) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 86.

(e) *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358, 368, C. A.; *Flanagan v. Great Western Rail. Co.* (1868), L. R. 7 Eq. 116, 123.

(f) *Kaye v. Croydon Tramways Co.*, *supra*; *Foster v. Oxford, Worcester, and Wolverhampton Rail. Co.* (1853), 13 C. B. 200.

1258. The office of a director becomes vacant if he at any time ceases to be a holder of the prescribed number of shares in the company (*g*). If he executes an equitable mortgage of his qualifying shares, and the mortgagee gives notice of the mortgage to the company, the mortgagor's position as a director is at once determined (*h*). Where he creates, in favour of his creditor, a mere equitable lien on his qualifying shares, by giving notice to the company's secretary not to register any transfer of them without the creditor's consent, his ownership of the shares is probably not so affected as to deprive him of his office (*i*).

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ment.

Failure to
hold shares.

(iii.) *Remuneration.*

1259. Except as otherwise provided by the special Act, the powers of the company as to determining what remuneration is to be paid to the directors must be exercised at a general meeting of the company (*k*). A general meeting, if duly called, may vote the remuneration of directors, even for past services; but unless a majority of the shareholders so vote, the directors have no claim to remuneration. If they obtain payment, it is in the nature of a gratuity, unless it is under a provision in the special Act, in which case the terms of the provision must be observed (*l*).

Remunera-
tion.

(iv.) *Appointment of Committees.*

1260. The directors may appoint one or more committees, consisting of such number of directors as they think fit, within the prescribed limits, if any, and they may grant to such committees power to do any acts relating to the affairs of the company which the directors could lawfully do, and which they from time to time think proper to intrust to them (*m*). The committees may meet from time to time, and may adjourn from place to place, as they think proper, for carrying into effect the purposes of their appointment. No committee can exercise the powers intrusted to them except at a meeting at which there is present the prescribed quorum, or, if no quorum is prescribed, then a quorum to be fixed for that purpose by the general body of directors. At all meetings of the committees one of the members present must be appointed chairman. All questions at any meeting of the committee must be determined by a majority of votes of the members present, and, in case of an equal division of votes, the chairman has a casting vote in addition to his vote as a member of the committee (*n*).

Rules as to
committees.

(*g*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 86.

(*h*) *Re Pearce, Ex parte Littledale* (1855), 6 De G. M. & G. 714, 728, 733, C. A.

(*i*) *Cumming v. Prescott* (1837), 2 Y. & C. (ex.) 488, 496.

(*j*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 91.

Hutton v. West Cork Rail. Co. (1883), 23 Ch. D. 654, 658, 672, C. A.; compare *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358, C. A.

(*m*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 95; and see *D'Arcy v. Tamar, Kit Hill, and Callington Rail. Co.* (1867), L. R. 2 Exch. 158, explained in *Re Bonetti's Telegraph Co., Collie's Claim* (1871), L. R. 12 Eq. 246, 259.

(*n*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 96.

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ment.How con-
tracts to be
made.(v.) *Making of Contracts.*

1261. The power which may be granted to a committee to make contracts, as well as the power of the directors to make contracts on behalf of the company (o), is exercisable as follows:— (1) Any contract which, if made between private persons, would be by law required to be in writing and under seal, may be made by the committee or the directors on behalf of the company in writing, and under the common seal of the company, and may be varied or discharged in the same manner; (2) any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged, may be made by the committee or the directors on behalf of the company in writing, signed by the committee or any two of them, or any two of the directors, and may be varied or discharged in the same manner; (3) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by the committee or the directors on behalf of the company by parol only, without writing, and may be varied or discharged in the same manner. All contracts so made are effectual in law, and binding upon the company and its successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and on any default in the execution of any such contract, either by the company or any other party thereto, such actions may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only (p).

Dispensing
with seal.

Contracts binding on the company may be made in other ways if there is power so to make them (q). Thus, a company established for the purpose of trading may, independently of the statutory provision, validly make all contracts which are of ordinary occurrence in its trade, and all contracts, not expressly regulated by any statute, such as, for instance, the Statute of Frauds, which relate to objects or purposes for which it was incorporated, without the formality of a seal (r).

(o) As to the directors exercising the powers of the company, see p. 706, *ante*. For miscellaneous examples of their powers, see *Hutton v. West Cork Rail. Co.* (1883), 23 Ch. D. 654, C. A. (gratuity out of the company's funds to its workmen, over and above their wages, in recognition of their past exertions, and by way of encouraging them to exert themselves in the future); *Russell v. Wakefield Waterworks Co.* (1875), L. B. 20 Eq. 474, 479, and *Exeter and Crediton Rail. Co. v. Buller* (1847), 5 Ry. & Can. Cas. 211, 217 (power to use the company's name in proceedings); *Peel v. London and North Western Rail. Co.*, [1907] 1 Ch. 5, C. A. (paying for the postage and stamping of proxy papers); *Ambergate, Nottingham and Boston and Eastern Junction Rail. Co. v. Mitchell* (1849), 4 Exch. 540 (making calls without the special authority of a general meeting).

(p) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 97. As to minutes and copies of contracts, see *ibid.*, s. 98; and p. 713, *post*.

(q) *Wilson v. West Hartlepool Rail. Co.* (1865), 2 De G. J. & Sin. 475, 498, C. A. As to implied contracts, see *Beverley v. Lincoln Gas Light and Coke Co.* (1837), 6 Ad. & El. 829, 845; *Langan v. Great Western Rail. Co.* (1873), 30 L. T. 173, Ex. Ch.; *Walker v. Great Western Rail. Co.* (1867), L. R. 2 Exch. 228; *Henderson v. Australian Royal Mail Steam Navigation Co.* (1855), 5 E. & B. 409. Compare *Cox v. Midland Counties Rail. Co.* (1849), 3 Exch. 268.

(r) *South of Ireland Colliery Co. v. Waddle* (1868), L. R. 4 C. P. 617, 618, Ex. Ch.; and title CORPORATIONS, Vol. VIII., pp. 382 *et seq.*

A company's rights and obligations under its contracts, when once validly made, are in all respects the same as those of individuals (s).

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and
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ment.
—
Contracts
under seal.

1262. In order to bind a company by a bond, the seal must be affixed by, or by the authority of, the directors, or a committee of the directors, acting together at a properly constituted meeting (a).

Where directors have only the power of affixing the company's seal under certain prescribed rules, a person dealing with them is taken to have notice of those rules; and if there is something which can only be done by them under limited powers, the person so dealing must, at his peril, see that those powers are not being exceeded. If, however, they have power to bind the company, but certain preliminaries are required to be gone through on the part of the company before their power can be duly exercised, the person so dealing is not bound to see that all those preliminaries have been observed, but is entitled to presume that the directors are acting regularly (b).

1263. As regards signed contracts in writing, a company cannot bind itself by a contract for the purchase or sale of land, or an interest in land, otherwise than by an instrument under its seal, or a writing signed in the manner above mentioned (c). After part performance, however, the company cannot evade liability on the ground that the terms of the contract were not evidenced in writing (d). The directors may ratify a written contract made by a company's manager; and if they do so, it becomes in effect the company's contract (e).

Written
contracts.

1264. Although a quorum of the directors may be competent to bind a company by a parol contract, the mere fact of work having been done, as, for instance, by a contractor, on the order of the company's engineer, is not enough to render the company liable, in the absence either of an order of the directors or a duly authorised committee, or of something from which a parol contract can be inferred (f). A company may, however, through its directors, make

Oral
contracts.

(s) *Greene v. West Cheshire Rail. Co.* (1871), L. R. 13 Eq. 44, 49; *London and Birmingham Rail. Co. v. Winter* (1840), Cr. & Ph. 57, 63.

(a) *D'Arcy v. Tamar, Kit Hill, and Callington Rail. Co.* (1867), L. R. 2 Exch. 158; see title SALE OF LAND.

(b) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327, Ex. Ch.; *Fountain v. Carmarthen Rail. Co.* (1868), L. R. 5 Eq. 316, 322; *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85; compare *Duck v. Tower Galvanizing Co.*, [1901] 2 K. B. 314, 318; *Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, O. A.; and see *Williams v. Chester and Holyhead Rail. Co.* (1851), 15 Jur. 828, 830; *Webb v. Herne Bay Commissioners* (1870), L. R. 5 Q. B. 642; and see p. 81, ante; and title CORPORATIONS, Vol. VIII., pp. 361, 363.

(c) *Finlay v. Bristol and Exeter Rail. Co.* (1852), 7 Exch. 409, 417.

(d) *Wilson v. West Hartlepool Rail. Co.* (1865), 2 De G. J. & Sm. 475, 492, 493, O. A.; compare *London and Birmingham Rail. Co. v. Winter* (1840), Cr. & Ph. 57, 63.

(e) *Wilson v. West Hartlepool Rail. Co.*, *supra*; and see *Leominster Canal Navigation Co. v. Shrewsbury and Hereford Rail. Co.* (1857), 3 K. & J. 654, (purchase of undertaking authorised to be purchased); *Serrell v. Derbyshire, Staffordshire and Worcestershire Junction Rail. Co.* (1850), 9 O. B. 811, 828 (cheque dishonestly drawn).

(f) *Homersham v. Wolverhampton Waterworks Co.* (1851), 6 Exch. 137, 141. As

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ment.

Liability of
directors.

a parol contract for the temporary occupation of land required for carrying out its undertaking, and on such a contract may be sued in respect of such occupation. If the company has so occupied land, the court may presume, in the absence of evidence to the contrary, that such a contract was duly made (g).

1265. No director, by being party to or executing as director any contract or instrument on behalf of the company, or lawfully executing any of the powers given to the directors, incurs any personal liability (h). The directors are entitled to be indemnified out of the capital of the company for all payments made or liability, losses, costs, and damages incurred in the execution of their powers. For the purposes of such indemnity they may apply the funds of the company, and, if necessary, make calls of the unpaid capital (i).

A director indorsing a debenture stock certificate with a warranty, contrary to the fact, that the amount of stock represented by the certificate is within the amount which the company has power to issue, is personally liable for breach of warranty, if the money is lent to the company on the faith of the warranty (k). Promoters of a company, who afterwards become its first directors, obtaining an advance of money on their personal credit, will not escape from personal liability merely by showing that the money was applied in payment of expenses incidental to the passing of the special Act, and that the company has purported to ratify their act in obtaining the advances (l).

(vi.) *Meetings of Directors.*

Meetings and
quorum.

1266. The directors must hold meetings at such times as they appoint for the purpose, and they may meet and adjourn as they think proper, from time to time, and from place to place. Any two of the directors may at any time require the secretary to call a meeting of the directors. In order to constitute a meeting of directors there must be present at least the prescribed quorum,

to contracts with corporations generally, see title CORPORATIONS, Vol. VIII., pp. 382 *et seq.*

(g) *Lowe v. London and North Western Rail. Co.* (1852), 18 Q. B. 632, 638. Where a company has had the benefit of a bargain, that is evidence on which a jury may find that the company, by its directors, entered into a binding contract to buy (*Pauling v. London and North Western Rail. Co.* (1853), 8 Exch. 867). In some cases a corporation has not been allowed to take the benefit of a misapprehension on the faith of which some person has expended money on the corporation's land, but a contract in favour of such persons has been implied (*Crampton v. Varna Rail. Co.* (1872), 7 Ch. App. 562, 568; *Laird v. Birkenhead Rail. Co.* (1859), John. 500, 510).

(h) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 100. Where acts have been honestly done by directors within their authority, they cannot generally be made personally liable, although bad consequences have resulted (*Charitable Corporation v. Sutton* (1742), 2 Atk. 400, 405). But if, being agents of the company, they exercise its functions for the purpose of improperly alienating its property or otherwise injuring its interests, the company is entitled to sue them for, and to obtain from them, redress (*A.-G. v. Wilson* (1840), Cr. & Ph. 1, 24, 25). As to actions of deceit against directors, see *Derry v. Peek* (1889), 14 App. Cas. 337, 374.

(i) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 100.

(k) *Whitehaven Joint Stock Banking Co. v. Reed* (1836), 54 L. T. 360, C. A.; and see title AGENCY, Vol. I., pp. 221, 222.

(l) *Scott v. Ebury (Lord)* (1867), L. R. 2 C. P. 255, 264, 270.

or, where no quorum is prescribed, one-third of the directors. All questions at any such meeting must be determined by the majority of votes of the directors present, and in case of an equal division of votes, the chairman has a casting vote in addition to his vote as a director (*m*). The directors, or at least a quorum of them, must act jointly and as a board, at a meeting, in order to do effectually such an act as authorising the affixing of the company's seal to a bond (*n*).

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**Regulation
and
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ment.**

1267. At the first meeting of directors held after the passing of the special Act, and at the first meeting of the directors held after each annual appointment of directors, the directors must choose one of themselves to act as chairman for the following year, and may also, if they think fit, choose another director to act as deputy chairman for the same period. If the chairman or deputy chairman dies or resigns, or ceases to be a director, or otherwise becomes disqualified to act, the directors must fill such vacancy at the next meeting; and every chairman or deputy chairman elected to fill a vacancy continues in office so long only as the person in whose place he may be so elected would have been entitled to continue if the vacancy had not occurred (*o*).

Chairman
of directors.

If at any meeting neither the chairman nor deputy chairman is present, the directors present must choose one of their number to be chairman of such meeting (*p*).

1268. The directors must cause notes, minutes, or copies of all appointments made or contracts entered into by the directors, and of the orders and proceedings of all meetings of the company, and of the directors and committees of directors, to be entered in books, which must be kept under the superintendence of the directors. Every entry must be signed by the chairman of the meeting, and, if signed, is to be received as evidence in all courts, without proof of the meetings having been duly convened or held, or of the persons making or entering the orders or proceedings being shareholders or directors or members of committee, or of the signature of the chairman, or of the fact of his having been chairman, all of which matters are presumed, until the contrary is proved (*q*). The signature required to authenticate the minutes is that of the director who has presided at the particular meeting; but the signature need not be attached at the time of that meeting, and may be given at a subsequent meeting (*r*).

Minutes of
meetings etc.

(*m*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 92.

(*n*) *D'Arcy v. Tamar, Kit Hill, and Callington Rail. Co.* (1867), L. R. 2 Exch. 158 (explained in *Re Bonelli's Telegraph Co., Colli's Claim* (1871), L. R. 12 Eq. 246, 259, 260; *Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, 632, 635, C. A.; and followed in *Re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230, 235).

(*o*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 93.

(*p*) *Ibid.*, s. 94.

(*q*) *Ibid.*, s. 98; compare *Sheffield and Manchester Rail. Co. v. Woodcock* (1841), 7 M. & W. 574; *Miles v. Bough* (1842), 3 Q. B. 845, 866.

(*r*) *Southampton Dock Co. v. Richards* (1840), 1 Man. & G. 448, 463, 467; *West London Rail. Co. v. Bernard* (1843), 3 Q. B. 873, 877. Where a meeting was held on one day and adjourned until the next, and the director who was in the chair

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1269. All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, are, notwithstanding it is afterwards discovered that there was some defect in the appointment of any of them, or that any of them were disqualified, as valid as if every such person had been duly appointed and qualified (a).

(vii.) *Retirement and Removal.*

Retirement
by rotation.

1270. The directors hold office for three years (b). In the case, however, of the directors first elected the prescribed number, and, if no number is prescribed, one-third of the directors, to be determined by ballot among themselves, unless they otherwise agree, must go out of office at the end of the first year; at the end of the second year the prescribed number, and, if no number is prescribed, one-half of the remaining number of the directors, to be determined in like manner, must go out of office; and at the end of the third year the prescribed number, and, if no number is prescribed, the remainder of the directors, must go out of office. In each instance the places of the retiring directors must be supplied by an equal number of qualified shareholders.

At the first ordinary meeting in every subsequent year the prescribed number, and, if no number is prescribed, one-third of the directors, being those who have been longest in office, must go out of office, and their places must be supplied in like manner. A retiring director may be re-elected immediately or at any future time.

If the prescribed number of directors is some number not divisible by three, and the number of directors to retire is not prescribed, the directors must in each case determine what number of directors, as nearly one-third as may be, are to go out of office, so that the whole number must go out of office in three years (c).

Power to
choose and
remove
directors.

1271. Except as otherwise provided by the special Act, and subject to the power of the directors to fill up casual vacancies in the office of director (d), the powers of the company to choose and remove directors can be exercised only at a general meeting of the company (e). A general meeting has power to remove directors, provided proper notice as to the object of the meeting is given, and may fill up vacancies if all the directors are removed, or if the

on both occasions signed the minutes of the adjourned meeting only, the minutes of both meetings were admitted in evidence (*Inglis v. Great Northern Rail. Co.* (1852), 16 Jur. 895, 897, 898, H. L.). A fact stated in minutes may, if necessary, be proved by other evidence (*ibid.*). Minutes, though duly signed, are not admissible in evidence for the purpose of establishing, in favour of the company, the facts stated in the minutes, as, for instance, against a bondholder suing the company (*Hill v. Manchester and Salford Water Works Co.* (1833), 5 B. & Ad. 866, 875, 876).

(a) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 99; compare Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 71, 74; and see p. 239, *ante*.

(b) As to the mode of appointment, see p. 706, *ante*.

(c) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 88.

(d) See p. 707, *ante*.

(e) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 91.

directors decline to exercise the power of filling up casual vacancies (*f*).

SUB-SECT. 3.—*Other Officers.*

1272. Besides the directors, the company is required by statute to have other officers, namely, the secretary (*g*), the auditors (*h*), and the book-keeper (*i*), besides the treasurer and the collector (*k*).

The powers of the company, as to the choice of auditors, and determining the remuneration of the auditors, treasurer, and secretary, can, except as otherwise provided by the special Act, be only exercised at a general meeting of the company (*l*). A person employed by the directors as secretary may, however, maintain an action against the company to recover remuneration for his services, although there has been no determination of a general meeting on the subject; but directors agreeing, without authority, to pay a salary to a secretary may, as between themselves and the general body of shareholders, have been guilty of a breach of trust (*m*).

1273. Before any person intrusted with the custody or control of moneys, whether as treasurer, collector, or other officer of the company, enters upon his office, the directors must take sufficient security from him for the faithful execution of his office (*n*).

1274. Every officer must, when required by the directors, make out and deliver to them, or to any person appointed by them, an account in writing under his hand of all moneys received by him on behalf of the company, stating how, and to whom, and for what purpose, such moneys have been disposed of, together with vouchers

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Statutory
requirements.

Security by
officers.

Accounts of
officers.

(*f*) *Isle of Wight Rail. Co. v. Tahourdin* (1883), 25 Ch. D. 320. C. A.

(*g*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 3, 10, 15, 18, 40, 45. As to the meaning of "secretary" see p. 677, *ante*. As to the position and duties of a secretary, see p. 244, *ante*.

(*h*) See p. 721, *post*.

(*i*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 119.

(*k*) *Ibid.*, s. 109.

(*l*) *Ibid.*, s. 91.

(*m*) *Bill v. Darenth Valley Rail. Co.* (1856), 1 H. & N. 305, 306.

(*n*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 109. Where the security of a surety is taken, any variation of the agreement to which the surety has subscribed, which is made without the surety's consent or knowledge, or may prejudice him (*North Western Rail. Co. v. Whinray* (1854), 10 Exch. 77, 82), or may amount to the substitution of a new agreement for the original agreement, will discharge the surety, even though the original agreement might, notwithstanding such variation, be substantially performed (*Donar v. Macdonald* (1850), 3 H. L. Cas. 226, 238, 239; *Phillips v. Foxall* (1872), L. R. 7 Q. B. 668, 672, 680). Where by statute the nature of a principal's office is so changed that its duties are materially altered, so as to affect the surety's risk, the latter is discharged (*Pybus v. Gibb* (1856), 6 E. & B. 902, 911). But the mere fact of the amalgamation of two railway companies will not, generally, so alter the position of an officer of one of the companies who continues to hold that office under the amalgamated companies as to discharge his surety (*London, Brighton and South Coast Rail. Co. v. Goodwin* (1849), 3 Exch. 320, 332). Where, under a bond, the principal is made liable for a given time only, the liability of the surety is also confined to that time (*Kinson v. Julian* (1855), 4 E. & B. 854, 858). See, generally, title GUARANTEE.

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ment.

Failure to
 account.

and receipts. He must also pay to the directors, or to any person appointed by them, all moneys which appear to be owing from him upon the balance of such accounts (o).

Any officer failing to render such account, or to produce and deliver up all the vouchers and receipts in his possession or power, or to pay the balance when required, or for three days after being required failing to deliver up to the directors, or to any person appointed by them, all papers and writings, property, effects, matters, and things in his possession or power, relating to the execution of the Act of 1845, or the special Act, or any Act incorporated therewith, or belonging to the company, is, on complaint to a justice, to be summoned before two or more justices. On his appearance, or in his absence upon proof that the summons was personally served or left at his last known place of abode, the justices may determine the matter in a summary way, and may adjust and declare the balance owing by him. If it appears, either upon his confession, or upon evidence, or upon inspection of the account, that any moneys of the company are in his hands, or owing by him to the company, the justices may order him to pay the amount. If he fails to do so, the justices may grant a warrant to levy the same by distress, or, in default of distress, may commit him to gaol for a period not exceeding three months (p).

Refusal to
 account.

If an officer refuses to make out his account in writing, or to produce and deliver to the justices his vouchers and receipts, or to deliver up any property in his possession or power, belonging to the company, the justices may commit him to gaol until he has delivered up all the vouchers and receipts, if any, in his possession or power, and all property, if any, in his possession or power, belonging to the company (q). Further, if any director or other person acting on behalf of the company makes oath that he has good reason to believe, upon grounds to be stated in his deposition, and does believe, that it is the intention of the officer to abscond, the justice before whom the complaint is made may, instead of issuing his summons, issue his warrant to bring the officer before two justices. No person executing the warrant is, however, to keep the officer in custody longer than twenty-four hours without bringing him before some justice. The justice before whom the officer may be brought may either discharge him, if he thinks there is no sufficient ground for his detention, or order him to be detained in custody, so as to be brought before two justices, unless he gives satisfactory bail for his appearance before them (r).

No such proceeding against an officer will deprive the company of any remedy which it might otherwise have against him or his surety (s).

(o) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 110. As to the liability of a statutory company in respect of improper accounts rendered by an officer, see *Presfontaine v. Grenier*, [1907] A. C. 101, P. C.

(p) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 111.

(q) *Ibid.*, s. 112.

(r) *Ibid.*, s. 113.

(s) *Ibid.*, s. 114.

SUB-SECT. 4.—*Bye-laws.*

SECT. 8.

Regulation
and
Management.Power to
make.

1275. The company may from time to time make such bye-laws as it thinks fit, for the purpose of regulating the conduct of its officers and servants, and for providing for the due management of its affairs (*t*), and may alter or repeal them, and make others. The bye-laws must not be repugnant to the general law or to the provisions of the Act of 1845, or the special Act. They must be put into writing, and sealed with the common seal of the company; and a copy must be given to every officer and servant of the company affected thereby (*a*).

By such bye-laws the company may impose such reasonable penalties upon all its officers or servants offending against them as it thinks fit, not exceeding £5 for any one offence (*b*).

All bye-laws must be so framed as to allow the justice before whom any penalty imposed thereby is sought to be recovered to order a part only of such penalty to be paid (*c*).

The production of a written or printed copy of the bye-laws, with the common seal of the company affixed, is sufficient evidence of them in all prosecutions under the same (*d*). Evidence.

SUB-SECT 5.—*General Meetings.*(i.) *Powers to be Exercised.*

1276. Except as otherwise provided by the special Act, the following powers of the company can be exercised only at a general meeting of the company (*e*), namely: (1) the choice and removal of the directors, except as above mentioned (*f*), and the increasing or reducing of their number where authorised by the special Act (*g*); (2) the choice of auditors (*h*); (3) the determination as to the remuneration of the directors, auditors, treasurer, and secretary (*i*); (4) the determination as to the amount of money to be borrowed on Powers exercisable only in general meeting.

(*t*) A corporation has an implied power to make bye-laws; but where a charter expressly gives a company the power, it can make them only in the cases in which it is empowered by the charter so to do (*Child v. Hudson's Bay Co.* (1723), 2 P. Wms. 207, 209). A bye-law to the effect that a company's canal shall not be used on Sundays is void, as an attempt to deal with a matter outside the cognisance of the company (*Calder and Hebble Navigation Co. v. Pilling* (1845), 14 M. & W. 76). Railway companies have special powers of making bye-laws under ss. 109—111 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); see title RAILWAYS AND CANALS. As to the bye-laws of corporations, see, generally, title CORPORATIONS, Vol. VIII., pp. 334—341.

(*a*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 124.

(*b*) *Ibid.*, s. 125.

(*c*) *Ibid.*, s. 126.

(*d*) *Ibid.*, s. 127.

(*e*) *Ibid.*, s. 91.

(*f*) See *ibid.*, ss. 83, 89, 93; and p. 707, *ante*. A general meeting has power to remove directors (*Isle of Wight Rail. Co. v. Tahourdin* (1883), 25 Ch. D. 320, 332, 334, C. A.).

(*g*) See Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 82; and p. 707, *ante*.

(*h*) See *ibid.*, ss. 101, 104; and pp. 723 *et seq.*, *post*.

(*i*) See *ibid.*, s. 38; and p. 715, *ante*.

COMPANIES.

SECT. 8. Regulation and Manage- ment.

Ordinary meetings.

Extra- ordinary meetings.

Notice of meeting.

Place.

mortgage (j); (5) the determination as to the augmentation of capital (k); and (6) the declaration of dividends (l).

(ii.) *Ordinary and Extraordinary Meetings.*

1277. The first general meeting of the shareholders of the company must be held within the time prescribed by the special Act, or if no time is so prescribed, within one month of the passing of the special Act. The subsequent general meetings must be held at the prescribed periods, or if no periods are prescribed, in the months of February and August in each year, or at such other stated periods as are appointed for that purpose by an order of a general meeting. The above meetings are called "ordinary meetings" (m).

Every general meeting of the shareholders, other than an ordinary meeting, is called an "extraordinary meeting" (n).

(iii.) *Convening of Meetings.*

1278. Fourteen clear days' public notice, at the least, of all meetings, whether ordinary or extraordinary, must be given by advertisement (o), specifying the place, the day, and the hour of meeting (p). No business, except such as may be appointed by the Act of 1845 or the special Act to be done at an ordinary meeting (q), can be transacted at any ordinary meeting, unless special notice of such business has been given in the advertisement convening the meeting (r). In the case of an extraordinary meeting the notice must always specify the purpose for which the meeting is called (s), and the meeting cannot enter upon any business not set forth in the notice upon which it has been convened (t).

The whole purpose, as distinguished from the details, must be fairly stated in the notice, which must not be a tricky notice, so framed as to mislead those to whom it is addressed; if there are several purposes, the notice will not be sufficient in respect of any purpose not indicated in it (u).

All meetings, whether ordinary or extraordinary, must be held in the prescribed place, if any, and, if no place be prescribed, then at some place appointed by the directors (a).

(j) See Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 39; and p. 731, *post*.

(k) See *ibid.*, s. 56; and p. 681, *ante*; see also Part II. of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118); and p. 682, *ante*.

(l) See Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 120; and p. 724, *post*.

(m) *Ibid.*, s. 66.

(n) *Ibid.*, s. 68.

(o) See p. 678, *ante*.

(p) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 71.

(q) Such as the election of directors (*ibid.*, s. 83; see p. 707, *ante*) or of auditors (*ibid.*, s. 101; see p. 723, *post*).

(r) *Ibid.*, s. 67. The remuneration of directors is a matter requiring special notice (*Hutton v. West Cork Rail. Co.* (1883), 23 Ch. D. 654, 659, C. A.).

(s) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 67, 69; *R. v. Shropshire Justices* (1838), 8 Ad. & El. 173; *R. v. Aberdare Canal Co.* (1850), 14 Q. B. 854, 868; *Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204, 205.

(t) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 69.

(u) *Kaye v. Groydon Tramways Co.*, [1898] 1 Ch. 358, 369, 370, 373, C. Tiesen v. Henderson, [1899] 1 Ch. 861.

(a) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 66.

1279. Extraordinary meetings may be convened by the directors at such times as they think fit (b).

The prescribed number of shareholders, holding in the aggregate shares to the prescribed amount, or, where the number of shareholders or amount of shares is not prescribed, twenty or more shareholders, holding in the aggregate not less than one-tenth of the capital of the company, may, by writing, under their hands, at any time require the directors to call an extraordinary meeting of the company.

The requisition must fully express the object of the meeting required to be called, and be left at the office of the company, or given to at least three directors, or left at their last or usual places of abode. Upon the receipt of the requisition the directors must forthwith convene a meeting of the shareholders; and if they fail to do so within twenty-one days, the shareholders signing the requisition may call it by giving fourteen days' public notice (c).

If the object of the requisition is such that in no manner and by no machinery can it be legally carried into effect, the directors are justified in refusing to act upon it; but if the object stated can be carried into effect, it is the duty of the directors to call the meeting (d). If, upon receiving a requisition, the directors issue a notice convening a meeting, so worded as not to be a proper compliance with the requisition, the requisitionists are justified in calling the meeting, as upon a failure by the directors to do so (e).

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ment.

Extra-
ordinary
meeting.

Requisition

(iv.) *Proceedings at Meetings.*

1280. In order to constitute a meeting (whether ordinary or extraordinary) there must be present, either personally or by proxy, the prescribed quorum, and, if no quorum is prescribed, then shareholders holding in the aggregate not less than one-twentieth of the capital of the company, and being in number not less than one for every £500 of such required proportion of capital, unless such number would be more than twenty, in which case twenty shareholders, holding not less than one-twentieth of the capital of the company, is the quorum. If, within one hour from the time appointed for the meeting a quorum is not present, no business can be transacted at the meeting, other than the declaring of a dividend, in case that is one of the objects of the meeting; and the meeting must, except in the case of a meeting for the election of directors, be adjourned *sine die* (f). If and so long as the total number of shares issued represents less than the amount of capital required to be represented at a general meeting, no valid meeting can be held (g).

Quorum at
general
meeting.

(b) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 68.

(c) *Ibid.*, s. 70.

(d) *Isle of Wight Rail. Co. v. Tahourdin* (1883), 25 Ch. D. 320, 334, O. A.

(e) *Ibid.* Statutory provisions as to the mode and place of service of a notice are generally to be construed as directory (*Foss v. Harbottle* (1843), 2 Hare, 461, 495, 496).

(f) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 72.

(g) *Re Skegness and St. Leonard's Tramways Co. Ex parte Hanly* (1888), 41 Ch. D. 215, 225, 231, 237, O. A.

SECT. 8.
Regulation
and
Manage-
ment.
Chairman.

1281. At every meeting of the company one or other of the following persons is to preside as chairman, namely, the chairman of the directors, or in his absence the deputy chairman (if any), or in the absence of the chairman and deputy chairman some one of the directors to be chosen for that purpose by the meeting, or in the absence of the chairman and deputy chairman and of all the directors, any shareholder to be chosen for that purpose by a majority of the shareholders present at the meeting (*h*).

What can
be done at
a meeting.

1282. The shareholders present at any meeting must proceed in the execution of the powers of the company with respect to the matters for which the meeting has been convened, and those only. Any meeting may be adjourned from time to time, and from place to place. No business, however, can be transacted at any adjourned meeting other than the business left unfinished at the meeting from which such adjournment took place (*i*).

Votes of
members.

1283. At all general meetings every shareholder is entitled to vote according to the prescribed scale of voting, and, where no scale is prescribed, every shareholder has one vote for every share up to ten, and an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares beyond the first hundred shares; but a shareholder is not entitled to vote at any meeting unless he has paid all calls then due upon his shares (*k*).

Where several persons are jointly entitled to a share, the person whose name stands first in the register of shareholders is for the purpose of voting deemed the sole proprietor; and on all occasions his vote, either in person or by proxy, must be allowed as the vote in respect of the share without proof of the concurrence of the other holders (*l*).

A shareholder who is a lunatic or idiot may vote by his committee; and a shareholder who is a minor may vote by his guardian or any one of his guardians; and every such vote may be given either in person or by proxy (*m*).

Proxies.

1284. The votes may be given either personally or by proxies who are shareholders, authorised by writing according to the statutory form, or in a form to the like effect, under the hand of the shareholder nominating the proxy, or, if the shareholder is a corporation, then under its common seal. Every proposition at a meeting is to be determined by the majority of votes of the parties present, including proxies, the chairman of the meeting being entitled not only to vote as a principal and proxy, but to have a casting vote if there is an equality of votes (*n*).

(*h*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 73.

(*i*) *Ibid.*, s. 74.

(*k*) *Ibid.*, s. 75.

(*l*) *Ibid.*, s. 78.

(*m*) *Ibid.*, s. 79.

(*n*) *Ibid.*, s. 76, and schedule, Form F. As to the stamps on proxies, see p. 258, *ante*. As to paying the stamps and postage on proxies, see *Peel v. London and North Western Rail. Co.*, [1907] 1 Ch. 5, C. A.; and p. 260, *ante*.

Where the shareholder is a body corporate, the proxy may be any member of such body, though not personally a shareholder in the company (o). During the continuance of his appointment the proxy is to be taken to be a shareholder in the company to which his appointment relates, holding the number of shares held by the corporation by whom he is appointed, for all purposes except the transfer of any such share or the giving receipts for any dividend (p). His appointment may be made and revoked by the corporation in the statutory forms (q).

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and
Manage-
ment.

No person is entitled to vote as a proxy unless the instrument appointing him has been transmitted to the secretary of the company within the prescribed period, or, if no period is prescribed, not less than forty-eight hours before the time appointed for holding the meeting at which the proxy is to be used (r).

Transmission
of proxies.

(v.) *Evidence as to Meetings.*

1285. Whenever in the Act of 1845 or the special Act the consent of any particular majority of votes at any meeting of the company is required in order to authorise any proceeding of the company, such particular majority is only required to be proved in the event of a poll being demanded at the meeting. If a poll is not demanded, a declaration by the chairman that the resolution authorising such proceeding has been carried, and an entry to that effect in the book of proceedings of the company, is sufficient authority for such proceeding, without proof of the number or proportion of votes recorded in favour of or against it (s).

Chairman's
declaration.

The chairman of a meeting is, generally, the proper person to grant a poll, and, in the absence of other business, the poll should be taken immediately. The chairman is also the person to decide as to an adjournment, and to direct it in a proper case (t).

Polls.

SUB-SECT. 6.—*Accounts and Audit.*

1286. The directors must cause full and true accounts to be kept of all sums of money received or expended on account of the company by the directors and all persons employed by or under them, and of the matters and things for which such sums of money have been received or disbursed and paid (a), and must appoint a

Duty of
directors.

(o) Companies Clauses Consolidation Act, 1888 (51 & 52 Vict. c. 48), s. 2, as amended by the Companies Clauses Consolidation Act, 1889 (52 & 53 Vict. c. 37), s. 2.

(p) Companies Clauses Consolidation Act, 1888 (51 & 52 Vict. c. 48), s. 3.

(q) *Ibid.*, s. 4.

(r) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 77.

(s) *Ibid.*, s. 80.

(t) *R. v. D'Oyly* (1840), 12 Ad. & El. 139, 159; *Re Chillington Iron Co.* (1885), 29 Ch. D. 159, 162. See, however, *Re Horbury Bridge Coal, Iron, and Waggon Co.* (1879), 11 Ch. D. 109, 114, O.A.; and compare *Re British Flax Producers Co.*, [1889] W. N. 7.

(a) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 115. Separate and distinct accounts must also be kept by the company as regards moneys raised by issuing debenture stock (Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 33); see p. 741.

SECT. 8.
Regulation
and
Manage-
ment.

Balance-
sheets.

book-keeper to enter the accounts aforesaid in books to be provided for the purpose (b).

1287. The books of the company must be balanced at the prescribed periods, and, if no periods are prescribed, fourteen days at least before each ordinary meeting. On the books being balanced, an exact balance-sheet must forthwith be made up, exhibiting a true statement of the capital stock, credits, and property of every description belonging to the company, and the debts due by it at the date of making the balance-sheet, and a distinct view of the profit or loss which has arisen on the transactions of the company in the course of the preceding half-year. Previously to each ordinary meeting the balance-sheet must be examined by the directors, or any three of them, and be signed by the chairman or deputy chairman of the directors (c).

Inspection of
books and
balance-
sheets.

1288. The books so balanced, together with the balance-sheet, must for the prescribed periods, and, if no periods are prescribed, for fourteen days previous to each ordinary meeting, and for one month after, be open for the inspection of the shareholders at the company's principal office or place of business. The shareholders are not, however, entitled at any time, except during these periods, to demand the inspection of the books, unless in virtue of a written order signed by three directors (d). There is no general rule that a shareholder desiring to inspect the books under a directors' order must state his reasons; but it is generally proper that he should intimate to the directors the particular purpose which he has in view. In the event of refusal by directors to allow inspection, the court has a discretionary power of enforcing it, but is not disposed to assist mere idle curiosity (e).

Every book-keeper must permit any shareholder to inspect the books, and to take copies or extracts at any reasonable time during the prescribed periods, and if no periods are prescribed, during one fortnight before and one month after every ordinary meeting. Failure to comply with these requirements involves forfeiture to the shareholder, for every offence, of a sum not exceeding £5 (f).

The books of account must also be open at all reasonable times to the inspection of the respective mortgagees and bond creditors of the company, with liberty to take extracts without payment (g).

(b) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 119.

(c) *Ibid.*, s. 116.

(d) *Ibid.*, s. 117.

(e) *R. v. Wills and Berke Canal Navigation* (1874), 29 L. T. 922; *R. v. London and St. Katharine's Docks Co.* (1874), 31 L. T. 588, 589, 590; *Holland v. Dickson* (1888), 37 Ch. D. 669; *Davies v. Gas Light and Coke Co.*, [1909] 1 Ch. 708, C. A.; and see p. 690, *ante*. As between the parties to an action, the rights of discovery and inspection of documents are regulated by R. S. O., Ord. 31, r. 12 *et seq.* As to inspection under the practice before the Judicature Acts, see *Draper v. Manchester, Sheffield and Lincolnshire Rail. Co.* (1861), 3 Do G. F. & J. 23, C. A.; *Swansea Vale Rail. Co. v. Budd* (1866), L. R. 2 Eq. 274.

(f) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 119. As to inspection of the register of debenture stock, see Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 28; and p. 742, *post*.

(g) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 55.

1289. The directors must produce to the shareholders at the ordinary meeting the balance-sheet, applicable to the period immediately preceding the meeting, together with the auditors' report (*h*).

SECT. 8.
Regulation
and
Manage-
ment.

1290. Except as otherwise provided by the special Act, the powers of the company, as regards the choice of auditors and determining what their remuneration is to be, can be exercised only at a general meeting of the company (*i*). Except where the special Act directs them to be appointed otherwise than by the company, the company must at the first ordinary meeting after the passing of the special Act elect the prescribed number of auditors, or if no number is prescribed two auditors, in the manner provided for the election of directors (*j*). At the first ordinary meeting in each year afterwards the company must in like manner elect an auditor to supply the place of the retiring auditor (*k*). Every auditor so elected, if he has not been removed or become disqualified, and has not resigned, continues to be an auditor until another is elected in his stead (*l*).

Auditors.

Where no other qualification is prescribed by the special Act, every auditor must have at least one share in the undertaking. He must not hold any office in the company or be in any other manner interested in its concerns, except as a shareholder (*m*).

Qualification.

The directors must deliver to the auditors the half-yearly or other periodical accounts and balance-sheet fourteen days at the least before the ensuing ordinary meeting at which they are required to be produced to the shareholders (*n*). It is the duty of the auditors to receive from the directors the accounts and balance-sheet, and to examine them (*o*); but they may employ such accountants and other persons as they think proper, at the expense of the company. They must either make a special report on the accounts or simply confirm them. Their report or confirmation must be read, together with the report of the directors, at the ordinary meeting (*p*). If the auditors differ, they may make separate reports, and each of them may separately employ an accountant (*q*).

Duties.

But entries in these books are not admissible in evidence in favour of the company, for the purpose of establishing the matters there mentioned, as against a creditor suing it (*Hill v. Manchester and Salford Water Works Co.* (1833), 5 B. & Ad. 868, 876). As to taking copies, see p. 690, *ante*.

(*h*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 118.

(*i*) *Ibid.*, s. 91. As to the position and duties of auditors, see p. 267, *ante*. As regards railway companies, the provisions of this Act respecting auditors are modified by ss. 11, 12 of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119); and see the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 30, and title RAILWAYS AND CANALS.

(*j*) See p. 707.

(*k*) As to the retirement of auditors, see *infra*.

(*l*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 101.

(*m*) *Ibid.*, s. 102.

(*n*) *Ibid.*, s. 106. As regards railway companies, see Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), ss. 3, 4; and title RAILWAYS AND CANALS.

(*o*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 107.

(*p*) *Ibid.*, s. 108.

(*q*) *Steele v. Sutton Gas Co.* (1883), 12 Q. B. D. 68, 69.

SECT. 8.
Regulation
and
Manage-
ment.

Re-election.

One of the auditors (to be determined in the first instance by ballot between themselves, unless they otherwise agree, and afterwards by seniority) must go out of office at the first ordinary meeting in each year; but the auditor going out is immediately eligible for re-election (*r*). If any vacancy takes place among the auditors in the course of the current year, then at any general meeting of the company the vacancy may, if the company think fit, be supplied by election of the shareholders (*s*).

The statutory provision (*t*) respecting the failure of an ordinary meeting at which directors ought to be chosen applies, *mutatis mutandis*, to any ordinary meeting at which an auditor ought to be appointed (*u*).

SUB-SECT. 7.—Dividends.

Scheme as
to proposed
dividend.

1291. Previously to every ordinary meeting at which a dividend is intended to be declared the directors must cause a scheme to be prepared, showing the profits, if any, of the company for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning them, or as much as they may consider applicable to the purposes of dividend, among the shareholders, according to the shares held by them, the amount paid thereon, and the periods during which the same have been paid. The scheme must be exhibited at the meeting, and a dividend may be declared at the meeting according to the scheme (*a*). Except as otherwise provided by the special Act, the powers of the company as to the declaration of dividend can be exercised only at a general meeting of the company (*b*).

Declaration
of dividend.

Reserve fund.

1292. Before apportioning the profits to be divided among the shareholders the directors may, if they think fit, set aside such sum as they may think proper to meet contingencies, or for enlarging, repairing, or improving the works connected with the undertaking, and may divide the balance only among the shareholders (*c*).

Dividend
out of capital.

1293. The company must not pay any dividend out of capital. A return of any portion of the capital stock, with the consent of all the mortgagees and bond creditors of the company, after due notice, is not, however, a payment of dividend (*d*).

(*r*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 103.

(*s*) *Ibid.*, s. 104.

(*t*) *Ibid.*, s. 84; and see p. 707, *ante*.

(*u*) *Ibid.*, s. 105.

(*a*) *Ibid.*, s. 120. It is the duty of directors to act strictly in accordance with the section (*Henry v. Great Northern Rail. Co.* (1857), 1 De G. & J. 606, C. A.). As to when the holders of preference shares are entitled to cumulative preferential dividends, see *ibid.*; *Corry v. Londonderry and Enniskillen Rail. Co.* (1860), 29 Beav. 263; but preference stock issued under the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), is non-cumulative (*ibid.*, s. 14). Debts incurred by the company for steam engines, stations and the like must be deducted from the company's gross earnings for the purpose of ascertaining the profits available for dividends, but money raised under borrowing powers must not be deducted (*Corry v. Londonderry and Enniskillen Rail. Co.*, *supra*).

(*b*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 91.

(*c*) *Ibid.*, s. 122.

(*d*) *Ibid.*, s. 121. As to declaring dividends when the revenue account is

1294. No dividend can be paid in respect of any share until all calls then due, in respect of that and every other share held by the person to whom the dividend may be payable, have been paid (e).

SECT. 8.
Regulation
and
Manage-
ment.

SECT. 9.—*Powers and Liabilities.*

SUB-SECT. 1.—*In General.*

1295. Companies to which the Companies Clauses Acts apply are companies incorporated by statute (f). Although a corporation created by royal charter has the power to deal with its property, and to bind itself by contract like an individual (g), a corporation created by statute is not to be treated as a corporation at common law subject to anything provided by the statute; it is a statutory corporation, and the statute alone must be looked at to find out what its powers are (h). The companies to which the Companies Clauses Acts apply have, therefore, only the powers expressly or by inference given them by their special Acts, with the superadded powers given them by the Companies Clauses Acts, or such of those Acts as are applicable (i). Such companies, being bodies corporate, may acquire and hold real or personal property in joint tenancy in the same manner as if they were individuals; but such acquisition and holding is subject to the like restrictions as attach to the acquisition and holding of property by a body corporate in severalty (k).

Powers
conferred
by statute.

The general rule that contracts entered into by a corporation aggregate must, with certain exceptions, be made under seal (l) does not apply to companies governed by the Act of 1845, which are subject to the special provision in that Act with respect to the making of contracts (m).

Form of
contracts.

entitled to be recouped out of capital, see *Hoole v. Great Western Rail. Co.* (1867), 3 Ch. App. 262, 269, 270.

As the claim for dividends rests on a specialty, the period of limitation is twenty years (*Smith v. Cork and Bandon Rail. Co.* (1870), 5 I. R. Eq. 65, 76, C. A.; *Re Cornwall Minerals Rail. Co.*, [1897] 2 Ch. 74; *Re Artisans' Land and Mortgage Corporation*, [1904] 1 Ch. 796; *Re Drogheda Steam Packet Co.*, [1903] 1 I. R. 512). The Statute of Limitations begins to run in favour of a company from the time when a dividend becomes payable (*Re Severn and Wye and Severn Bridge Rail. Co.*, [1896] 1 Ch. 559, 565). As to railway companies' dividends, see *Railway Companies Act, 1867* (30 & 31 Vict. c. 127), s. 30; *Bloxam v. Metropolitan Rail. Co.* (1868), 3 Ch. App. 337.

(e) *Companies Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 16), s. 123.

(f) *Ibid.*, s. 1. As to the exemption from increment value duty etc. in the case of lands held by such companies for the purposes of their undertaking, see *Finance (1909-10) Act, 1910* (10 Edw. 7, c. 8), s. 38.

(g) *Sutton's Hospital Case* (1612), 10 Co. Rep. 23 a; and see *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354.

(h) *Wenlock (Baroness) v. River Dee Co.* (1883), 36 Ch. D. 685, n., C. A.; *Asbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653, 693; *Eastern Counties Rail. Co. v. Hawkes* (1855), 5 H. L. Cas. 331; *A.-G. v. Great Eastern Rail. Co.* (1880), 5 App. Cas. 473, 486; *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87, 92, 94, 103.

(i) As to statutory corporations, see, further, title CORPORATIONS, Vol. VIII., pp. 358 *et seq.*

(k) *Bodies Corporate (Joint Tenancy) Act, 1899* (62 & 63 Vict. c. 20), s. 1. As to the restrictions on holding land, see title CORPORATIONS, Vol. VIII.,

(l) See title CORPORATIONS, Vol. VIII., p. 380.

(m) See *Companies Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 16), s. 97;

SECT. 9.

Powers and
Liabilities.

The rule that a corporation aggregate is liable to be sued for its torts (*n*) applies to companies governed by the Companies Clauses Acts (*o*), as also does the rule that in certain cases corporations may be indicted or fined in respect of criminal or quasi-criminal offences (*p*).

SUB-SECT. 2.—*Arbitration.*Application
of Arbitration
Act, 1889.

1296. The provisions of the Act of 1845 with respect to the settlement of disputes by arbitration (*q*) must be read subject to the Arbitration Act, 1889, which applies to every arbitration under any previous or subsequent Act as if the arbitration were pursuant to a submission, except in so far as it is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorised or recognised by that Act (*r*). The fact that any particular provision contained in the Arbitration Act, 1889, is additional to the provisions of the Act of 1845 does not of itself show that there is any inconsistency in the two Acts, the test being whether the provisions of the later Act can be read into the earlier one without any conflict between the two (*s*).

Appointment
of arbitrators.

1297. Where any dispute authorised or directed by the Act of 1845, or the special Act, or any Act incorporated therewith, to be settled by arbitration has arisen, then, unless both parties concur in the appointment of a single arbitrator, each party, on the request of the other, must by writing under his hand nominate and appoint an arbitrator, to whom the dispute is to be referred. After the appointment has been made neither party can revoke it without the consent of the other, nor does the death of either operate as a revocation.

Failure to
appoint.

If for the space of fourteen days after a dispute has arisen, and after a request in writing has been served by the one party on the other party to appoint an arbitrator, the latter fails to appoint an arbitrator, the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters in dispute. In this case the award or determination of the single arbitrator is final (*a*).

(*n*) See title CORPORATIONS, Vol. VIII., p. 386.

(*o*) *Poullon v. London and South Western Rail. Co.* (1867), L. R. 2 Q. B. 534; *Maund v. Monmouth Canal Co.* (1842), Car. & M. 606; *Cooke v. Midland Great Western Railway of Ireland*, [1909] A. O. 229; *Goff v. Great Northern Rail. Co.* (1861), 3 E. & E. 672; *Moore v. Metropolitan Rail. Co.* (1872), L. R. 8 Q. B. 36.

(*p*) *R. v. Birmingham and Gloucester Rail. Co.* (1842), 3 Q. B. 223; *Whitfield v. South Eastern Rail. Co.* (1858), E. B. & E. 115; and see title CORPORATIONS, Vol. VIII., p. 391.

(*q*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 128—134; see *infra*; and p. 727, *post*.

(*r*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 24; and see title ARBITRATION, Vol. I., p. 492. A consent under s. 14 of the Act of 1889 does not amount to a submission (*Zelma Gold Mining Co. v. Hoskins*, [1895] A. O. 100). Under the Act of 1845 the submission to arbitration could be made a rule of court on the application of either of the parties (Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 134. But see now Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 12; and title ARBITRATION, Vol. I., p. 473).

(*s*) *Tabernacle Permanent Building Society v. Knight*, [1892] A. O. 298.

(*a*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s.

If, before the matters referred are determined, an arbitrator appointed by either party dies, or becomes incapable or refuses or for seven days neglects to act as arbitrator, the party by whom he was appointed may appoint in writing some other person to act in his place; and if, for the space of seven days after notice in writing from the other party, he fails to do so, the remaining or other arbitrator may proceed *ex parte*. Every arbitrator so substituted has the same powers and authorities as were vested in the former arbitrator at the time of his death, refusal, or disability (b).

SECT. 9.
Powers and
Liabilities.

1298. Where more than one arbitrator has been appointed, they must, before they enter on the matters referred to them, appoint by writing under their hands an umpire to decide on any matters on which they differ. If the umpire dies, or refuses or for seven days neglects to act, they must forthwith appoint another umpire in his place. The decision of the umpire on the matters so referred to him is final (c).

Appointment
of umpire.

If in either case the arbitrators refuse, or for seven days after request of either party to the arbitration neglect to appoint an umpire, the Board of Trade may, in any case in which a railway company is one party to the arbitration, on the application of either party to such arbitration, appoint an umpire, whose decision on the matter on which the arbitrators differ is to be final (d).

1299. The arbitrators or their umpire may call for the production of any documents in the possession or power of either party, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose (e).

Conduct of
arbitration.

Except where it is otherwise provided by the Act of 1845 or the special Act, or any Act incorporated therewith, the costs of and attending an arbitration are in the discretion of the arbitrators or their umpires, as the case may be (f).

SUB-SECT. 3.—*Claims in Bankruptcy.*

1300. If any person against whom the company has any claim becomes bankrupt or insolvent, the secretary or treasurer of the company, in all proceedings against his estate, may represent the company, and act in its behalf, as if such claim had been his own claim (g).

Bankruptcy
claims.

Compare Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 119 (see p. 323, *ante*); Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59); Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 126 *et seq.*; and Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 25 *et seq.*; and see title RAILWAYS AND CANALS.

(b) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 129.

(c) *Ibid.*, s. 130.

(d) *Ibid.*, s. 131.

(e) *Ibid.*, s. 132.

(f) *Ibid.*, s. 133.

(g) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 140. For all or any of the purposes of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), a corporation may act by any of its officers authorised in that behalf under the corporation's seal (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 148); and see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 49, 231.

SECT. 9.

Powers and Liabilities.

Recovery of amounts ascertained by justices.

SUB-SECT. 4.—*Recovery of Damages and Penalties.*

1301. Where any damages, costs, or expenses are by the Act of 1845 or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing payment is not provided for, such amount, in case of dispute, must be ascertained by two justices. If the amount so ascertained is not paid by the company or other party liable to pay within seven days after demand, the amount may be recovered by distress under warrant of the justices (*h*). If sufficient goods of the company cannot be found, the amount, if it does not exceed £20, may be recovered by distress on the goods of its treasurer, after seven days' notice in writing, stating the amount due, and demanding payment, has been given to him, or left at his residence. If he pays any money, he may retain the amount paid and costs out of any money of the company coming into his control, or he may sue the company (*i*).

Procedure in compensation cases before justices.

1302. Where any question of compensation, expenses, charges, or damages is referred to the determination of any one justice or more, any justice may on the application of either party summon the other party to appear, at a time and place named in the summons. Upon the appearance of the parties, or in the absence of any of them, upon proof of due service of the summons, the question may be determined and the parties and their witnesses may be examined on oath, the costs being in the discretion of the justices (*k*).

Publication of particulars of offences.

1303. The company must publish the short particulars of the several offences for which any penalty is imposed by the Act of 1845 or the special Act or any Act incorporated therewith, or by any bye-law affecting other persons than its shareholders, officers, or servants, and of the amount of every such penalty, and shall cause such particulars to be painted or printed upon paper and pasted on a board to be hung up on some conspicuous part of its principal place of business. Where the penalties are of local application it must cause such boards to be affixed in some conspicuous place in the immediate neighbourhood to which the penalties are applicable; and no such penalty is recoverable unless it has been so published and kept published (*l*).

Recovery of penalties.

Every penalty or forfeiture, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices (*m*).

Distress.

1304. Any sum of money, whether in the nature of penalty or otherwise, directed to be levied by distress must be levied by distress

(*h*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 142. With this and the following sections, relating to the recovery of damages and penalties, compare the corresponding sections of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 136 *et seq.* (see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., pp. 90, 98); and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 140 *et seq.* (see title RAILWAYS AND CANALS).

(*i*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 143.

(*k*) *Ibid.*, s. 144.

(*l*) *Ibid.*, s. 145; as to the penalty for defacing such boards, see *ibid.*, s. 146.

(*m*) *Ibid.*, s. 147, as amended by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4; Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

and sale of the goods of the party, and the surplus, after satisfying the amount due and the expenses, must be returned to him on demand (n).

SECT. 9.
Powers and
Liabilities.

No distress is unlawful on account of any defect of form in the summons, conviction, warrant, or other proceeding; nor is the party making it to be deemed a trespasser *ab initio* on account of any irregularity afterwards committed by him. All persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage in an action (o).

1305. The justices by whom penalty or forfeiture is imposed may, where the application of it is not otherwise provided for, award not more than half to the informer, and must award the remainder to the overseers of the poor of the parish in which the offence has been committed for the benefit of the poor (p).

Interests of
common
informer and
overseers.

1306. The Act of 1845 authorises any officer or agent of the company, and all persons called by him to his assistance, to seize and detain any person who has committed any offence against the provisions of the company's statutes or bye-laws, and whose name and residence are unknown to him, and to convey him before some justice without warrant. The justice must proceed with all convenient despatch to the hearing and determining of the complaint (q).

Arrest of
delinquents.

1307. No proceeding in pursuance of the Act of 1845, or the special Act, or any Act incorporated therewith, can be quashed for want of form, or removed by *certiorari* or otherwise into the High Court (r). Any party aggrieved by any determination or adjudication of any justice with respect to any penalty or forfeiture may, however, appeal to quarter sessions (s), which must proceed to hear and determine the appeal in a summary way, or may adjourn it to the following sessions. Upon the hearing of the appeal the court may mitigate any penalty or forfeiture, or confirm or quash the adjudication, and order any money paid by the appellant, or levied by distress, to be returned to him, and may also order further satisfaction to be made to the party injured (t).

Appeals.

(n) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 150. No action lies for the surplus until after a formal demand for the return of it has been made (*Simpson v. Routh* (1824), 2 B. & C. 682; *Philp v. Donati* (1809), 2 Taunt. 62, 66).

(o) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 151.

(p) *Ibid.*, s. 152, as amended by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66).

(q) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 156.

(r) *Ibid.*, s. 158. But the High Court can allow a *certiorari* to be issued where an inferior tribunal has proceeded without any jurisdiction at all, though not where there has only been some irregularity in the exercise of jurisdiction (*R. v. London and North Western Rail. Co.* (1863), 12 W. R. 208; *R. v. Sheffield Rail. Co.* (1839), 11 Ad. & El. 194, 199—201); see title CROWN PRACTICE, Vol. X., pp. 192 *et seq.*

(s) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 159, as amended by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4.

(t) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 160;

SECT. 10.
Borrowing.

Regulation of
company's
statutory
power to
borrow.

Mode of
borrowing.

Limit on
amount
borrowed.

SECT. 10.—*Borrowing.*

SUB-SECT. 1.—*In General.*

1308. Although the Act of 1845 contains certain provisions with respect to the borrowing of money by the company on mortgage or bond (a), it does not itself give any company the power to borrow money, but only regulates the exercise of the borrowing power conferred by the company's special Act. To enable a company to which the Act of 1845 applies to borrow at all, it must by its special Act be expressly given power to do so.

The giving of a power to borrow on mortgage or bond, without more, impliedly prohibits any other mode of borrowing, as, for instance, on Lloyd's bonds (b), or by overdrawing a banking account (c). Borrowing powers are limited by statute, and directors are in the position of special agents, having authority to affix the company's seal to mortgages and other deeds which are *intra vires* of the company, but having no power to affix the seal, so as to bind the company, in any case where the deed is one the execution of which the legislature has expressly or impliedly forbidden (d).

As regards a limit on the amount to be borrowed, a prohibition against borrowing more than a specified sum is, in substance, disobeyed only when, and so far as, an obligation to pay more than that sum is contracted. So far as money borrowed has been applied in discharging debts or liabilities which could be enforced against the company, the lender is entitled to have the loan treated as valid (e). It is provided by statute that money borrowed by a company for the purpose of paying off and duly applied in paying off its bonds or mortgages given or made under its statutory powers is, so far as the same is so applied, to be deemed money borrowed

compare the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 147; and see title RAILWAYS AND CANALS.

(a) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 38—55. As to issuing shares in place of borrowing, see p. 680, *ante*; as to the application of the money raised, see p. 681, *ante*.

(b) As to Lloyd's bonds, see title BONDS, Vol. III., p. 82.

(c) *Brooks & Co. v. Blackburn Benefit Building Society* (1881), 9 App. Cas. 857, 865, 868; *Hooker v. Wrigley* (1882), 9 Q. B. D. 397; *Landowners West of England and South Wales Land Drainage and Inclosure Co. v. Ashford* (1880), 16 Ch. D. 411, 437; and see p. 338, *ante*.

(d) *Chambers v. Manchester and Milford Rail. Co.* (1864), 5 B. & S. 588, 605—608; *Landowners West of England and South Wales Land Drainage and Inclosure Co. v. Ashford*, *supra*; *Re Cork and Youghal Rail. Co.* (1869), 4 Ch. App. 748, 757, 758. A railway company which is not expressly empowered by its special Act to draw, accept, or indorse bills of exchange is incompetent to do so (*Bateman v. Mid-Wales Rail. Co.* (1866), L. R. 1 C. P. 499, 500, 510, 512).

(e) Compare *Re Anglo-Danubian Steam Navigation and Colliery Co.* (1875), 20 Eq. 339; *Re Wrexham, Mold and Connah's Quay Rail. Co.*, [1899] 1 Ch. 440, 446, 447, O. A.; *Fountaine v. Carmarthen Rail. Co.* (1868), L. R. 5 Eq. 316, 325; *Brooks & Co. v. Blackburn Benefit Building Society*, *supra*; *Re Cork and Youghal Rail. Co.*, *supra*, at p. 759; *Re National Permanent Benefit Building Society, Ex parte Williamson* (1869), 5 Ch. App. 309; *Yorkshire Railway Wagon Co. v. Maclure* (1882), 21 Ch. D. 309, O. A.; *Re Lough Neagh Ship Co., Ex parte Workman*, [1895] 1 L. R. 533; see also *Bannatyne v. MacIver*, [1906] 1 K. B. 103, O. A., where the principle was explained and applied.

within and not in excess of the statutory powers (*f*). To raise money by an issue of debenture stock special power is required (*g*). SECT. 10.
Borrowing.

1309. Mortgages or debentures under the Act of 1845, and debenture stock, may validly be issued at a discount (*h*). They are not bills of sale (*i*) within the meaning of the Bills of Sale Acts, 1878 and 1882 (*j*), and they do not impliedly contain the power of sale conferred by the Conveyancing and Law of Property Act, 1881 (*k*). Nature of
debentures.

1310. If, after having borrowed any part of the money authorised by its special Act to be borrowed on mortgage or bond, the company pays it off, it may again borrow the amount paid off, and so from time to time. This power of reborrowing must not be exercised without the authority of a general meeting of the company, unless the money is reborrowed in order to pay off any existing mortgage or bond (*l*). A debenture issued for cash by way of reborrowing to a lender who has no notice of any irregularity may, however, be valid although the reborrowing was not authorised by a general meeting (*m*). Reborrowing.

If a company's goods are sold under a judgment, and a debenture-holder gets payment of his debt out of the proceeds of sale, the transaction is equivalent to payment off by the company (*n*).

1311. Where debenture stock (which is not redeemable) has been issued, the company's powers of borrowing and reborrowing are, to the extent of the money raised by the issue, extinguished (*o*). Irredeemable
debenture
stock.

SUB-SECT 2.—*Borrowing on Mortgage or Bond.*

1312. A company, if so authorised by its special Act, may, subject to the restrictions contained in the special Act, borrow on mortgage or bond such sums of money as are from time to time authorised by a general meeting (*p*), not exceeding in the whole the sum prescribed, and, for securing the repayment of the money so borrowed, with interest, may mortgage the undertaking and the future calls on the shareholders, or give bonds (*q*). Mortgages of
undertaking.

The limitation as to amount is imperative, and a debenture issued

(*f*) Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), s. 4.

(*g*) See p. 739, *post*.

(*h*) *Webb v. Shropshire Railways Co.*, [1893] 3 Ch. 307, 320, 330.

(*i*) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627, 644, 648, C. A.; see title BILLS OF SALE, Vol. III., pp. 19, 20.

(*j*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.

(*k*) 44 & 45 Vict. c. 41; *Blaker v. Herts and Essex Waterworks Co.* (1889), 41 Ch. D. 399, 406.

(*l*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 39.

(*m*) *Fountaine v. Carmarthen Rail. Co.* (1868), L. R. 5 Eq. 316, 323—325; *Landowners West of England and South Wales Land Drainage and Inclosure Co. v. Ashford* (1880), 16 Ch. D. 411, 438; *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85, 92.

(*n*) *Fountaine v. Carmarthen Rail. Co.*, *supra*.

(*o*) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 34.

(*p*) The provision as to a general meeting is directory, and a lender need not, as against the company, show that it has been observed (*Landowners West of England and South Wales Land Drainage and Inclosure Co. v. Ashford*, *supra*, at p. 438).

(*q*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 38; see p. 734, *post*.

SECT. 10. in excess of a company's statutory powers of borrowing is void *ab initio* (r).

Meaning of
"undertaking."

1313. In the case of a railway company, the undertaking includes the land actually used for the railway, with the stations and other buildings and the rails, and, under a mortgage in the statutory form, the mortgagee has a title to them paramount to that of a judgment creditor of the company who has issued an *elegit*. The court will interfere by injunction, at the instance of a debenture-holder or mortgagee, to restrain a subsequent judgment creditor from impairing the subject-matter of the debenture or mortgage by *elegit* proceedings (s).

Although various ingredients go to make up an undertaking, the term describes not the ingredients but the completed work (t) from which the earnings arise. So far as contracts of mortgage are concerned, the undertaking is made over as a thing complete or to be completed, as a going concern, with internal and parliamentary powers of management not to be interfered with; and the undertaking cannot, under a contract pledging it as security, be destroyed, broken up, or annihilated (u). The tolls and other earnings of the undertaking are available to satisfy the mortgage; but the mortgagees cannot by seizing, or calling on the court to seize, the capital, or lands, or proceeds of sales of land, or the stock of the undertaking, either prevent its completion or reduce it into its original elements when it has been completed (x).

How far land
affected.

A mortgage debenture in the statutory form does not entitle the debenture-holder to bring an action to recover the company's land (a), or for sale or foreclosure of it (b). Where, however, a railway has been sold under a special Act and the proceeds paid into court, a debenture-holder is entitled to payment out of the

(r) *Fountaine v. Carmarthen Rail. Co.* (1868), L. R. 5 Eq. 316, 324. In the case of railway companies, money borrowed for the purpose of paying off, and duly applied in paying off, bonds or mortgages of the company given or made under its statutory powers are, so far as the same are so applied, to be deemed money borrowed within, and not in excess of, such statutory powers (Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 26; and see title RAILWAYS AND CANALS). There is a similar provision in favour of all companies governed by the Companies Clauses Acts; see Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), s. 4. As to the doctrine of subrogation when money is advanced to a company which has exhausted its borrowing powers, see *Re Wrexham, Mohl and Connah's Quay Rail. Co.*, [1899] 1 Ch. 440, C. A.

(s) *Legg v. Mathieson* (1860), 2 Giff. 71, 78, 79; *Gardner v. London, Chatham and Dover Rail. Co.* (No. 1) *Drawbridge v. Same*, *Gardner v. Same* (No. 2), *Imperial Mercantile Credit Association v. Same* (1867), 2 Ch. App. 201; *Wildy v. Mid-Hants Rail. Co.* (1868), 16 W. R. 409; *Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574, 576.

(t) But a company with powers to mortgage its undertaking may mortgage chattels, such as barges, which it has a statutory power to own and use (*Reeve v. Medway (Upper) Navigation Co.* (1905), 21 T. L. R. 400).

(u) *Legg v. Mathieson*, *supra*.

(x) *Hart v. Eastern Union Rail. Co.* (1852), 7 Exch. 246, 265, 266; *Wickham v. New Brunswick and Canada Rail. Co.* (1865), L. R. 1 P. O. 64, 78; *Re Portsmouth Borough (Kingston, Fratton, and Southsea) Tramways Co.*, [1892] 2 Ch. 362, 366.

(a) *Doe d. Myatt v. St. Helen's Rail. Co.* (1841), 2 Q. B. 364.

(b) *Furness v. Caterham Rail. Co.* (1858), 25 Beav. 614.

fund in court in priority to a subsequent judgment creditor (c). The lien of a railway company's debenture-holders on the company's undertaking is not a specific charge upon, or claim against, the sale proceeds of its surplus lands (d).

SECT. 10.
Borrowing.

1314. Although a company may validly assign a call to a creditor by way of security for an existing debt, it may be that, in such a case, a power of sale cannot validly be given to the assignee (e). Assignment of calls.

1315. Where by the special Act the company is restricted from borrowing any money on mortgage or bond until a definite portion of its capital has been subscribed or paid up, or where by the Act of 1845 or the special Act the authority of a general meeting is required for such borrowing, the certificate of a justice that such definite portion of the capital has been subscribed or paid up, and a copy of the order of a general meeting authorising the borrowing, certified by a director or by the secretary, are sufficient evidence of the fact of the capital having been subscribed or paid up, and of the order having been made (f). Upon production to any justice of the books of the company, and of such other evidence as he thinks sufficient, he must grant such a certificate (g). A copy of an order of a general meeting would not be conclusive evidence as between the directors and the company, if no such order had in fact been made (h), although it would be evidence on which a lender might reasonably act. Evidence of authority to borrow.

1316. Every mortgage or bond for securing money borrowed by the company must be by deed (i) under its common seal, duly stamped, and truly stating the consideration; and it may be either according to the statutory form or to the like effect (k). Where the seal has been affixed without due authority, the company is not bound by the instrument (l), except as against a lender who takes the security without notice, actual or imputed, of the irregularity (m). With regard to the consideration, a debenture may be valid, if the true consideration is disclosed by it, though not in express terms stated, the consideration being required to be stated for the purpose of the stamp (n). A debenture issued in the statutory form, and Necessity for deed.

(c) *Furness v. Caterham Rail. Co.* (1859), 27 Beav. 358, 361, 362; and see *Re Opera, Ltd.*, [1891] 3 Ch. 260, 263, O. A.

(d) *Re Hull, Barnsley, and West Riding Junction Rail. Co.* (1888), 40 Ch. D. 119, 127, O. A. (decided on Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 23); and see title RAILWAYS AND CANALS.

(e) *Pickering v. Ilfracombe Rail. Co.* (1868), L. R. 3 C. P. 235, 248, 249; compare *Re Humber Ironworks Co., Ex parte Warrant Finance Co.* (1860), 10 W. R. 474, 667; *Re Sankey Brook Coal Co.* (1870), L. R. 9 Eq. 721.

(f) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 40.

(g) *Ibid.*

(h) *Fountaine v. Carmarthen Rail. Co.* (1868), L. R. 5 Eq. 316, 322, 323.

(i) *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555, 560, O. A.

(k) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 41, and Scheds. C and D.

(l) *D'Arcy v. Tamar, Kit Hill, and Callington Rail. Co.* (1867), L. R. 2 Exch. 158.

(m) *Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629, 632, O. A.

(n) *Landowners West of England and South Wales Land Drainage and Inclosure Co. v. Ashford* (1880), 10 Ch. D. 411, 438.

COMPANIES.

SECT. 10. providing that the money advanced is to be repaid on or by a specified day, entitles a debenture-holder to bring an action and recover judgment against the company on the debenture (o).

Effect of mortgages in statutory form.

1317. Although the statutory form of mortgage purports to assign the whole undertaking to each mortgagee, as if he were the sole and first incumbrancer, the respective mortgagees are entitled only to the property comprised in the mortgages in proportion to the sums advanced by them (p). A mortgage is not avoided because it does not show in terms the amount advanced upon it, it being enough if the amount is ascertainable (q). The sums advanced are to be repaid, with interest, without any preference by reason of priority of the date of any mortgage, or of the meeting at which it was authorised (p). Every mortgagee who comes in under the Act, whatever the property charged by the mortgage may be, has to bring that property into hotchpot with all the other mortgagees. All the mortgage claims and all the subject-matters of the mortgages are consolidated, the whole charge being made upon the whole subject-matter, and the whole proceeds being distributed *pari passu* (r). The mortgagees are entitled, rateably, to the tolls, sums, and premises comprised in their mortgages, and, further, to be repaid their advances, with interest generally, and not merely out of tolls and the like (s).

Effect of mortgage on uncalled capital.

1318. No mortgage (although it comprises future calls on shareholders), unless it expressly so provides, precludes the company from receiving and applying to the purposes of the company calls to be made by it (a). A mortgagee of unpaid capital, it seems, prevails against a judgment creditor of the company, who is proceeding by *scire facias* against a shareholder whose shares are not fully paid up, and against a liquidator making calls in winding up a company governed by the Act of 1845, and capable of being wound up under the Act of 1908 (b).

Rights of bondholders.

1319. The obligees in bonds given by the company are proportionally, according to the amount of the moneys secured, entitled to be paid, out of its tolls or other property, the sums secured,

(o) *Bowen v. Brecon Rail. Co., Ex parte Howell* (1867), 1 L. R. 3 Eq. 541, 547.

(p) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 42; and see *ibid.*, Sched. C.

(q) *Landowners West of England and South Wales Land Drainage and Inclosure Co. v. Ashford* (1880), 16 Ch. D. 411.

(r) *Ibid.*, at p. 439.

(s) *Bowen v. Brecon Rail. Co., Ex parte Howell, supra*. As to the distinction between the rights of mortgagees as debenture-holders and the rights of bondholders, see and compare *Gardner v. London, Chatham and Dover Rail. Co.* (No. 1), *Drawbridge v. Same*, *Gardner v. Same* (No. 2), *Imperial Mercantile Association v. Same* (1867), 2 Ch. App. 201; *Russell v. East Anglian Rail. Co.* (1850), 3 Mac. & G. 125; *Bowen v. Brecon Rail. Co., Ex parte Howell, supra*.

(a) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 43.

(b) 8 Edw. 7, c. 69; *Re Pyle Works* (1890), 44 Ch. D. 534, C. A., per LINDLEY, L.J., at p. 587; approved in *Newton v. Anglo-Australian Investment Co. (Debenture Holders etc.)*, [1895] A. C. 214, P. C.

without any preference one above another by reason of priority of date of any bond, or of the meeting at which it was authorised (c).

SECT. 10.
Borrowing.

Bondholders are not assignees of the undertaking or tolls (d); nor are they entitled to any specific equitable lien on any of the company's property or effects (e). Their only remedy appears to be the obtaining of a judgment (f), and, as against them, any judgment creditor of the company may seize its goods and chattels under a writ of *fi. fa.* (g).

1320. A register of mortgages and bonds must be kept by the secretary, and, within fourteen days after the date of the mortgage or bond, an entry or memorial, specifying its number and date, the sums secured, and the names of the parties, with their proper additions, must be made in the register. The register may be perused at all reasonable times by any of the shareholders, or by any mortgagee or bond creditor, or by any person interested in any mortgage or bond, without payment (h). The right to inspect includes the right to take copies or extracts (i). An applicant for inspection is not bound to state the grounds of his application, and his right, if disputed, can be enforced by injunction (k).

Register of
mortgages
and bonds.

1321. The company may, if it thinks proper, fix a period for the repayment of the principal money borrowed, with interest, in which case the company must cause the period to be inserted in the mortgage deed or bond. Upon its expiration the principal sum, together with arrears of interest, must, on demand, be paid to the party entitled to the mortgage or bond. If no other place of payment is inserted in the instrument, the principal and interest are payable at the principal office or place of business of the company (l).

Fixing time
for repayment
of principal.

1322. In default of payment, a right of action arises on the mortgage or bond (m). A debenture-holder may sue on behalf of himself and the other debenture-holders of the same issue, and, after obtaining on interlocutory motion the appointment of a

Remedies of
mortgagees
and bond-
holders.

(c) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 44.

(d) *Bowen v. Brecon Rail. Co., Ex parte Howell* (1867), L. R. 3 Eq. 541, 548.

(e) *Russell v. East Anglian Rail. Co.* (1850), 3 Mac. & G. 125, 141, 143. As to the priority of bondholders in the case of railway companies, see *Railway Companies Act, 1867* (30 & 31 Vict. c. 127), s. 23; and title *RAILWAYS AND CANALS*.

(f) *Bowen v. Brecon Rail. Co., Ex parte Howell, supra*.

(g) *Russell v. East Anglian Rail. Co., supra*.

(h) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 45; compare Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 100; and see p. 364, *ante*. The neglect to register under the latter section does not invalidate the security (*Wright v. Horton* (1887), 12 App. Cas. 371). But the Act of 1903 imposes a penalty on officers making default, whereas there is no such penalty in the Act of 1845.

(i) *Mutter v. Eastern and Midlands Rail. Co.* (1888), 38 Ch. D. 92, C. A.; and see p. 690, *ante*. As to the employment of agents to make inspections, see *Bevan v. Webb*, [1901] 2 Ch. 59, C. A.; *Norey v. Keep*, [1909] 1 Ch. 561.

(k) *Holland v. Dickson* (1888), 37 Ch. D. 669; compare *Davies v. Gas Light and Coke Co.*, [1909] 1 Ch. 708, C. A.

(l) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 50.

(m) *Hart v. Eastern Union Rail. Co.* (1852), 7 Exch. 246, 265, 266, 268.

SECT. 10.
Borrowing.

receiver of the undertaking, may obtain a judgment, declaring that he and the other debenture-holders are entitled to stand in the position of judgment creditors of the company for the principal and interest due upon the debentures, and appointing the existing receiver to be receiver of all property of the company not included in the interlocutory order. The plaintiff, with the leave of the court, may then issue execution; and, if he fails to obtain satisfaction of his debt, he may, unless the company is a railway company incorporated by statute, obtain an order on petition for its winding up (n). If an individual debenture-holder has, by means of an execution, obtained satisfaction of his debt, he cannot afterwards be made to refund, for the benefit of other debenture-holders, any part of what he has received (o).

Repayment
where no
time fixed.

1323. If no time is fixed in the mortgage deed or bond for the repayment of the money borrowed, the person entitled to the mortgage or bond may, at the expiration or at any time after the expiration of twelve months from the date of the instrument, demand payment of the principal money secured, with all arrears of interest, upon giving six months' previous notice for that purpose. Similarly, the company may at any time pay off the money borrowed on giving the like notice. Every notice must be in writing or print, or both. If given by a mortgagee or bond creditor, it must be delivered to the secretary or left at the principal office of the company. If given by the company, it must be given either personally to the mortgagee or bond creditor or left at his residence, or if he is unknown to the directors, or cannot be found after inquiry, the notice must be given by advertisement in the *London Gazette*, and in some other newspaper as mentioned in the Act (p). If the company fails to pay pursuant to such a demand, a right of action on his mortgage or bond will, at the expiration of the prescribed notice, accrue to the mortgagee or bondholder (q).

Interest on
mortgages
and bonds.

1324. The interest on money borrowed upon a mortgage or bond must be paid at the periods appointed therein, or, if no period is appointed, half-yearly, and in preference to any dividends payable to the shareholders of the company (r). Where a company issues

(n) *Russell v. East Anglian Rail. Co.* (1850), 3 Mac. & G. 104; *Bowen v. Brecon Rail. Co., Ex parte Howell* (1867), L. R. 3 Eq. 541; *Re Potteries, Shrewsbury, and North Wales Rail. Co.* (1869), 5 Ch. App. 67, 69; *Hope v. Croydon and Norwood Tramways Co.* (1887), 34 Ch. D. 730; *Re Portsmouth Borough (Kingston, Fratton and Southsea) Tramways Co.* [1892] 2 Ch. 362; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 267. Even a railway company incorporated by special Act may be so wound up, if a warrant for the abandonment of the whole of its railway has been obtained; see Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), s. 4; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 268; and title RAILWAYS AND CANALS. In *Re Herne Bay Waterworks Co.* (1879), 10 Ch. D. 42, debenture-holders of a waterworks company were held to be not entitled to a winding-up order; but they had not taken the preliminary step of getting into the position of judgment creditors.

(o) *Fountaine v. Carmarthen Rail. Co.* (1868), L. R. 5 Eq. 316, 324.

(p) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 51, 138; see p. 678, *ante*.

(q) *Bowen v. Brecon Rail. Co., Ex parte Howell, supra*.

(r) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 48.

a debenture for a principal sum, to be paid on a specified day with 5 per cent. interest in the meantime, and does not pay, or offer to pay, the principal at the date fixed, the debenture-holder is entitled to interest from the date fixed for payment until actual payment of the principal sum (s). In such cases there is no general rule that the rate of interest allowed by the court, as from the day for payment, will be the same as the agreed rate up to that day (t). If a debenture-holder sues the company on its covenant to pay and recovers judgment, the original debt merges in the judgment debt, and the judgment creditor is only entitled to 4 per cent. interest on the latter, although a higher rate is given by the debenture (a).

SECT. 10.
Borrowing.

Where the company has given notice of its intention to pay off a mortgage or bond at a time when it may lawfully be paid off, all further interest ceases to be payable on the mortgage or bond at the expiration of the notice, unless, on demand of payment made pursuant to the notice, or at any time afterwards, the company fails to pay the principal and interest due at the expiration of the notice (b).

When interest ceases.

1325. Where by the special Act the mortgagees of the company are empowered to enforce the payment of arrears of interest, or arrears of principal and interest, due on the mortgages, by the appointment of a receiver, then the mortgagee may, without prejudice to his right to sue for the sum due in the High Court, require the appointment of a receiver, by an application to be made to justices of the peace (1) if the interest accruing upon any mortgage is not paid within thirty days after it has become payable, and after a demand in writing, and (2) if the principal money owing upon any mortgage is not paid within six months after it has become payable, and after a demand in writing, provided that his debt amounts to the prescribed sum; if it does not, he may combine with other mortgagees entitled to make the application whose debts, together with his debt, amount to the prescribed sum (c).

Appointment of receiver.

The application must be made to two justices, and on the application they may, by order in writing, after hearing the parties, appoint some person to receive the whole or part of the tolls or sums liable to the payment of the amount due, until such amount and all costs, including the charges of receiving the tolls or sums, are fully paid. On the appointment being made all such tolls and sums must be paid to the person appointed. The money received is so much money received by or to the use of the party to whom the interest, or principal and interest, as the case may be, is then due, and on whose behalf the receiver has been appointed; and after

Application for receiver.

(s) *Price v. Great Western Rail. Co.* (1847), 16 M. & W. 244.

(t) *Cook v. Fowler* (1874), L. R. 7 H. L. 27, 37; as to interest, see generally title MONEY AND MONEY-LENDING.

(a) *Re European Central Rail. Co., Ex parte Oriental Financial Corporation* (1876), 4 Ch. D. 33, C. A. Nevertheless, a mortgagee whose debt is merged in a judgment may recover interest at the agreed rate out of any enforceable security he holds (*Economic Life Assurance Society v. Ussborne*, [1902] A. C. 147).

(b) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 52.

(c) *Ibid.*, s. 53.

SECT. 10.
Borrowing.

the interest and costs, or principal, interest, and costs, have been so received, the power of the receiver ceases (d).

The special remedy of an application to justices for the appointment of a receiver does not oust or exclude the ordinary jurisdiction of the High Court to appoint a receiver (e); and a mortgage debenture-holder may either bring an action to recover his interest and principal or apply for the appointment of a receiver of tolls or sums liable to the payment of such principal and interest (f). Where the security is in jeopardy, a receiver may be appointed before the money secured has become payable (g). As a general rule, debenture-holders of companies incorporated for carrying on undertakings of a public nature cannot have a manager of the undertaking appointed by the court, or have the undertakings sold (h), though, if such a company is ordered to be wound up, its undertaking may be sold by the liquidator (i).

Transfer of
mortgage
or bond.

1326. A person entitled to a mortgage or bond may from time to time transfer his interest to any other person. The transfer must be by deed (k) duly stamped, truly stating the consideration; and it may be in the statutory form or to the like effect (l). The transferee is entitled to sue in his own name (m).

Registration
of transfer.

1327. A transfer must be produced to the secretary within thirty days after its date if it is executed within the United Kingdom, or otherwise within thirty days after its arrival in the United Kingdom, and he must thereupon enter it in the register of mortgages (n). For such entry the company may demand a sum not exceeding the prescribed sum, or, where no sum is prescribed, the sum of 2s. 6d. (o).

(d) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 54. And see *Russell v. East Anglian Rail. Co.* (1850), 3 Mac. & G. 125.

(e) *Fripp v. Chard Rail. Co.*, *Fripp v. Bridgewater and Taunton Canal etc. Co.*, (1853), 11 Hare, 241, 259; *Russell v. East Anglian Rail. Co.* (1850), 3 Mac. & G. 125, 144; and see Judicature Act, 1873 (36 & 37 Vict. c. 63), s. 25 (8).

(f) *Gardner v. London, Chatham and Dover Rail. Co.* (No. 1), *Drawbridge v. Same*, *Gardner v. Same* (No. 2), *Imperial Mercantile Credit Association v. Same* (1867), 2 Ch. App. 201, 213; *Hart v. Eastern Union Rail. Co.* (1852), 7 Exch. 246, 265, 266, 268.

(g) *Wildy v. Mid-Hants Rail. Co.* (1868), 16 W. R. 409; and see pp. 376, 381, *ante*.

(h) *Gardner v. London, Chatham and Dover Rail. Co.* (No. 1), *supra*, at p. 212; *Blaker v. Herts and Essex Waterworks Co.* (1889), 41 Ch. D. 399; *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, disapproving *Bartlett v. West Metropolitan Tramways Co.*, [1893] 3 Ch. 437, [1894] 2 Ch. 286. But a judgment creditor may now obtain the appointment of a manager in the case of a railway company (Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4); see title RAILWAYS AND CANALS. As to the difference between a receiver and a manager, see *Re Manchester and Milford Rail. Co.*, *Ex parte Cambrian Rail. Co.* (1880), 14 Ch. D. 645, 653, O. A.

(i) *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, 53, O. A.; *Pegge v. Neath District Tramways Co.*, [1895] 2 Ch. 508, 511.

(k) *Powell v. London and Provincial Bank*, [1893] 2 Ch. 555, 560, O. A.

(l) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 46.

(m) *Vertue v. East Anglian Railways Co.* (1850), 5 Exch. 280, 285, 286. As to the rights of transferees where there have been irregularities, see *Re Romford Canal Co.*, *Pocock's Claim*, *Frickett's Claim*, *Carew's Claim* (1883), 24 Ch. D. 85. As to allowing a transferee to have a charge on surplus land as a further security, see *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169.

(n) See p. 735, *ante*.

(o) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 47.

Until registration of the transfer the company is not in any manner responsible to the transferee in respect of a mortgage (*p*); but after such entry the transfer entitles him to the full benefit of the original mortgage or bond, and no party, having made a transfer, can release or discharge the mortgage or bond transferred, or any money thereby secured (*q*).

SECT. 10.
Borrowing.

1328. Where there is power to issue securities, an irregularity in the issue cannot be set up, even against the original holder, if he is entitled to presume *omnia ritè esse acta*. If the security is legally transferable, the irregularity, and *à fortiori* any equity against the original holder, cannot be asserted by the company against a *bonâ fide* transferee for value without notice. Nor can such an equity be set up against an equitable transferee, whether the security is transferable at law or not, if by the original conduct of the company in issuing the security, or by its subsequent dealing with the transferee, he has a superior equity (*r*). If the original conduct of the company in issuing the security justifies the public in treating it as a representation that the security is legally transferable, there is an equity, in any person who has agreed for value to take a transfer of the security, to restrain the company from pleading its invalidity, provided that the company has power to issue transferable securities, and the equitable transferee has no reason to suspect any irregularity in the issue (*s*). Relief will be only given to an equitable transferee on equitable terms, and, if his security consists of debentures, he will be allowed to recover, *pari passu* with other debenture-holders, not necessarily the full nominal amount of his debentures, but only such a sum, not exceeding that amount, as he may be able to prove that he *bonâ fide* advanced, in money or money's worth, upon the security of the debentures (*t*).

Irregularity
in issue of
securities.

1329. Interest on a mortgage or bond is only transferable by deed duly stamped (*u*). Transfer of
interest.

SUB-SECT. 3.—*Debenture Stock.*

1330. Any company having power to raise money on mortgage or bond by virtue of any Act of Parliament, but not having power to create and issue debenture stock, may create and issue debenture stock subject to the provisions of the Act of 1863 (*b*). Power to
issue.

(*p*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 47.

(*q*) *Ibid.*

(*r*) *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim* (1883), 24 Ch. D. 85; see also *Re Gwelo, Williamson's Claim*, [1901] 1 I. R. 38.

(*s*) *Re Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim, supra.*

(*t*) *Ibid.*

(*u*) Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 49.

(*b*) The provisions of Part III. of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), ss. 22–35, as amended by the Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), are deemed to be incorporated with its special Act (Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), s. 3). As to the borrowing powers of railway companies by issuing debenture stock etc., see Railway Companies' Powers Act, 1864 (27 & 28 Vict. c. 120); Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121); Railway Companies Securities

SECT. 10.
Borrowing.

Conditions
under which
it may be
issued.

1331. Where a company, whenever incorporated, has by its special Act power to create and issue debenture stock (c), or where it has no such statutory power, but has only by virtue of some statute the power to raise money on mortgage or bond (d), it may (with the sanction of such proportion of the votes of the shareholders and stockholders entitled to vote in that behalf present (personally or by proxy) at a meeting specially convened for the purpose, as is prescribed in the special Act, and if no proportion is prescribed, then of three-fifths of such votes) from time to time raise all or any part of the money which for the time being it has raised, or is authorised to raise, on mortgage or bond, by the creation and issue, at such times, in such amounts and manner, on such terms, subject to such conditions, and with such rights and privileges, as it thinks fit, of debenture stock (e), instead of and to the same amount as the whole or any part of the money which may for the time being be owing by the company on mortgage or bond, or which it may from time to time have power to raise on mortgage or bond. To the stock so created it may attach such fixed and perpetual preferential interest, payable half-yearly or otherwise, and commencing at once or at any future time or times, when and as the debenture stock is issued, or otherwise, as it thinks fit (f).

The creation of the stock, as distinguished from its issue, is effected by the resolution authorising the issue fixing the rate of interest, and prescribing the other conditions on which the stock is to be held (g).

Issuing at
a discount

1332. A company empowered to create debenture stock, and governed by the Companies Clauses Acts, may issue such stock at a discount, or (within the limits of its borrowing powers) by way of collateral security for a loan, and, in the last-mentioned case, with reservation of a right of redemption (h).

Act, 1866 (29 & 30 Vict. c. 108); Railway Companies Act, 1867 (30 & 31 Vict. c. 127); Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57); and title RAILWAYS AND CANALS.

(c) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 22. The special Act must incorporate Part III. of the Act of 1863 (*ibid.*).

(d) See p. 731, *ante*.

(e) Wherever "debenture stock" is mentioned in Part III. of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), the provisions of Part III. are deemed to apply to mortgage preference stock, and to funded debt, as the case may require, in all respects as if mortgage preference stock or funded debt were debenture stock (*ibid.*, s. 35).

(f) *Ibid.*, s. 22, as amended by Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), s. 1. Since the passing of the Companies Clauses Act, 1869 (32 & 33 Vict. c. 48), a company entitled to issue debenture stock may attach to it any rate of interest which the exigencies of its financial position at the time of the creation of the stock may require; and any special Act of a company passed before the passing of the Act of 1869, prescribing any rate, is to be read as if no rate had been prescribed therein (*ibid.*, s. 1). But debenture stock, authorised but not issued before the Act of 1869, could not be issued on any terms other than those whereon it might have been issued before the Act of 1869 without further authority of the company (*ibid.*, s. 2).

(g) *Re Burry Port and Gwendreath Valley Rail. Co.* (1885), 52 L. T. 842, 845.

(h) *Webb v. Shropshire Railways Co.*, [1893] 3 Ch. 307, 330, C. A.; *Whitehaven Joint Stock Banking Co. v. Read* (1886), 64 L. T. 360, C. A.; compare *Re Anglo-*

1333. The money raised by debenture stock must be applied exclusively either in paying off money due by the company on mortgage or bond, or else for the purposes to which the money would be applicable if it were raised on mortgage or bond instead of on debenture stock (*i*). SECT. 10.
Borrowing.
Application of proceeds.

Separate and distinct accounts must be kept by the company, showing how much money has been received on account of debenture stock, and how much money, borrowed or owing on mortgage or bond, or which it has power so to borrow, has been paid off by debenture stock, or raised thereby, instead of being borrowed on mortgage or bond (*k*). Accounts of moneys borrowed.

1334. Debenture stock so created is not a debenture; there is no debt, except as to the annual interest, and the capital cannot be called in or paid off; it is only a right to a perpetual annuity, payable out of the concern. There is no conveyance or assignment of anything to the stockholder, or to any trustee for him; but there is an entry in the books of the concern that there is so much debenture stock, on which there is so much to be paid half-yearly to each holder. Nature of stock.

The whole of a holder's rights depend on the statutes authorising railways and other bodies to create such a stock (*l*). He is a creditor of the company, with a security of a special and limited kind on its assets, and with a right, if the interest on the stock is in arrear, to obtain or join with other holders in obtaining the appointment of a receiver. He is not a member of the company, and is not entitled to vote, or to be present, at any of its meetings (*m*). He has, however, the rights and powers of mortgagees of the undertaking, other than the right to require repayment of the principal money paid up on the stock (*n*). Rights of holder.

1335. The debenture stock, with the interest thereon, is a charge on the undertaking of the company, prior to all its shares or stock, and is transmissible and transferable in the same manner and according to the same regulations and provisions as its other stock, and in all other respects has the incidents of personal estate (*o*). Charge created by debenture stock.

The issue of debenture stock does not in any way affect any mortgage or bond at any time legally granted by the company before the creation of such stock, or any power of the company to raise money on mortgage or bond, the holders of all such mortgages and bonds being entitled to the same priorities, rights, and privileges in all respects as they would have been entitled to if the special Act authorising the issue of debenture stock had not been passed (*p*),

Danubian Steam Navigation and Colliery Co. (1875), L. R. 20 Eq. 339. As to borrowing by railway companies on the security of debenture stock, see, further, title RAILWAYS AND CANALS.

(*i*) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 32; and see p. 686, *ante*.

(*k*) *Ibid.*, s. 33.

(*l*) *Attres v. Hawe* (1878), 9 Ch. D. 337, 349, C. A.

(*m*) *Re Bodman, Bodman v. Bodman*, [1891] 3 Ch. 135, 137, 138; see p. 719, *ante*.

(*n*) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 31; see pp. 735 *et seq.*, *ante*.

(*o*) *Ibid.*, s. 23; see p. 699, *ante*.

(*p*) *Ibid.*, s. 30.

SECT. 10. the result being that the priority of mortgages and bonds granted before the creation of the debenture stock is saved, as also are the existing borrowing powers of the company (q).

Borrowing.

Interest.

The interest on debenture stock has priority of payment over all dividends or interest on any shares or stock of the company, whether ordinary or preference or guaranteed, and ranks next to the interest payable on its mortgages or bonds for the time being legally granted before the creation of the debenture stock. The holders of debenture stock created and issued under the same special Act are not, as among themselves, however, entitled to any preference or priority (r).

Certificate and registration.

1336. The company must deliver to every holder of debenture stock a certificate stating the amount of stock held by him; and all regulations or provisions for the time being applicable to certificates of shares in the company apply, *mutatis mutandis*, to certificates of debenture stock (s).

Register of holders.

The company must enter in a register, to be kept for that purpose, the names and addresses of the persons and corporations entitled to the debenture stock, and the amounts of the stock to which they are entitled. The register must be accessible for inspection at all reasonable times to every mortgagee, bondholder, debenture stockholder, shareholder, and stockholder of the company, without payment (a).

Interest in default.

1337. If the interest on debenture stock is not paid within thirty days after it is payable, any one or more of the stockholders holding, individually or collectively, the nominal amount prescribed in the special Act, and, if no sum is prescribed, then a sum equal to one-tenth of the aggregate amount which the company is for the time being authorised to raise by mortgage, by bond, and by debenture stock, or the sum of £10,000, whichever of the two last-mentioned sums is the smaller sum, may (without

(q) *Re Burry Port and Gwendreath Valley Rail. Co.* (1885), 52 L. T. 842, 846; and see *Harrison v Cornwall Minerals Rail. Co.* (1881), 18 Ch. D. 334, O. A.; affirmed *sub nom. Fenton v. Harrison* (1883), 8 App. Cas. 780.

(r) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 24; *Re Mersey Rail. Co.*, [1895] 2 Ch. 287, 296, 297, O. A. The principal distinction between debenture stock and mortgages or debentures authorised by the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), is that a holder of the former, instead of being a lender, obtains a charge on the undertaking for the interest of his loan in the nature of a perpetual annuity; whereas a mortgagee or a debenture-holder is entitled to repayment of his capital at the time usually fixed by the instrument (*Re Burry Port and Gwendreath Valley Rail. Co.*, *supra*, at p. 844). As to a company borrowing under statutory powers specifying in the prospectus of the loan all the Acts under which it is borrowing, see *Harrison v. Cornwall Minerals Rail. Co.*, *supra*, at p. 341.

(s) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 29; and see p. 690, *ante*.

(a) *Ibid.*, s. 28. As to the right of inspection including the right to take copies or extracts, see *Mutter v. Eastern and Midlands Rail. Co.* (1888), 38 Ch. D. 92, 107, O. A.; *Holland v. Dickson* (1888), 37 Ch. D. 689; and see p. 690, *ante*. As to enforcing the right, see *Davies v. Gas Light and Coke Co.*, [1909] 1 Ch. 708, O. A., and pp. 690, 722, *ante*.

prejudice to the right to sue in any court of competent jurisdiction for the interest in arrear) require the appointment of a receiver (b). SECT. 10.
Borrowing.

The application for a receiver must be made to two justices, who may by order in writing appoint some person to receive the whole or part of the tolls or sums liable to the payment of the interest, until all the arrears of interest then due on the debenture stock, with all costs, including the charges of receiving the tolls or sums, are fully paid. On the appointment being made, all such tolls or sums must be paid to and received by the person appointed (c). All money so received is deemed so much money received to the use of the several persons interested in the same, according to their several priorities; and the receiver must distribute it rateably, and without priority, among all the proprietors of debenture stock to whom interest is in arrear, after satisfying the interest on the company's mortgages and bonds. When the full amount of interest and costs has been so received, the receiver's power ceases, and he is bound to account to the company, and to pay it any balance in his hands (d). Appointment
of receiver.

If the interest on debenture stock is in arrear for thirty days after any of the days on which the same is payable, the stockholder for the time being may (without prejudice to his power to apply for the appointment of a receiver) recover the arrears, with costs, by action against the company in any court of competent jurisdiction (e). Recovery by
action.

SECT. 11.—*Winding up.*

1338. Any company incorporated by special Act for carrying on public works, and consisting of more than seven members, except a railway company (f), may be wound up by the court under the Act of 1908 as an unregistered company (g). Winding up
of statutory
companies.

(b) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 25; and as to the High Court's jurisdiction to appoint a receiver in a proper case, see *Fripp v. Chard Rail. Co.*, *Fripp v. Bridgewater and Taunton Canal and Rail. Co.* (1853), 17 Jur. 887.

(c) Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), s. 26.

(d) *Ibid.*

(e) *Ibid.*, s. 27. The cause of action being statutory, the period of limitation is twenty years (*Re Cornwall Minerals Rail. Co.*, [1897] 2 Ch. 74, 78; *Re Severn and Wye and Severn Bridge Rail. Co.*, [1896] 1 Ch. 559; *Re Drogheda Steam-packet Co.*, [1903] 1 I. R. 512; *Re Artisans' Land and Mortgage Corporation*, [1904] 1 Ch. 796).

(f) Except in so far as is provided by the Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), and the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), and any Acts amending them. The provisions of the Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), ss. 30—33 (referred to in the saving words), were repealed by s. 10 of the Abandonment of Railways Act, 1869 (32 & 33 Vict. c. 114), which substituted (s. 4) other provisions enabling a petition for winding up to be presented under the Companies Acts then in force; see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38; and title RAILWAYS AND CANALS.

(g) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 267; see *Re Barton-upon-Humber and District Water Co.* (1889), 42 Ch. D. 585; *Re Electric*

Part X.—Chartered Companies.

PART X. Chartered Companies.

Crown's
power to
incorporate
by charter.

1339. The Crown has at common law the power to incorporate by charter any number of persons assenting to be incorporated (*h*), and thus to form a chartered company. Formerly traders took advantage of this power, in preference to applying for a statute of incorporation, and obtained, like other corporations aggregate, a corporate name, the right of suing and being sued in that name, perpetual succession, the power to hold property, and a common seal (*i*).

Incorporation
for a term.

At common law, the Crown cannot grant a charter of incorporation for a definite period (*k*), but, by statute, it may grant a charter for a term of years or any other period (*l*), and it may by charter, or warrant, or other writing under the sign manual, from time to time extend or renew conditionally any period for which the charter or any of its privileges may for the time being be limited (*m*).

Monopoly.

Grants by the Crown to subjects of an exclusive right to sell, buy, make, work or use anything within the realm are in general void (*n*). The Crown may, however, grant charters to any companies or societies of merchants, within the realm, created for the maintenance, enlargement, or ordering of any trade or merchandise (*o*).

Limitation of
liability.

The Crown cannot, under its prerogative, incorporate persons so as to make them personally liable to any extent for the debts of the corporation (*p*); but, by statute, it is empowered in any charter of incorporation, whether in perpetuity or for any term or period, either by reference to the statute or otherwise, to impose on the corporation thus formed, and its officers and members, the same liabilities as may by the statute be imposed by letters patent on any

Telegraph Co. of Ireland (1856), 22 Beav. 471; and other cases cited at pp. 648, 650, *ante*.

(*h*) See title CORPORATIONS, Vol. VIII., pp. 314—316. For procedure to obtain a charter, and forms of petition and charter, see *Encyclopædia of Forms*, Vol. XI., pp. 514, 539 *et seq.*

(*i*) See title CORPORATIONS, Vol. VIII., pp. 306—311.

(*k*) *Ibid.*, p. 315. But this strict view has not always been acted upon. The first charter of the East India Company was granted for a period of fifteen years, and under condition that, if not found to be advantageous to the country, it might be annulled on notice, and the charter provided that it might be renewed (Mill's "History of British India," 4th ed., Vol. I., p. 24). As to the limit of William III.'s charter of 1693 to the same company, see *ibid.*, p. 132.

(*l*) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 29.

(*m*) Chartered Companies Act, 1884 (47 & 48 Vict. c. 56), s. 1.

(*n*) *Case of Monopolies* (1602), 11 Co. Rep. 84 b; Statute of Monopolies, 1623, (21 Jac. 1, c. 3), s. 1; see title CONSTITUTIONAL LAW, Vol. VI., p. 488. For the exceptions, see titles COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 139 *et seq.*; PATENTS AND INVENTIONS.

(*o*) Statute of Monopolies, 1623 (21 Jac. 1, c. 3), s. 9. The East India Company's charter, renewed in 1609, gave it the exclusive privilege of trading to the East Indies, and the legality of this grant was contested, but upheld, in *East India Co. v. Sandys* (1685), 10 State Tr. 371; and see title CORPORATIONS, Vol. VIII., p. 316.

(*p*) See *Elve v. Doyton*, [1891] 1 Ch. 501, 507, C. A.

PART X.—CHARTERED COMPANIES.

unincorporated company or its officers or members (*q*), including the liability of individual members to some definite extent for its debts (*r*).

PART X. Chartered Companies.

1340. The Crown has on several occasions been empowered by a special statute to grant a charter which it could not have granted under its prerogative powers (*s*).

Power under
special
statutes.

1341. A chartered company may, if it has seven or more members, subject to certain restrictions and conditions, register as a company under the Act of 1908 (*t*); but unless it registers under that Act, it is not subject to its general provisions (*a*). It may, however, be wound up by the court as an unregistered company (*b*).

Law
governing
chartered
companies.

Except in the above cases, and except where the special statutory provisions applicable to companies, whether formed by charter or otherwise (*c*), apply, the chartered companies now in existence are for the most part governed by the general law applicable to corporations aggregate which are constituted by royal charter (*d*).

(*q*) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 29; as to the Act, s. 1 of which repealed a similar provision in stat. (1825) 6 Geo. 4, c. 91, which repealed stat. (1719) 6 Geo. 1, c. 18 (the Bubble Act), see p. 751, *post*.

(*r*) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 4.

(*s*) *Elve v. Boyton*, [1891] 1 Ch. 501, 507. Under stat. (1719) 6 Geo. 1, c. 18, referred to in that case, royal charters of incorporation were granted in 1720 to the London Assurance, and in 1721 to another company. Under stat. (1698) 9 Will. 3, c. 44, a royal charter of incorporation was granted in 1698 to the East India Company. Under the Bank of England Act, 1694 (5 & 6 Will. & Mar. c. 20), a royal charter was granted to the Bank of England, and by the Bank Act, 1892 (55 & 56 Vict. c. 48), s. 7, the Crown was empowered to grant to the Bank a supplemental charter regulating its internal affairs; see title BANKERS AND BANKING, Vol. I., p. 570. The South Sea Company was incorporated by a royal charter, granted under the powers specially confirmed for the purpose by stat. (1710) 9 Ann. c. 15. For a limited period the Crown was empowered, with the advice of the Privy Council, to grant letters patent, incorporating persons executing a deed of settlement, and future shareholders, as a body corporate for the purpose of carrying on the business of a joint stock bank (Joint Stock Banks Act, 1844 (7 & 8 Vict. c. 113)). But this Act has been repealed; see Companies Act, 1862 (25 & 26 Vict. c. 89), s. 205, and Sched. III., Parts I. and II.; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286, and Sched. VI., Parts I. and II.; see, however, p. 612, *ante*.

(*t*) See p. 39, *ante*.

(*a*) See pp. 36, 37, *ante*.

(*b*) *Re Faversham Free Fishermen (Company or Fraternity)* (1887), 36 Ch. D. 329, C. A.; *Re English, Scottish, and Australian Chartered Bank*, [1893] 3 Ch. 385, C. A.; *Re Oriental Bank Corporation* (1885), 54 L. J. (CH.) 481, C. A.; and see p. 648, *ante*.

(*c*) See pp. 39, 646 *et seq.*, *ante*.

(*d*) See, generally, title CORPORATIONS, Vol. VIII., pp. 299 *et seq.* As to the use of seals of trading corporations, see *ibid.*, pp. 310, 311. As to the general powers of a chartered company, see *ibid.*, p. 359. It does not follow because a chartered company does some act which it is forbidden to do by its charter that such act is void as being *ultra vires*, and in such a case the company seems to be bound by its *ultra vires* act, although liable to have its charter repealed (*British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354).

Part XI.—Livery Companies of the City of London.

SECT. 1.

Origin of the Companies.

Origin of London livery companies.

SECT. 1.—*Origin of the Companies.*

1342. The livery companies of London (*e*) had their origin in the mediæval craft guilds of that city (*f*), which, originating on the continent, and deriving their constitution and monopolies from the express or implied sanction of needy princes, were combinations for the purpose of regulating and monopolising the trades in which they were respectively conversant, their immediate and prominent object being the establishment and preservation of their exclusive trading privileges. By degrees, most large towns, both at home and abroad, had become altogether occupied by the guilds, and during the reign of Henry II. the London guilds had increased to such an extent, and with such inconveniences in the eyes of royalty, that many of them were then abolished, although their influence was powerfully exercised in regulating the constitution of the municipal corporations which were subsequently formed (*g*).

SECT. 2.—*Existing Livery Companies.*

SUB-SECT. 1.—*Constitution.*

(i.) *Charter of Incorporation.*

Incorporation.

1343. The livery companies (*h*) are corporations created by royal charters, the first of which were granted in the reign of

(*e*) In 1884 a Royal Commission made a report on the City of London livery companies, including (*inter alia*) the circumstances and dates of their foundation, the objects for which they were founded, the statutes, charters, trust deeds, decrees of court, and other documents forming, regulating, or affecting the companies, the constitution and powers of their governing bodies, and the mode of admission of freemen, livery, and other members; and on the findings of this report, so far as they relate to the law relating to the City of London livery companies, this part of this article is mainly based. The date of the Commission itself is July 29th, 1880, and that of the report (of the majority only of the Commissioners) is May 28th, 1884; see Blue-book numbered C. 4073, referred to in this article as "Report of 1884." The report contains much learning, obtained from many sources, but is ill-arranged, verbose, irrelevant, and often frivolous. Two of the Commissioners who signed the majority report did so only subject to certain memoranda and observations, and a "dissent" report was signed by three members of the Commission. Various suggestions were made as to the so-called improvement and alteration of the constitution of the livery companies and the administration of their properties and revenues, by the majority report which was ably commented on by Mr. G. H. Blakesley, barrister-at-law, in a pamphlet, published in 1885, by Messrs. Kegan Paul, Trench & Co., and in "The Livery Companies of London," by Sir Lewis T. Dibdin, published in 1886 by Hamilton, Adams & Co.

(*f*) See Report of 1884, p. 8. And see Gross, *Gild Merchant*, Vol. I. pp. 20, 78, 80, 113, 116, 117, 164, 186—188.

(*g*) Norton, *City of London*, 3rd ed., p. 104.

(*h*) According to the Report of 1884 there were then twelve great City livery companies, namely, the Mercers' Company, the Grocers' Company, the Drapers' Company, the Fishmongers' Company, the Goldsmiths' Company, the Skinners

Edward III. (i), but the others later (k), some charters being granted much later than the Tudor period (l). The contents of the charters no doubt differed considerably, but many of them recognised a religious character in the guilds, several enumerated banquets amongst the corporate franchises, and some, but not all, referred to the relief of poor members of the association (m).

By these charters and bye-laws, and by grants from the municipality of London, the companies obtained monopolies, and powers of search; they assumed to prevent non-members from trading and manufacturing, visited shops, manufactories, and houses for the purpose of testing wares required, whether by statute, municipal precepts, or their own private regulations, to be of a certain standard or quality, and enforced a strict system of apprenticeship (n). Later charters generally extended the local limits of trade control as London spread beyond its walls (o).

Although the trade franchises, namely, the monopolies and powers of search, may be separable from the other franchises, and possibly liable to be seized by the Crown in *quo warranto* proceedings, the non-user of them at the present time would not be sufficient to avoid the charters altogether, the incorporation of the companies as social communities and benefit societies, under their more recent charters, being perfectly valid (p).

SECT. 2.
Existing
Livery
Companies.

Monopolies.

Company, the Merchant Taylors' Company, the Haberdashers' Company, the Salters' Company, the Ironmongers' Company, the Vintners' Company, and the Clothworkers' Company, and a number of minor companies, namely, the Society of Apothecaries, and the Companies of Armourers, Bakers, Barbers, Basket Makers, Blacksmiths, Bowyers, Brewers, Broderers, Butchers, Carmen, Carpenters, Clockmakers, Coachmakers, Cooks, Coopers, Cordwainers, Curriers, Outlers, Distillers, Dyers, Fanmakers, Feltmakers, Fletchers, Founders, Framework Knitters, Fruiterers, Girdlers, Glass Sellers, Glaziers, Glovers, Gold and Silver Wyre Drawers, Gunmakers, Horners, Innholders, Joiners, Leathersellers, Loriners, Makers of Playing Cards, Masons, Musicians, Needle makers, Painters, Patten Makers, Pewterers, Plasterers, Plumbers, Poulterers, Saddlers, Scriveners, Shipwrights, Spectaclemakers, Stationers, Tallowchandlers, Tylers and Bricklayers, Tinsplate Workers, Turners, Upholders, Waxchandlers, Weavers, Wheelwrights, and Woolmen (Report of 1884, p. 24). Some of the minor companies, such as the Armourers, Carpenters, Leathersellers, and Saddlers, are in point of numbers and wealth equal to the less opulent of the great companies (*ibid.*). Thirteen livery companies had become extinct before the date of the report, namely, the Companies of Combmakers, Fishermen, Gardeners, Hatband Makers, Longbowstring Makers, Paviourers, Pinmakers, Silk Weavers, Silk Throwers, Soapmakers, Starchmakers, Tobacco-pipemakers, and Woodmongers (*ibid.*, p. 8). The Fellowship-porters, and the Companies of Carmen, Parish Clerks, and Watermen and Lightermen were not livery companies (*ibid.*).

(i) *Ibid.*, p. 12.

(k) *Ibid.*, p. 13. The Fishmongers' Company was not incorporated until 1433, although it had previously existed as a guild or fraternity, and its charter contains a licence to hold lands of a prescribed annual value notwithstanding the then Statutes of Mortmain. Before the charter the fraternity could only hold lands in the names of trustees, and then not openly, as they were within stat. (1391) 15 Ric. 2, c. 5 (*A.-G. v. Fishmongers' Co.* (1841), 5 My. & Cr. 16, *per* Lord COTTENHAM, L.C., at p. 19).

(l) Report of 1884, p. 15.

(m) *Ibid.*, p. 12.

(n) *Ibid.*, p. 13.

(o) *Ibid.*, p. 14. As to the illegality of some of the rights comprised by charter, see cases cited *ibid.*, p. 14.

(p) *Ibid.*, p. 19

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Companies.

1344. The companies are not charities, in any legal sense of the word, unless there is something special in their charters (q).

(ii.) *Membership and Government.*

Charities.
Grades of
membership.

1345. A London livery company has three grades of membership, namely, (1) mere membership or the possession of the freedom, which makes a "freeman" or "freewoman"; (2) membership of the livery; (3) membership of the court or governing body (r).

Freedom of a
company.

1346. Freedom of a company may be obtained by apprenticeship, by patrimony, by redemption, or *honoris causâ*.

Freedom by patrimony is obtainable on payment of fees by any son or daughter of a person who has been admitted to the freedom, on proving that the applicant is of age and legitimate, and that the father was a freeman at the date of the applicant's birth (s).

Freedom by redemption exists in all the companies, subject to limitations in some companies, except the Grocers' Company, and is obtainable by outsiders by purchase (t).

Freedom *honoris causâ* is given to persons of distinction, and presumably without the payment of any fees being required (a).

Possession of the mere freedom of a company, as a rule, confers only the privilege of relief in case of poverty; but in some of the companies the freemen are enabled to educate their children on advantageous terms (b).

Members of
the livery.

1347. The members of the livery are above the freemen, and are persons who are either craftsmen or non-craftsmen, that is, persons of wealth and position who have joined the company by patrimony or by purchase, and are entitled to wear its livery (c). Although the court of aldermen may have the right of prescribing the number of persons who are to be admitted as liverymen, the court or governing body of the company itself has, as a general rule, the sole power of "calling to the livery," and larger fees are payable by persons who have obtained freedom by redemption than those who are freemen by patrimony or apprenticeship (d). Apparently the attainment of the position of a liveryman is a condition precedent to his being eligible as a member of the court or governing body of a company (e), and that position gives the owner certain privileges as regards relief in case of poverty (f). In some cases the livery constitutes the governing body of the company (g).

Governing
body.

1348. The governing body is called "the court of assistants." It consisted originally of the first corporators, and vacancies in their

(q) *Re Meech's Will, Butchers' Co. v. Rutland*, [1910] 1 Ch. 426; and see title CHARITIES, Vol. IV., p. 117.

(r) Report of 1884, p. 20.

(s) *Ibid.*, pp. 20, 21.

(t) *Ibid.*, p. 21.

(a) *Ibid.*

(b) *Ibid.*, p. 22. As to voting, see p. 750, *post*.

(c) *Ibid.*, p. 21.

(d) *Ibid.*

(e) *Ibid.*

(f) *Ibid.*, p. 22.

(g) *Ibid.*, and see p. 749, *post*.

body were filled by co-optation from the members of the livery. The present system is practically the same as that in early times, under which the courts assumed the form of a master or prime warden, several other wardens, the junior of whom was the renter-warden or bursar, and a number of assistants. A new member taking office as warden or renter-warden is promoted from wardenship to wardenship till he becomes prime warden or master, and, after passing the chair, becomes an ordinary assistant for life (*h*).

There are a few companies, namely, the Ironmongers' and Joiners' Companies, and for some purposes the Mercers' Company, in which the livery and not merely the master, wardens and assistants, constitute the governing body (*i*).

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Companies.

1349. The court has in its hands the entire control of the company's affairs, the appointment of its salaried officials, the management of its corporate property (*j*), the admissions to the freedom, livery and court, the administration of its trusts (if any) (*k*), the appointments of clergy to its livings and masters to its schools (*l*).

Powers of
governing
body or
court.

Members of the courts, their widows and orphans, are, like freemen and liverymen, eligible for relief in case of poverty (*m*).

SUB-SECT. 2.—*Special Rights of Particular Companies.*

1350. The Fishmongers' Company discharges the duty of preventing offences against the statutory provisions as regards the sale of undersized fish or of fish during close time (*n*). In reliance on its charters, it appoints and pays "fish meters," who examine fish offered for sale at Billingsgate Market, and condemn any which are unsound, the company defraying the expense of deodorising and removing the condemned fish (*o*).

Special rights
of particular
companies.

The Goldsmiths' Company is by statute empowered to assay and mark plate, and to prosecute persons who, in any part of England, sell

(*h*) Report of 1884, pp. 21, 22. In some companies a liveryman is at once promoted to the court on his election as an alderman of one of the wards of the City of London (*ibid.*, p. 23).

(*i*) *Ibid.*, p. 21.

(*j*) The power of the companies to hold lands depends upon their charters, which generally contain a limitation on the amount they can hold (*A.-G. v. Fishmongers' Co.* (1841), 5 My. & Cr. 16). Even the predecessors of the companies, the guilds, had commonly licences to hold lands in mortmain, and became large holders of real property, either by means of devises made to them by their members, or by the investment of their savings in land (Report of 1884, pp. 10, 11). The companies, when incorporated, were in a better position in this respect, for, by the ascertained custom of the City of London, citizens, although they could not convey lands in mortmain, could devise them in mortmain, and a company could accept the lands so devised, even although their value exceeded that authorised by its charter. When a company purchased lands beyond the value allowed by its charter, the conveyance was made to trustees, who conveyed them to some one person, who devised them to the company (*A.-G. v. Fishmongers' Co.*, *supra*).

(*k*) See *Re Meech's Will, Butchers' Co. v. Rutland*, [1910] 1 Ch. 426.

(*l*) Report of 1884, pp. 22, 23. As to privileges in respect of entertaining and being entertained, see *ibid.*, p. 23.

(*m*) *Ibid.*

(*n*) Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42).

(*o*) Report of 1884, p. 19.

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Companies.

plate requiring to be marked which is below standard, or who forge the company's marks or utter wares bearing counterfeit marks (*p*).

The Vintners' Company, by virtue of an ancient custom, employs a staff of "tackle porters" to unload wines at the London docks (*q*). Its freemen, by patrimony or by apprenticeship, and their widows, enjoy by custom the right of selling foreign wines without a licence throughout England (*r*).

The Vintners' Company and the Dyers' Company are, by ancient custom, associated with the Crown as joint protectors of the Thames swans (*s*).

The Society of Apothecaries has statutory powers as to examining candidates for and conferring licences to practise as apothecaries (*t*).

The Founders' Company has rights as to stamping weights (*u*).

The Scriveners' Company has statutory duties and powers with reference to the office of notary public (*a*).

The Stationers' Company maintains a register of books and other publications under statutory authority (*b*), and in its corporate capacity carries on the trade of a publisher (*c*).

SUB-SECT. 3.—Municipal and Parliamentary Rights.

Municipal
position of
livery

1351. The freemen of the companies, whether liverymen or not, have the right to claim as such the freedom of the City, the possession of which is essential to being entitled to the benefit of the customs of the City of London (*d*).

The Corporation of the City of London is brought into connection with the livery companies by reason of the existence of a body called "the Common Hall," which consists of those liverymen of the companies who are also freemen of the City. This body proposes to the court of aldermen two aldermen (one of whom the court elects lord mayor), and itself elects the sheriffs, chamberlain, bridgemaster, and the auditors of the City and Bridgehouse accounts (*e*).

(*p*) Plate (Offences) Act, 1738 (12 Geo. 2, c. 26); Gold and Silver Wares Act, 1844 (7 & 8 Vict. c. 22). As to offences with reference to hall marks on plate, see title CRIMINAL LAW AND PROCEDURE, Vol IX., pp. 758, 759.

(*q*) Report of 1884, p. 19.

(*r*) See Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 20 (2); Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 72 (2); *Roberts v. Twining* (1909), 25 T. L. R. 525, 527, extending the exemption to British wines; and title INTOXICATING LIQUORS; REVENUE.

(*s*) Report of 1884, p. 19.

(*t*) Apothecaries Act, 1815 (55 Geo. 3, c. 194); Apothecaries Act Amendment Act, 1874 (37 & 38 Vict. c. 34). The Act of 1815, as amended, is still in force (*Davies v. Makuna* (1885), 29 Ch. D. 596, C. A.). As to registered medical practitioners generally being now privileged to practise medicine and charge in respect of medicaments, see Medical Act, 1886 (49 & 50 Vict. c. 48), s. 6; and title MEDICINE AND PHARMACY.

(*u*) See Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 67; and title WEIGHTS AND MEASURES.

(*a*) Public Notaries Act, 1801 (41 Geo. 3, c. 79), s. 13; see title NOTARIES.

(*b*) Copyright Act, 1842 (5 & 6 Vict. c. 45); and see title COPYRIGHT AND LITERARY PROPERTY, Vol. VIII., pp. 152 *et seq.*

(*c*) Report of 1884, p. 20.

(*d*) *Ibid.*, p. 23; see stat. (1849) 12 & 13 Vict. c. xciv.; stat. (1867) 30 & 31 Vict. c. i.; and title ELECTIONS.

(*e*) Report of 1884, p. 23; see title LOCAL GOVERNMENT.

A freeman and liveryman is entitled to be registered as a parliamentary elector (*f*), even where he obtained his freedom by purchase (*g*), provided that he has resided, for the six months preceding registration, in, or within twenty-five miles of, the City of London (*h*).

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Livery
Companies.

Part XII.—Quasi-Corporations.

SECT. 1.—*Meaning of the Term.*

1352. In 1826 the legislature gave unincorporated joint stock banking companies the means of obtaining power to sue and be sued in the name of a public officer, on complying with the statutory requirements (*i*), and in 1834 the Crown was empowered to grant to unincorporated companies and associations certain privileges, including that of suing and being sued in the name of a public officer (*j*). In 1837 it was found necessary to repeal the Act of 1834 (*k*), but power was given to the Crown to confer on associations formed for trading or other purposes, some of which associations it would be inexpedient to incorporate by royal charters, some of the privileges of corporations created by royal charters, and also to invest such associations, or some of them, with certain other powers and privileges (*l*). Companies obtaining privileges under the Acts of 1826, 1834, and 1837 are called *quasi*-corporations, or privileged companies.

Meaning
of "*quasi*-
corporation."

SECT. 2.—*Quasi-Corporations subject to the Chartered Companies Act, 1837.*

SUB-SECT. 1.—*Powers of the Crown.*

1353. The Crown may, by letters patent under the Great Seal, grant to any company or body of persons associated together for any trading or other purposes whatsoever, and to the heirs, executors, administrators, and assigns of any such persons, although not incorporated by such letters patent, any privileges

Crown's
power to
grant cor-
poration
privileges.

(*f*) Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), s. 32.

(*g*) *Croucher v. Browne* (1846), 2 O. B. 97.

(*h*) Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 46, amending Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), s. 32; and see, generally, title ELECTIONS.

(*i*) Country Bankers Act, 1826 (7 Geo. 4, c. 46). And see title BANKERS AND BANKING, Vol. I., p. 581.

(*j*) Stat. (1834) 4 & 5 Will. 4, c. 94.

(*k*) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 1, itself repealed by the Statute Law Revision Act, 1874 (37 & 38 Vict. c. 35).

(*l*) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73). As to companies incorporated under the Companies Act, 1844 (7 & 8 Vict. c. 110), see p. 644, *ante*. That Act was repealed by the Companies Act, 1862 (25 & 26 Vict. c. 89). See *Ridley v. Plymouth Grinding and Baking Co., Kingsbridge Flour Co. v. Same* (1848), 2 Exch. 711; *R. v. Whitmarsh* (1850), 14 Q. B. 803.

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Quasi-
Corpora-
tions
subject
to the
Chartered
Companies
Act, 1837.

Restrictions
on grant.

which, according to the rules of the common law, it would be competent to the Crown to grant to any such company or body of persons by any charter of incorporation (*m*).

1354. The Crown cannot by such letters patent grant any privilege in derogation of any existing exclusive privileges enjoyed by any company or corporation under any Act of Parliament (*n*).

Nor can the letters patent exempt the company from the necessity of entering into the partnership deed, or from enrolling the letters patent, or from complying with the statutory requirements as to the change of the company's name, or as to the cessation, addition, or change of name of any of the individual members of the company, or the transfer of shares and the notices to be given thereof, or the payment of any sum by a shareholder on account of any preferment against the company, or the returns to be made to the Central Office of such payment, or of the repayment thereof, or the making of a return to that office of the name of the officer appointed by the company to sue and be sued on its behalf, in case of the death, resignation, or removal of the one registered, or the period at which the several members are to become entitled or cease to share in the profits of the company (*o*).

Limitation of
liability.

1355. The letters patent may provide that the members of the company shall be individually liable for its debts, contracts, and liabilities to such extent only per share as shall be declared by the letters patent, such liability nevertheless being enforceable in the manner and subject to the provisions of the Act (*p*). Where the extent per share of the liability of the individual members of any such company is so limited, any person who may from time to time have advanced or paid any sum in consequence or by virtue of any execution issued against him in respect of any share, under any judgment, decree, or order obtained against any officer of the company, or any member thereof, may make a return thereof to the proper office (*q*); every such return must be accompanied with a proper voucher or vouchers of the fact of such payment, without which the return will not be registered (*r*). If any sum is at any time repaid by any such company or body in respect of any such sum which may have been so advanced or paid by virtue of such execution, the company or body must forthwith make or cause to be made a return to the proper office, specifying the amount of such repayment (*s*).

(*m*) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 2; Statute Law Revision (No. 2) Act, 1890 (53 & 54 Vict. c. 51). The Crown is empowered to apply the provisions of the Act of 1837 to chartered companies (*ibid.*, s. 29); and see, as to renewal and extension of charters under this section, Chartered Companies Act, 1884 (47 & 48 Vict. c. 56); see p. 744, *ante*.

Ibid., s. 31.

Ibid., s. 30; Statute Law Revision (No. 2) Act, 1890 (53 & 54 Vict. c. 51).

(*p*) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 4.

(*q*) As to the proper office, see note (*a*), p. 753, *post*.

(*r*) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 11. For form of return, see Sched. E to the Act.

(*s*) *Ibid.*, s. 12. For form of return, see Sched. F to the Act.

1356. Every company to which, under the authority of the Chartered Companies Act, 1837, any privileges or powers are to be granted, must be entered into or formed by a deed of partnership or association, or an agreement in writing of that nature, by which the undertaking must be divided into a certain specified number of shares. The deed or agreement, or some schedule thereto, must set forth the name or style of the company, the names or styles of its members, the date of its commencement, the business or purpose for which it is formed, and the principal or only place for carrying on such business. The deed must also contain the appointment of two or more officers to sue or be sued on its behalf in the manner mentioned in the Act (t).

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Corpora-
tions
subject
to the
Chartered
Companies
Act, 1837.

Preliminaries
to obtaining
letters
patent.

SUB-SECT. 2.—*Application for and Grant of Patent.*

1357. Whenever an application is made to the Crown to grant letters patent under the Act of 1837, and such application has been referred by the Crown to the Board of Trade, then, before any report is made to His Majesty, and before any such letters patent are granted, notice of the application must be inserted by the parties applying three several times in the *London Gazette*, and in one or more of the newspapers circulating within the county in which it is proposed that the principal place of business of the company is to be established, at intervals of not less than one week (u).

Advertise-
ment of
application.

1358. Every company must, within three calendar months after the grant of the letters patent, make a return to the proper office (x), containing the date of the grant of the letters patent, the name of the company, the business or purpose for which it is formed, the principal or only place for carrying on such business, the total number of shares in the company (each of which shares is to be distinguished by a separate number in regular succession), the amount to which each share is to render the holder liable, the names and (except where the member is a corporation) the addresses of all the members, and the distinctive number or numbers of the share or shares which each member holds. The company must also at the same time make a return of the names and descriptions of the officers appointed by the company to sue and be sued on its behalf (a).

Preliminary
return.

(t) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 5. The Crown cannot exempt any company or association from the necessity of entering into a deed of partnership (*ibid.*, s. 30).

(u) *Ibid.*, s. 32.

(x) As to the proper office, see note (a), *infra*.

(a) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 6. There is no power to exempt the company from making the return (*ibid.*, s. 30; see also *ibid.*, s. 6; and Sched. A). Where the principal or only place of business is situate in England or Wales, this and the other returns under the Act must be made at the Enrolment Office of the Central Office of the Supreme Court (*ibid.*, s. 16). All returns under the Act which are to be made by the company must be signed by one of its officers, and verified by a statutory declaration by him; and if there is no such officer, or he refuses to act, the return must be signed and verified by a member of the company (*ibid.*, s. 14); Statute Law Revision (No. 2) Act, 1890 (53 & 54 Vict. c. 51). Any return of the name or address of any member is not rendered invalid by any error if the company within one month after discovery of such error makes a correct return; but this provision does

SECT. 2.

Quasi-Corporations subject to the Chartered Companies Act, 1837.

Effect of bankruptcy of members.

Service of notices.

Registration of returns and inspection.

SUB-SECT. 3.—Statutory Incidents of the Grant.

1359. After registration of the company no change must be made in its name or style (b); and if the principal or only place for carrying on its business is changed, it must, within three calendar months, make a return to the proper office of such change (c).

1360. The bankruptcy, insolvency, or stopping payment of any officer or member, in his individual capacity, is not to be construed to be the bankruptcy, insolvency, or stopping payment of the company. Its property and effects, and the property and effects of the individual members or other individual members (as the case may be), are, notwithstanding such bankruptcy, insolvency, or stopping payment, liable to execution as if such event had not taken place (d).

1361. Any summons, demand, or notice, or any writ or other proceeding, may be served on the company by serving it on the clerk of the company, or by leaving it at the head office for the time being. Where the clerk or office is not known, it may be served on any agent or officer employed by the company, or by leaving it at his usual place of abode (e).

Any summons, demand, or notice of any kind required to be given by the company to any person or corporation may be given in writing, signed by the clerk or solicitor for the time being of the company, without being under its common seal (f).

1362. All returns required by the Act of 1837 are to be registered, the day of registration being written on the return by the official in the Central Office of the Supreme Court. Any person may inspect the register and require a certified copy of any return on payment of a fee (g). The certified copy of a return, including the date marked thereon, is to be received in evidence in all proceedings, whether civil or criminal, and is also to be received as evidence of the day of registration (h).

SUB-SECT. 4.—Transfer of Shares and Cesser of Membership.

Cesser of membership.

1363. If any person ceases to be or becomes a member, except by means of the transfer by deed or writing of any share, or in case of the change of the name of any member by marriage or otherwise, the company must, within three months after information of the

not prejudice any intermediate transaction upon the faith of such erroneous return, nor does the benefit of the provision extend to any fraudulent error (Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 15, and Sched. F).

(b) *Ibid.*, s. 7.

(c) *Ibid.*, s. 7, and Sched. B. The letters patent cannot exempt the company from the necessity of complying with the provision as to change of name or style (*ibid.*, s. 30). As to the proper office, see note (g), *infra*.

(d) *Ibid.*, s. 25.

(e) *Ibid.*, s. 26.

(f) *Ibid.*, s. 27.

(g) *Ibid.*, s. 17. The registration was formerly effected at the Enrolment Office of the Court of Chancery, now the Central Office of the Supreme Court (Judicature (Officers) Act, 1879 (42 & 43 Vict. c. 78), ss. 5, 12); see R. S. O., Ord. 61, rr. 8—14.

(h) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 18. The address need not be given where a corporation is transferor or transferee (*ibid.*).

PART XII.—QUASI-CORPORATIONS.

fact has been received, make a return of the names and addresses of all such persons (i).

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tions
subject
to the
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Companies
Act, 1837.

1364. On a transfer of any share in the company, a notice in writing, specifying the date of the transfer, the distinguishing number of the share transferred, and the names and addresses of the persons by whom and to whom the transfer is made, must be given to the company, by leaving the transfer, when executed by both parties, or some note or memorandum of it signed by them, at the company's principal or only office (k). The company must, within three calendar months after receiving the notice of transfer, make a return of these particulars (l).

Transfer.

1365. A person ceasing to be a member of a company, whether by the transfer of any share, or by death or otherwise, is to be considered, for all purposes of liability, as continuing a member until the proper return is duly registered (m). No person becoming a member of a company, by the transfer of any share or otherwise, is entitled to sue for or recover any share of the profits until the proper return has been registered (n).

Necessity for
registration.

SUB-SECT. 5.—*Actions and other Proceedings.*

1366. All proceedings on behalf of a company must be commenced and prosecuted in the name of one of the two officers for the time being to be appointed to sue and be sued on its behalf, and duly registered (o). All proceedings against the company must be commenced and prosecuted against one of such officers, or if there is no such officer for the time being, then against any member of the company (p).

Proceedings
in name of
registered
officers.

1367. On the death, resignation, or removal of any officer appointed to sue and be sued on behalf of the company, the company must appoint another in his stead, and must, within three calendar months, make a return to the proper office, containing the names and descriptions of the old and the new officers (q).

Vacancies.

No proceedings by or against the company are abated or prejudiced by the death or by any act of such officer, or by his resignation or removal, either before or after the commencement of proceedings, or by any change in membership by the transfer of shares or otherwise, and the proceedings are to be continued in his name (r).

Non-abate-
ment of
proceedings.

(i) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 8, and Sched. C.

(k) *Ibid.*, s. 9.

(l) *Ibid.*, s. 10, Sched. D.

(m) *Ibid.*, s. 21.

(n) *Ibid.*, s. 20.

(o) See p. 753, *ante*.

(p) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 3; Statute Law Revision (No. 2) Act, 1890 (53 & 54 Vict. c. 51).

(q) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 13; and for the form of return, see *ibid.*, Sched. G.

(r) *Ibid.*, s. 22.

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Corpora-
tions
subject
to the
Chartered
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Act, 1837.

Effect of
judgment
against
registered
officers.

1368. All judgments, decrees, and orders obtained in any proceedings against such officer, whether he is party to such proceedings as plaintiff, petitioner, or defendant, may be enforced against the property and effects of the company, and also against the property and effects of the present or former members. Where, however, the liability of the individual members has been limited by the letters patent (*s*), execution cannot be issued against any present or former member for a greater sum than the residue, if any, of the amount for which, by virtue of the letters patent, he is liable in respect of his share or shares, after deducting the amount, if any, which appears by the register to have been paid in respect of such shares or any of them, under or by virtue of any former execution, and not repaid at the time of issuing the subsequent execution (*a*).

SUB-SECT. 6.—*Determination of the Company.*

How far
company still
subsisting.

1369. In case of the determination of a company it is nevertheless to be considered as subsisting, and in all respects subject to the provisions of the Act of 1837, so long and so far as any matters relating to the company remain unsettled. Hence, it may do all things necessary to the winding up of its concerns, and may sue and be sued under the Act (*b*).

Part XIII.—Foreign Companies.

SECT. 1.—*Definition of Foreign Companies.*

Definition.

1370. The definition of the term "company" in the Act of 1908 (*c*) does not extend to a company or corporation incorporated outside the United Kingdom, and any such company is a foreign one (*d*). On the other hand, a company incorporated by or under any Act of Parliament, or by charter or letters patent from the Crown, is not a foreign company, although its council of administration is required to meet abroad, and its books, except its register and common seal, are kept abroad (*e*), or although all its members are aliens (*f*), or its business is to be carried on abroad (*g*). As regards the United Kingdom, companies outside of the jurisdiction of its courts are undoubtedly foreign companies, whether they are

(*s*) See Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 4; and p. 752, *ante*.

(*a*) *Ibid.*, s. 24; and see title EXECUTION.

(*b*) Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73), s. 28; as to winding up, see p. 648, *ante*.

(*c*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285.

(*d*) *Thomas v. United Butter Cos. of France, Ltd.*, [1909] 2 Ch. 484. The fact that many or all of the members are British subjects does not affect the question (*Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484, 497, 498, 501, 505). As to the domicile of a foreign company, see p. 16, *ante*.

(*e*) *A.-G. v. Jewish Colonization Association*, [1901] 1 K. B. 123, 129, 130, C. A.

(*f*) *Reuss (Princess) v. Bos* (1871), L. R. 5 H. L. 176, 199, affirming *Re General Co. for the Promotion of Land Credit* (1870), 5 Ch. App. 363; and see Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 1.

(*g*) *A.-G. v. Jewish Colonization Association, supra*.

incorporated or formed under the laws of a foreign State or under those of a British colony or dependency; and companies incorporated in Scotland or Ireland are for some purposes, such as service of process, to be regarded as foreign companies.

SECT. 1.
**Definition
of Foreign
Companies.**

SECT. 2.—*Recognition of such Companies.*

1371. It is a well-established principle that a corporation duly created in one country is recognised as a corporation by other countries. This principle is adopted by the courts in England (*h*) if the Government of the country under whose laws the corporation was created is acknowledged by the British Government; and whether the foreign Government is so recognised is a matter of public notoriety (*i*).

Recognition
of foreign
company.

Conventions between the Government of this country and many foreign Governments have been made with reference to the rights in one country of a company formed in another country. These would not seem to be confined to incorporated companies; for in one convention, of Great Britain with France, the high contracting parties mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorised in conformity with the laws in force in either of the two countries, the power of exercising all their rights, and of appearing before the tribunals, whether as plaintiffs or defendants, throughout the dominions and possessions of the other power, subject to the sole condition of conforming to the laws of such dominions and possessions; and similar conventions have been made with other countries (*k*).

It would be contrary to the comity of nations to prevent a company, incorporated in one country, from carrying on business at all in another country unless it was re-incorporated in the latter country (*l*). A foreign company cannot be registered in the United Kingdom as an existing company (*m*), nor does the Act of 1908 contemplate that a foreign partnership, actually complete and existing in a foreign country, can be brought within its purview (*n*).

SECT. 3.—*Restrictions on Rights.*

SUB-SECT. 1.—*Holding Land.*

1372. A foreign company, other than a company incorporated in a British possession, is under the disabilities imposed by the Mortmain Acts (*o*), and has to obtain a licence from the Home Secretary with regard to each interest in land, freehold or leasehold,

Land-ownr
by foreign
corporation

(*h*) Dicey, *Conflict of Laws*, 2nd ed., pp. 23, 469.

(*i*) *Berne (Common Council) v. Bank of England* (1804), 9 Ves. 347; *Peru Republic v. Dreyfus Brothers & Co.* (1888), 38 Ch. D. 348, 358, 359.

(*k*) Lindley on Companies, 6th ed., pp. 1227, 1228.

(*l*) *Bateman v. Service* (1881), 6 App. Cas. 386, 391, C. A.

(*m*) For it is not within the definition of an "existing company"; see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 285; and p. 36, *ante*. See also *Thomas v. United Butter Cos. of France, Ltd.*, [1909] 2 Ch. 484.

(*n*) *Bulkeley v. Schutz* (1871), L. R. 3 P. C. 764, 769; *Bateman v. Service* *supra*.

(*o*) See title CORPORATIONS, Vol. VIII., pp. 367 *et seq.*

SECT. 3.
Restrictions
on Rights.

which it may wish to acquire. A company, however, which is incorporated in a British possession, and which has filed with the registrar a certified copy of its instrument of constitution (with a translation where one is required), a list of its directors, and the names and addresses of persons within the jurisdiction who may accept service on its behalf, has the same power to hold lands in the United Kingdom as if it were a company incorporated under the Act of 1908 (*p*). This privilege has not been granted to companies incorporated in foreign States.

SUB-SECT. 2.—*Owning British Ships.*

Ownership
of British
ship.

1373. A company cannot be the owner of a British ship or any share therein unless it is a body corporate, established under and subject to the laws of some part of His Majesty's dominions, and also has its principal place of business in those dominions (*q*), in which case it is immaterial that some or all of its members are aliens (*r*).

SUB-SECT. 3.—*Registration in the United Kingdom.*

Registration
of particulars.

1374. Every company incorporated outside the United Kingdom which establishes a place of business within the kingdom must within one month from the establishment of the place of business (*s*) file with the registrar (1) a certified (*t*) copy of its charter, statutes, or memorandum and articles, or other instrument constituting or defining its constitution, and, if the instrument is not written in the English language, a certified translation thereof; (2) a list of its directors (*u*); and (3) the names and addresses of some one or more persons resident in the United Kingdom authorised to accept on its behalf service of process and any notices required to be served on the company (*a*). In the event of any alteration being made in any such instrument, or in the directors, or in the names or addresses of any of the persons authorised to accept service, the company must, within the time prescribed by the Board of Trade, file with the registrar a notice of the alteration (*b*).

(*p*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 275 [Companies Act, 1908 (8 Edw. 7, c. 12)]. The object of the Act which this section replaces was to place trading corporations incorporated in a British possession on the same footing with regard to the Mortmain Acts, as companies registered in the United Kingdom, which have the power to hold lands to any extent (*ibid.*, s. 16 [Companies Act, 1862 (25 & 26 Vict. c. 18), s. 18]), unless they are formed for the purpose of promoting art, science, religion, charity, or any other like object not involving the acquisition of gain by the company or its individual members; see p. 334, *ante*.

(*q*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1.

(*r*) *R. v. Arnaud* (1846), 9 Q. B. 806.

(*s*) This includes a share transfer or share registration office (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 274 (*6*)).

(*t*) "Certified" means certified in the prescribed manner to be a true copy or a correct translation (*ibid.*).

(*u*) The expression "director" includes any person occupying the position of a director by whatever name called (*ibid.*).

(*a*) As to service of process in the case of a foreign company, see p. 19, *ante*.

(*b*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 274 (1)

1375. A certified copy of the instrument constituting or defining the constitution of the company incorporated in a foreign country is deemed to be certified as a true copy if in such foreign country it is (1) duly certified as a true copy by an official of the Government to whose custody the original is committed, the signature or seal of such official being duly authenticated by a British official (c); or (2) duly certified as a true copy by a notary of the foreign country, the certificate of the notary being duly authenticated as above; or (3) duly certified as a true copy on oath by some officer of the company before a person having authority to administer an oath (d), the status of the person administering the oath being duly authenticated as above (e).

SECT. 3.
Restriction
on Rights

Certified
copy of
instrument &
constitution

A certified copy of the instrument constituting or defining the constitution of a company incorporated in British dominions outside the United Kingdom is deemed to be certified as a true copy if it is (1) duly certified as a true copy by an official of the Government to whose custody the original is committed; (2) duly certified as a true copy by a notary public of the country in which it is incorporated; (3) duly certified as a true copy on oath by some officer of the company before some person having authority to administer an oath (f).

1376. When the instrument constituting or defining the company's constitution is not written in the English language the certified translation required to be filed is deemed to be certified as a correct translation if it is so certified, (1) when the translation is made out of the United Kingdom, by (i.) an official having custody of the original; or (ii.) a notary public of the country or place where the company is incorporated, the signature or seal of the person certifying, where the company is incorporated in a foreign country, being duly authenticated in either case as above: and, (2) where the translation is made within the United Kingdom, (i.) in the case of a translation made in regard to a company whose place of business is established in England, by a notary public in England, or a solicitor of the Supreme Court in England; or (ii.) in the case of a translation made in regard to a company whose place of business is established in Ireland by a notary public in Ireland, or a solicitor of the Supreme Court in Ireland; and (iii.) in the case of a translation made in regard to a company whose place of

Translation
when not
English.

[Companies Act, 1907 (7 Edw. 7, c. 50), s. 35 (1)]. A fee of 5s. or such smaller fee as may be prescribed is payable on the registration of every document under s. 274 (Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 274 (7) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 35 (7)].

(c) That is to say, every British ambassador, envoy, minister, *chargé d'affaires*, and secretary of embassy or legation, exercising his functions in any foreign country, and every British consul-general, consul, vice-consul, acting consul, pro-consul, and consular agent exercising his functions in any foreign place (Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10)).

(d) Namely, any person having authority to administer an oath in the place, out of England, where the oath is to be taken (*ibid.*, s. 3).

(e) Board of Trade Order of March 29th, 1909, r. 1.

(f) *Ibid.*, r. 2. For the persons having authority to administer an oath see note (c).

SECT. 3. business is established in Scotland, by a notary public in Scotland or an enrolled law agent (*g*).
Restrictions on Rights.

The Board of Trade may, however, in any particular case, if it thinks fit to do so, and upon such conditions as it thinks fit, permit certified copies or translations, though not certified in accordance with the above-mentioned requirements, to be filed with the registrar (*h*).

Filing of statements in form of balance-sheets.

1377. Every foreign company which has a place of business within the United Kingdom must also in every year file with the registrar such a statement in the form of a balance-sheet as would, if it were a company formed and registered under the Act of 1908, and having a share capital (*i*), be required to be included in the annual summary (*k*).

Use of word "Limited."

1378. If any company uses the word "Limited" as part of its name, it must also, (1) in every prospectus (*l*) inviting subscriptions for shares, debentures, or debenture stock in the United Kingdom, state the country in which it is incorporated; and (2) conspicuously exhibit, on every place where it carries on business in the United Kingdom, its name, and the country in which it is incorporated; and (3) have the name of the company and of the country in which it is incorporated mentioned in legible characters in all its billheads and letter paper, and in all its notices, advertisements, and other official publications (*m*).

Penalties.

1379. Failure to comply with any of the above-mentioned statutory requirements renders the company, and every officer or agent, liable to a fine not exceeding £50, or, in the case of a continuing offence, £5 for every day during which the default continues (*n*).

SUB-SECT. 4.—*Special Provisions as to Assurance Companies.*

Application of statutory requirements.

1380. On and after July 1st, 1909, assurance companies, as the term is defined by the Assurance Companies Act, 1909 (comprising all persons or bodies of persons, whether corporate or unincorporate), which are established outside the United Kingdom, but carry on within that kingdom assurance business of all or any of the classes referred to in the Act, must comply with its provisions as to making deposits and returns and other matters (*o*).

Such a company must also comply with the above-mentioned

g) Board of Trade Order of March 29th, 1909, r. 3.

h) *Ibid.*, r. 4.

i) See p. 265, *ante*.

l) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 274 (3) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 35 (3)].

m) The expression "prospectus" means any prospectus, notice, circular, advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures of the company (*ibid.*, s. 274 (6)).

n) *Ibid.*, s. 274 (4) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 35 (4)].

o) *Ibid.*, s. 274 (5) [Companies Act, 1907 (7 Edw. 7, c. 50), s. 35 (5)].

p) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), ss. 1, 38; see pp. 616 *et seq.*, *ante*.

PART XIII.—FOREIGN COMPANIES.

provisions as to filing a copy of its constituting instrument, a list of directors, and names and addresses of persons to accept service of process or notices (p).

SECT. 3.
Restrictions
on Rights.

SECT. 4.—*Law applicable to Contracts etc.*

1381. A foreign company's contracts are governed by the law of the country in which they are made and by the company's own constitution, and not by the law of the country under which the company is incorporated, a contract made in a country under whose law it is valid being held good even by the courts of a country under whose law it would, if made there, be invalid (q). If a contract made in England with a foreign company is not *ultra vires* of the company, and is not contrary to the law of England, it may be enforced by the company by an action in an English court (r). The mere fact that a contract with a foreign company has been entered into in England is not enough to give an English court jurisdiction to make the company appear before it (a); but the company may be sued in an English court where it has a place of business and an agent in England, although its domicile is in another country (b). A lien on its property abroad can only be enforced in England where it is founded on a contractual obligation binding on the company (c).

Contracts.

SECT. 5.—*Shares and Calls.*

1382. Shares in a foreign company must be transferred in accordance with the law of the country in which the company is incorporated and the instrument of constitution or regulations of the company itself (d).

Transfer of
shares.

(p) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 19; see p. 627, ante.

(q) *Branley v. South Eastern Rail. Co.* (1862), 12 C. B. (N. s.) 63. And see *Maunder v. Lloyd* (1862), 2 John. & H. 718. As to general principles of English commercial law being, *prima facie*, applicable in foreign countries, see *Pickering v. Stephenson* (1872), L. R. 14 Eq. 322. As to conflict of laws generally, see title CONFLICT OF LAWS, Vol. VI., pp. 232 *et seq.*

(r) Lindley on Companies, 6th ed., p. 1222, citing *Bank of Augusta v. Earle* (1839), 13 Peters, 519; see also *Newby v. Colt's Patent Firearms Co.* (1872), L. R. 7 Q. B. 293; *Saunders v. Sun Life Assurance Co. of Canada*, [1894] 1 Ch. 537; *Janson v. Driefontein Consolidated Gold Mines, Ltd.*, [1902] A. C. 484; *Nigel Gold Mining Co. v. Hoade*, [1901] 2 K. B. 849; *Robinson Gold Mining Co. v. Alliance Insurance Co.*, [1901] 2 K. B. 919. As to the law affecting contracts made abroad, see *African Breweries Ltd. v. King*, [1900] 1 Ch. 273, C. A.

(a) *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

(b) *Carron Co. v. Maclaren* (1855), 5 H. L. Cas. 416, 450; reversing *Maclaren v. Stainton* (1852), 16 Beav. 279.

(c) *Norris v. Chambres* (1860), 29 Beav. 246, affirmed (1861), 7 Jur. (N. s.) 689. As to adjudicating a foreign firm bankrupt, see *Re Artola Hermanos, Ex parte André Châle* (1890), 24 Q. B. D. 640, C. A.

(d) Many British colonies have adopted the provisions of all or some of the Acts which are consolidated by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and the shares of companies in such colonies are transferable in the same manner as are shares in companies under that Act. As to foreign laws of estoppel and instruments treated by foreign laws as negotiable, see *v. Cady and Williams* (1890), 15 App. Cas. 267; *Picker v. London*

SECT. 5.
Shares
and Calls.

Calls on
shares.

Certificates of shares in a foreign company, on which a form of transfer and power of attorney has been indorsed and executed in blank, may be liable to probate duty, if they are marketable in this country and are operative by delivery (*e*).

Calls in respect of shares in a company incorporated under an Act of a British Colony, and presumably a company incorporated in a foreign State, are only simple contract debts (*f*).

SECT. 6.—*Actions and Proceedings.*

Actions by
or against.

1383. A company is not, by reason of its having a foreign domicile, precluded from suing in an English court, and it may sue or be sued even in a name acquired by reputation (*g*). The *lex fori* regulates the procedure and the parties to be joined (*h*). When a foreign company is plaintiff, it must, in its writ of summons, give its address, which must be that of its domicile or residence, and not merely that of its place of business (*i*).

Security for
costs.

When suing or applying to the court, it may be ordered to give security for costs (*k*), unless it has substantial, available, and sufficient assets within the jurisdiction (*l*), as to which fact the onus of proof is on the company (*m*), or unless the defendant admits his liability, or admits it subject to a counterclaim (*n*), or the liability has been proved in English proceedings (*o*).

and *County Banking Co.* (1887), 18 Q. B. D. 515, C. A.; and title **BILLS OF EXCHANGE ETC.**, Vol. II., pp. 567 *et seq.* As to stamp duties on shares and securities of foreign companies, see Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 82–85; Finance Act, 1899 (62 & 83 Vict. c. 9), ss. 4, 6; Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 76; *Brown, Shipley & Co. v. Inland Revenue Commissioners*, [1895] 2 Q. B. 598, C. A.; *Revelstoke (Lord) v. Inland Revenue Commissioners*, [1898] A. C. 565. As to the principles regulating appointments of personal representatives, applicable where shares in a company incorporated in one country are registered in the name of a deceased shareholder domiciled in another country, see *New York Breweries Co. v. A.-G.*, [1899] A. C. 62.

(*e*) *A.-G. v. Bouwens* (1838), 4 M. & W. 171; *Stern v. R.*, [1896] 1 Q. B. 211; and see *Re Agness*, [1900] P. 60.

(*f*) *Welland Rail. Co. v. Blake* (1861), 6 H. & N. 410, 415.

(*g*) See p. 19, *ante*.

(*h*) Lindley on Companies, 6th ed., p. 1221; see title **CONFLICT OF LAWS**, Vol. II., p. 304.

(*i*) R. S. C., Ord. 4, r. 1; *Stoy v. Rees* (1890), 24 Q. B. D. 748. As to service of process, see p. 19, *ante*.

(*k*) R. S. C., Ord. 65, r. 6a; *Re Alabama Portland Cement Co.*, [1909] W. N. 157; *Re Norman* (1849), 11 Beav. 401; *Cochrane v. Fearon* (1854), 18 Jur. 568. It is doubtful whether s. 278 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), applies to foreign companies.

(*l*) *Redondo v. Chaytor* (1879), 4 Q. B. D. 453, 457, C. A.; *Hamburger v. Poetting* (1882), 30 W. R. 769; *Ebrard v. Gassier* (1884), 28 Ch. D. 232, C. A.; *Re Apollinaris Co's. Trade-Marks*, [1891] 1 Ch. 1, C. A.; *Clarke v. Barber* (1890), 6 T. L. R. 256; *Redfern v. Redfern* (1890), 63 L. T. 780.

(*m*) *Sacker v. Bessler & Co.* (1887), 4 T. L. R. 17.

(*n*) *Wintfield v. Bradnum* (1878), 3 Q. B. D. 324, C. A.; *De St. Martin v. Davis & Co.*, [1884] W. N. 86.

(*o*) *Re Contract and Agency Corporation* (1887), 57 L. J. (OH.) 5. As to security for costs by a defendant foreign company, counterclaiming or otherwise, see *Neck v. Taylor*, [1893] 1 Q. B. 560, C. A.; *Sykes v. Sacerdoti* (1885), 15 Q. B. D. 423, C. A.; *Mapleson v. Masini* (1879), 5 Q. B. D. 144; and title **PRACTICE AND PROCEDURE**.

1384. A colonial company empowered by statute to sue and be sued by a public officer is not a colonial corporation (*p*), and cannot so sue or be sued in England (*q*). When judgment, however, is recovered against the officer in the colony, it may be enforced in England against a member resident in England, although he was not a party to the colonial proceedings (*a*).

SECT. 6.
Actions
and Pro-
ceedings.

1385. Where by a company's instrument of constitution its members are not personally responsible for its debts, or responsible only up to a limited amount, their liability is no greater in a foreign country in which it may have incurred contractual liability than it would be in the country in which it is incorporated or registered (*b*). If its instrument of incorporation or regulations authorise it to comply with the laws of a foreign country in which it carries on business, and it does so, its members are not liable, in the country of its incorporation, for debts contracted by the company in the other country, notwithstanding a provision in the laws of the latter country that the members of a foreign company shall be individually liable for its debts (*c*).

Liabilities of
companies
in countries
outside their
domicil.

A foreign company amenable to an English court's jurisdiction may be restrained from suing its members in a court where its principal place of business is (*d*); but an application by a foreign company to extend its powers will not be restrained (*e*).

SECT. 7.—Winding up.

1386. A foreign or colonial company, with a branch office or place of business and assets in England, may be wound up as an unregistered company under the Act of 1908, although the court cannot dissolve it as a corporation (*f*). It may be wound up, notwithstanding the company may be in the course of being wound up in the

Winding up.

(*p*) See Chartered Companies Act, 1837 (7 Will. 4 & 1 Vict. c. 73); and *p. 761, ante*; *Aldridge v. Cato* (1872), L. R. 4 P. O. 313.

(*q*) *Alivon v. Furnival* (1834), 1 Cr. M. & R. 277.

(*a*) *Bank of Australasia v. Harding* (1850), 9 C. B. 661; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Kelsall v. Marshall* (1856), 1 C. B. (N. S.) 241.

(*b*) *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877. The French courts will receive an English counsel's opinion, verified as to his status, as to the non-liability, personally, of a member of an English limited liability company carrying on business in France.

(*c*) *Risdon Iron and Locomotive Works v. Furness*, [1906] 1 K. B. 49, C. A. As regards the liability of members of an unincorporated company, see *Maunder v. Lloyd* (1862), 2 John. & H. 718. As to enforcing in England judgments obtained abroad against a company or its members, see *Sheehy v. Professional Life Assurance Co.* (1857), 3 C. B. (N. S.) 597; *Vallée v. Dumergne* (1849), 4 Exch. 290; *Copin v. Adamson* (1875), 1 Ex. D. 17, C. A.

(*d*) *Carron Co. v. Maclaren* (1855) 5 H. L. Cas. 416. As to reviewing decisions of foreign courts with jurisdiction, see *Sudlow v. Dutch Rhenish Rail. Co.* (1855), 21 Beav. 43; *Bank of Australasia v. Harding*, *supra*.

(*e*) *Bill v. Sierra Nevada etc. Co.* (1859), 1 De G. F. & J. 177, C. A.

(*f*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 267, 268; *Re Union Bank of Calcutta, Ex parte Watson* (1850), 3 De G. & Sm. 253; *Re Commercial Bank of India* (1868), L. R. 6 Eq. 517; *Bulkeley v. Shutz* (1871), L. R. 3 P. C. 764; *Re Lloyd Generale Italiano* (1885), 29 Ch. D. 219; *Re Matheson Brothers, Ltd.* (1884), 27 Ch. D. 225; *Re Commercial Bank of South Australia* (1886), 33 Ch. D. 174; (1887) 36 Ch. D. 522; *Re Mercantile Bank of Australia*, [1892] 2 Ch. 204; *Re English, Scottish, and Australian Chartered Bank*, [1893] 3 Ch. 385, C. A.; *Re*

SECT. 7.
Winding up. country in which it is incorporated. In such a case the English liquidation is ancillary only to the other liquidation (*g*); but the foreign liquidation is no answer to an action in England on a contract made and to be carried out in England (*h*). An arrangement of the affairs of a company incorporated in one country, under a statute of that country, is no bar to proceedings by a non-assenting creditor brought in another country (*i*). Where an English company is in voluntary winding up, a sale by way of reconstruction to a foreign company cannot be effected under the Act of 1908 (*a*).

Part XIV.—Illegal Companies.

SECT. 1.—Companies which are Illegal.

Unincorporated companies with transferable shares.

1387. An unincorporated company with transferable shares is probably not illegal at common law, unless it can be shown to be of a dangerous and mischievous character, tending to the grievance of His Majesty's subjects (*b*). Many unincorporated companies are, however, illegal by reason of their contravening some statutory prohibition, such as that against carrying on business with more than a certain number of members without being incorporated (*c*).

Australian Joint-Stock Bank, [1897] W. N. 48; *Re Syria Ottoman Rail. Co.* (1904), 20 T. L. R. 217; and see p. 649, *ante*.

(*g*) *Re Commercial Bank of South Australia* (1886), 33 Ch. D. 174; *Re English, Scottish, and Australian Chartered Bank*, [1893] 3 Ch. 785; *Re Federal Bank of Australia*, [1893] W. N. 46, 77, O. A.

(*h*) *Gibbs & Sons v. Société Industrielle et Commerciale des Métaux* (1890), 25 Q. B. D. 399, C. A.; compare *Re Imperial Anglo-German Bank* (1872), 25 L. T. 895.

(*i*) *New Zealand Loan and Mercantile Agency Co. v. Morrison*, [1898] A. C. 349, P. O.

(*a*) *Thomas v. United Butter Cos. of France, Ltd.*, [1909] 2 Ch. 484; as to sales by way of reconstruction, see p. 584, *ante*.

(*b*) Lindley on Companies, 6th ed., 183. The Bubble Companies Act (stat. (1719) 6 Geo. 1, c. 18, s. 19), declared to be illegal and void dangerous and mischievous undertakings and attempts tending to the common grievous prejudice and inconvenience of the King's subjects, or great numbers of them, and more particularly by unincorporated companies presuming to act as if they were corporate bodies, and pretending to make their shares in stocks transferable, without any legal authority by Act of Parliament or charter; but even before the Bubble Act was repealed there were conflicting decisions as to whether acting, by an unincorporated company, as a corporation, without the authority of a statute or charter, and pretending to be possessed of transferable stock, was illegal (*Duvergier v. Fellows* (1828), 5 Bing. 248, 267; *Blundell v. Winsor* (1837), 8 Sim. 601; *Walburn v. Ingilby* (1833), 1 My. & K. 61, 76). After the Bubble Companies Act was repealed in 1825 (by stat. (1825) 6 Geo. 4, c. 91), notwithstanding the recital in the repealing Act that the several undertakings, attempts, practices, acts, matters and things referred to in the repealed Act should be adjudged and dealt with in like manner as the same might have been adjudged and dealt with "according to the common law, notwithstanding the Act," the mere raising and transfer of stock in an unincorporated company was not an offence at common law (*Garrard v. Hardey* (1843), 5 Man. & G. 471; *Harrison v. Heathorn* (1843), 6 Man. & G. 81).

(*c*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1; and p. 44, *ante*. Many of the earlier Acts which required companies, under penalties, to register within a certain period under such Acts, and placed non-complying

1388. Any company, association, or partnership (1) consisting of more than ten persons which is formed for the purpose of carrying on the business of banking, and is not registered as a company under the Act of 1908, or formed in pursuance of some other Act of Parliament, or of letters patent; or (2) consisting of more than twenty persons which is formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by its individual members, and is not registered as a company under the Act of 1908, or formed in pursuance of some other Act of Parliament, or of letters patent (unless it is a company engaged in working mines within the stannaries and subject to the jurisdiction of the court exercising the stannaries jurisdiction), is an illegal company (*d*). Where such a company is formed, the law can take no cognisance of its existence except perhaps from a penal point of view (*e*).

SECT. 1.
Companies
which are
Illegal.
Companies.

1389. A building society established and certified after 1856 under the Building Societies Act, 1836 (*f*), but never incorporated (*g*), or an unregistered building society (*h*), or, where there are more than twenty members, an unregistered loan society (*i*), is an illegal society.

Building and
loan societies.

A corporation may be a money-lender within the meaning of the Money-lenders Act, 1900 (*j*). In that case, unless it is (1) such a society as is mentioned in the Act, or (2) a body corporate, incorporated or empowered by a special Act of Parliament to lend money in accordance with a special Act, or (3) a company *bonâ fide* carrying on the business of banking or insurance, or any business not having

Money-
lending
companies.

companies under certain disabilities in case of non-compliance, expressly provided that default should not make the non-complying company an illegal one (see for instance p. 28, *ante*). Banking companies of more than six persons, formed by agreement or co-partnership covenant on or after May 6th, 1844, unless by letters patent granted under special statutory authority, were illegal companies (Joint Stock Banks Act, 1844 (7 & 8 Vict. c. 113); *O'Connor v. Bradshaw* (1850), 5 Exch. 882; and see *R. v. Whitmarsh* (1850), 15 Q. B. 600). This number was in 1857 increased to ten (Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49), s. 12). The Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4 (see p. 44, *ante*) contained provisions as to the necessity of incorporating banking and other companies with members exceeding a certain number, similar to those contained in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1, (see *infra*), and companies acting in disregard of these provisions of the Act of 1862 were also illegal companies (see the cases cited under s. 1 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), at p. 45, *ante*).

(*d*) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1 [Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4]; and see p. 44, *ante*.

(*e*) *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, 145, 146, 149, C. A. But see p. 768, *post*.

(*f*) 6 & 7 Will. 4, c. 32.

(*g*) *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102; see title BUILDING SOCIETIES, Vol. III., p. 325, note (*h*).

(*h*) *Re Day, Ex parte Day* (1876), 1 Ch. D. 699. As to the legality of such companies, see *Re General Co. for the Promotion of Land Credit* (1870), 5 Ch. App. 363; affirmed *sub nom. Reuss (Princess) v. Bos* (1871), L. R. 5 H. L. 176; and Lindley on Companies, 6th ed., p. 185.

(*i*) *Jennings v. Hammond* (1882), 9 Q. B. D. 225; *Shaw v. Benson* (1883), 11 Q. B. D. 563, C. A. As to trade unions, see title TRADE AND TRADE UNIONS.

(*j*) 63 & 64 Vict. c. 51, s. 2 (2); see title MONEY AND MONEY LENDING.

SECT. 1.
Companies
which are
Illegal.

Illegality of
purpose.

for its primary object the lending of money, in the course of which and for the purposes whereof it lends money, or (4) a body corporate for the time being exempted by the Board of Trade from registration under the Money-lenders Act, 1900 (k), it must, as regards registration and otherwise, comply, under penalties in case of default, with the requirements of the Act (l). Further, if default has been made as to registration, any contract with or security taken from a borrower is illegal and unenforceable (m); but the courts have not yet held that the neglect to register makes a company an illegal company (n).

1390. A company formed to set up a lottery in England is illegal (o); but it is not illegal if it is formed to set up a lottery in a foreign State in which lotteries are legal (p).

It may be that if the company has on the face of its memorandum an object or purpose which is illegal, it is itself an illegal company (q); but if a company is actually registered under the Act of 1908 (a), the mere insertion in its articles of a provision which is illegal does not make the company itself an illegal company (b). Nor is a company illegal because it is formed by a trader to take over his solvent business, in order to limit his liability and obtain the preference of a debenture holder over other creditors of the company, although all the shares are taken by himself and members of his family (c).

The fact that some only of the regulations of a company are illegal does not necessarily make the company an illegal one, or prevent the court from giving effect to such of the rules as are legal (d). If a company is formed for legal purposes, the commission by it of illegal acts does not make it an illegal company, any more than the illegal acts of an individual deprive him of all the rights of a citizen (e).

(k) 63 & 64 Vict. c. 51, s. 6.

(l) *Ibid.*, s. 2.

(m) *Victorian Daylesford Syndicate, Ltd. v. Dott*, [1905] 2 Ch. 624; *Bonnard v. Dott*, [1906] 1 Ch. 740, O. A.

(n) See *Bonnard v. Dott*, *supra*; *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300; *Dott v. Brickwell* (1906), 23 T. L. R. 61.

(o) As to lotteries, see titles CRIMINAL LAW AND PROCEDURE, Vol. IX., p. 547; GAMING AND WAGERING.

(p) *Macnee v. Persian Investment Corporation* (1890), 44 Ch. D. 306.

(q) *Ibid.*, at p. 311.

(a) 8 Edw. 7, c. 69.

(b) *Re General Co. for the Promotion of Land Credit* (1870), 5 Ch. App. 363; affirmed *sub nom. Reuss (Princess) v. Bos* (1871), L. R. 5 H. L. 176; and see *McGlade v. Royal London Mutual Insurance Society* (1910), 26 T. L. R. 471, O. A.; *Re Ennis and West Clare Rail. Co.* (1879), 3 L. R. Ir. 104.

(c) *Salomon v. Salomon & Co.*, [1897] A. C. 22; and see *Seligman v. Prince & Co.*, [1895] 2 Ch. 617, O. A. But the creditors of a sole trader, who has turned his business into a company and fraudulently transferred all his assets to the company to defeat his creditors, may impeach the transaction as an act of bankruptcy, and if they are successful the property will be ordered to be handed over to the trustees in bankruptcy, notwithstanding that the company is in liquidation (*Re Carl Hirth, Ex parte The Trustees*, [1899] 1 Q. B. 612, O. A.).

(d) *Strick v. Swansea Tin Plate Co.* (1887), 36 Ch. D. 558; *Swaine v. Wilson* (1889), 24 Q. B. D. 252, O. A.; *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A. C. 426, 428.

(e) It has, however, been questioned whether the failure of bankers to make

SECT. 2.—*Effect of Company being Illegal.*

SECT. 2.

**Effect of
Company
being
Illegal.**—
Proceedings
by or against
illegal
companies.

1391. An illegal company cannot sustain an action to recover a debt incurred for money lent, either to members or outsiders (*f*), or on any contract made directly for the purpose of carrying on its business (*g*). A trustee for the illegal company is in no better position (*h*). The fact that it began with less than twenty members does not prevent it from becoming illegal by an increase beyond that number (*i*). If, however, while it is illegal by reason of its having more than twenty members, it lends money to a member, and then registers under the Act of 1908, instalments of the debt being paid before and after the date of registration, it is inferred that all the members have agreed that transactions prior to registration shall be binding, and the society can recover the balance of the loan (*k*).

Money lent to an illegal company for the purpose of carrying out its object cannot be recovered (*l*), and persons making other contracts with an illegal company may not be able to enforce them against it (*m*). Persons subscribing to the formation of a company, the agreement to form which is illegal, may, however, recover the money before it is actually applied to the illegal purpose (*n*). The question, even now, seems open whether the courts will not interfere to enable members of illegal companies to recover their subscriptions from the persons who have been the recipients of them (*o*).

It is doubtful whether members of an illegal company, or the company itself, may not hold its property beneficially (*p*), and recover from an officer moneys of the society in his hands (*q*).

the return required under penalties by the Bank Charter Act, 1844 (7 & 8 Vict. c. 32), s. 21, makes illegal a banking partnership or company composed in part of members whose names are not returned (Lindley on Companies, 6th ed., p. 186); and see *Ransford v. Copeland* (1837), 6 Ad. & El. 482; *Hughes v. Thorpe* (1839), 5 M. & W. 656.

(*f*) *Jennings v. Hammond* (1882), 9 Q. B. D. 225.

(*g*) *Ibid.*

(*h*) *Shaw v. Benson* (1883), 11 Q. B. D. 563, C. A.

(*i*) *Re Thomas, Ex parte Poppleton* (1884), 14 Q. B. D. 379.

(*k*) *Ibid.*

(*l*) *Phillips v. Davies* (1888), 5 T. L. R. 98.

(*m*) *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, C. A.

(*n*) *Strachan v. Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697, C. A.; *Burge v. Ashley & Smith, Ltd.*, [1900] 1 Q. B. 744, C. A.

(*o*) See *Hume v. Record Reign Jubilee Syndicate* (1899), 80 L. T. 404; *Sheppard v. Owenford* (1855), 1 K. & J. 491; *Symes v. Hughes* (1870), L. R. 9 Eq. 475; *Taylor v. Bowers* (1876), 1 Q. B. D. 291, C. A.; *Re Duncan (W. W.) & Co.*, [1905] 1 Ch. 307. Where there is a society which holds subscribed funds, the court is now inclined to wind up the society and distribute the funds equitably among the members (*Re Lead Co.'s Workmen's Fund Society, Lowes v. Smelting down Lead with Pit and Sea Coal (Governor & Co.)*, [1904] 2 Ch. 196).

(*p*) *R. v. Tankard*, [1894], 1 Q. B. 548; *R. v. Stainer* (1870), 39 L. J. (M. C.) 164. As to the case of an association made criminal by statute, see *R. v.* (), 8 C. & P. 642.

See *Re Day, Ex parte Day* (1876), 1 Ch. D. 699; *Marrs v. Thompson* (1902), 86 L. T. 759; *Hume v. Record Reign Jubilee Syndicate, supra*; *Re One*

SECT. 2.

Effect of
Company
being
Illegal.

Winding up.

If, however, he embezzles its money, he may be indicted for embezzlement (r).

1392. An illegal company cannot be wound up by the court under the Act of 1908 on its own petition, or that of a member (s), or on the petition of a creditor, at any rate, if he had notice of the illegality (a). If a winding-up order is made it should be appealed against, and while it exists the illegality of the company is not a bar to proceedings in the winding-up (b).

Company's
right to set
up its own
illegality.

1393. An illegal company may set up its own illegality in answer to proceedings against it (c); but where effect is given to the defence, the company is not allowed costs (d).

Sale of shares.

1394. The sale of shares or scrip in an illegal company, or intended company, is illegal (e), and a broker who is employed to sell or purchase them cannot recover from his principal any commission, or any sums expended on his behalf (f). Nor can the buyer recover any purchase-money paid to the broker (g), who is, however, bound to pay it over to the seller (h).

and *All Sickness Association* (1909), 25 T. L. R. 674. But see *Rigby v. Connol* (1880), 14 Ch. D. 488; *Simpson v. Bloss* (1818), 7 Taunt. 246, and *De Begnis v. Armitstead* (1833), 10 Bing. 107.

(r) *R. v. Tankard*, [1894] 1 Q. B. 548; *R. v. Stainer* (1870) 39 L. J. (M. C.) 54.

(s) *Re Mexican and South American Mining Co., Barclay's Case* (1858), 26 Beav. 177; *Fenn's Case* (1854), 4 De G. M. & G. 285, C. A.; *Re London and Eastern Banking Corporation, Longworth's Case* (1859), 1 De G. F. & J. 17, C. A.

(a) *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, C. A.; *Re South Wales Atlantic Steamship Co.* (1876), 2 Ch. D. 763, C. A.; *Re Arthur Average Association for British, Foreign, and Colonial Ships, Ex parte Hargrove & Co.* (1875), 10 Ch. App. 542, 545, n.; *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102.

(b) *Re Padstow Total Loss and Collision Assurance Association, supra*; *Re Arthur Average Association for British, Foreign, and Colonial Ships, Ex parte Hargrove, supra*; *Re Arthur Average Association* (1876), 3 Ch. D. 522; *Re Queen's Average Association, Ex parte Lynes* (1878), 38 L. T. 90; *Re Marine Insurance Association, Andrew's and Alexander's Case, Chatt's Case, Cook's Case, Crew's Case* (1869), L. R. 8 Eq. 176.

(c) *Phillips v. Davies* (1888), 5 T. L. R. 98; *Re Ilfracombe Permanent Mutual Benefit Building Society, supra*; compare *Re Padstow Total Loss and Collision Assurance Association, supra*; *Doolan v. Midland Rail. Co.* (1877), 2 App. Cas. 792, 806.

(d) *Ibid.*

(e) *Josephs v. Pebrer* (1825), 3 B. & C. 639; *Buck v. Buck* (1808), 1 Camp. 547.

(f) *Ibid.*; *Ex parte Neilson* (1853), 3 De G. M. & G. 556, C. A.

(g) *Buck v. Buck, supra*.

(h) *Bousfield v. Wilson* (1846), 16 M. & W. 185.

COMPENSATION.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION;
MASTER AND SERVANT.

COMPOSITION WITH CREDITORS.

See BANKRUPTCY AND INSOLVENCY.

COMPOUNDING FELONY.

See CRIMINAL LAW AND PROCEDURE.

COMPROMISE.

See LOCAL GOVERNMENT; PRACTICE AND PROCEDURE.

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END OF VOL. V.

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